EMPLOYMENT TRIBUNALS

Claimant: Mr B Mellor

Respondent: Staffordshire Fire & Rescue Service

FINAL HEARING

Heard at: Birmingham

On: 19 to 22 & (Tribunal deliberations in private) 23 & 29 February 2024

Before: Employment Judge Camp
Mrs H Astill
Mrs N Chavda

Appearances
For the claimant: Mr R Marsh, lay representative
For the respondent: Mrs H Winstone, counsel

JUDGMENT BY CONSENT

1. By consent, the Claimant's complaints that the respondent directly discriminated against him by dismissing him and by allegedly failing to get up to date medical evidence before doing so are dismissed upon withdrawal, in accordance with rules 51 and 52 of the Rules of Procedure

RESERVED JUDGMENT

2. The Claimant's entire remaining claim, consisting of complaints of unfair dismissal and of disability discrimination under section 15 of the Equality Act 2010, fails and is dismissed.

REASONS

Introduction

3. The Claimant was employed by the Respondent for more than 10 years as a Breathing Apparatus Technician. He was dismissed for ill-health incapability on 17 January 2022, after a period of sickness absence from November 2020. This claim concerns his dismissal. It now consists of just two complaints: unfair dismissal under section 98 of the Employment Rights Act 1996 ("ERA");

unfavourable treatment – namely dismissal – because of something arising in consequence of disability under section 15 of the Equality Act 2010 ("EQA").

4. There is no suggestion that the Claimant was anything other than good at his job, nor that he was at all to blame for being dismissed. This case is not about either of those things; it is not about his competence, nor is it about the reasonableness of his actions. Instead, it is about why the respondent did what it did and the rights and wrongs of that.

5. The Claimant was during the latter stages of his employment particularly focussed on things that happened in work between July 2019 and February 2020, and he remains so. He is bringing a County Court personal injury claim about them with the assistance of legal representatives. Originally, this Tribunal claim was about them too, but in July 2023 he withdrew those parts of the claim from the Tribunal, with a view to them being pursued solely in the County Court. As part of the County Court claim, he is alleging that his dismissal was the result of psychiatric injury which, in turn, directly resulted from the alleged events of July 2019 to February 2020. In other words, his County Court claim is broadly to the effect that those events made him too ill to be able to return to work from the long-term sickness absence that began in November 2020.

6. Be that as it may, this Tribunal claim is about, and only about, whether, given his state of health, it was fair and reasonable and proportionate to dismiss him in 2022. The Claimant seems to have struggled to accept this during the hearing, but the claim no longer concerns what happened in 2019 to 2020 and why he ended up being off on long-term sick. As we explained near the start of this hearing, an employer is entitled to dismiss an employee who is too ill or injured to return to work for the foreseeable future, even if the employer is entirely responsible for their illness or injury. Moreover, one of the reasons the Claimant withdrew parts of his Tribunal claim in July 2023 was, as we understand it, to avoid the Tribunal deciding anything that could prejudice the County Court claim.

7. We would summarise our decision as a whole in the following way: the Claimant cannot help how his poor mental health has made him think and feel, about what occurred between July 2019 and February 2020 and otherwise; but, most unfortunately, given how he thought and felt, and given the risks to his health there would have been had he returned to work, there was in practice nothing the Respondent could reasonably have done to get him back.

8. Finally by way of introduction, we note that the Respondent evidently did not want to dismiss the Claimant for ill-health incapability. It would much have preferred, and would have supported, the option of ill-health retirement. This would have been of considerable financial value to the Claimant and would not have prevented him getting another job outside the Respondent, or bringing and pursuing County Court and Tribunal claims. However, ill-health retirement was not something the Respondent could force upon the Claimant: he would have to have applied for it. For his own reasons, he has chosen not to apply.

The issues

9. In the file or 'bundle' of documents for this hearing, from page 79, there is an "updated list of issues" which the parties confirmed was agreed. During the

hearing, the 'live' issues were further reduced by the Claimant withdrawing his direct disability discrimination claim and by the following:

9.1 as the claim has become one purely about dismissal in 2022, no time limits issues arise and there has been no need for us to concern ourselves with whether the claimant was a disabled person because of various psychiatric conditions[1] before the earliest date the respondent concedes he was (26 July 2019), nor whether the respondent had knowledge of this before it concedes it did (November 2020);

9.2 in the updated list of issues there is said to be an EQA section 15 complaint about the Respondent's alleged failure "*to get up to date medical information prior to the claimant's dismissal*". However the "*something arising in consequence of disability*" relied on in relation to this complaint, as in relation to the section 15 complaint about dismissal is "*The claimant being off on long term sick*". It is no part of the Claimant's true case that the reason the Respondent [allegedly] failed to get up to date medical information prior to his dismissal was him being off on long term sick; and, on any view, that was not the reason;

9.3 it was agreed at the start of the hearing that the only part of remedy we might make a decision about was the so-called 'Polkey' issue (see **Polkey v AE Dayton Services Ltd** [1987] UKHL 8 & **Chagger v Abbey National plc** [2009] EWCA Civ 1202).

10. In light of this, and in light of concessions made by both sides (in practice, even if not in theory), the only issues we have ultimately had to decide are:

10.1 was dismissal fair or unfair, in accordance with ERA section 98(4)?

10.2 was dismissal a proportionate means of achieving one or more legitimate aims, in accordance with EQA section 15(1)(b)?

11. The respondent relies, essentially, on two legitimate aims, which could be put in various different ways, but which boil down to: its duty to take reasonable care for the Claimant's (and others') health, safety and wellbeing; the aim, common to virtually every case where a disabled employee is dismissed for ill-health incapability after a long period of sickness absence, of wanting / needing, in the interests of efficiency, to employ only individuals capable of performing their duties. The aim relied on was summarised in counsel's – Mrs Winstone's – written closing submissions as: "*the need for its employees to be capable of attending work without exacerbation of their mental health*".

12. There can be no doubt that the Respondent's aims were legitimate; so the issue for us has been as to the proportionality of dismissal.

[1] We are not proposing to go into more detail about the Claimant's mental health conditions and symptoms, and the various incidents that have occurred connected with them, than is absolutely necessary.

13. At the heart of this decision is our negative answer to one question: was there a reasonable and viable alternative to dismissal?

14. There is no complaint before the Tribunal about the unsuccessful appeal against dismissal. No such complaint appears in the list of issues. The claim form was presented on 1 June 2022, well before the 13 September 2022 appeal decision, and no application to amend the claim form to add any complaint about the appeal has ever been made, still less has permission to amend been given.[2] What happened in relation to the appeal is, though, relevant to the fairness of dismissal under ERA section 98(4) and we shall, for the sake of completeness, look at whether the appeal decision was a proportionate one, as if there were an EQA section 15 complaint about that decision similar to the one about dismissal.

The law

15. Our starting point on the law is the relevant legislation: as above, ERA section 98(4) and EQA section 15(1)(b). The wording, and the law to be applied, is different, but there is very considerable overlap between whether an employee's dismissal was proportionate and whether it was fair or unfair, taking into account whether the employer acted reasonably in all the circumstances, as well as equity and the substantial merits of the case. In practice in relation to the Claimant's claim, that overlap is almost total.

16. Respondent's counsel's closing submissions, in paragraphs 6 to 8, include an accurate summary of the law relating to the unfair dismissal complaint, which we adopt, including references to **East Lindsey District Council v Daubney** [1977] ICR 566 and **O'Brien v Bolton St Catherine's Academy** [2017] EWCA Civ 145[3]. We also note the guidance provided in an even better-known case: **Iceland Frozen Foods v Jones** [1982] IRLR 439, at paragraph 24 of the EAT's decision, which includes a reference to the "*band of reasonable responses*" test. That is the test we have to apply to both the procedural and substantive parts of the respondent's decision-making[4], although (see **Newbound v Thames Water Utilities Limited** [2015] EWCA Civ 677): the band of reasonable responses test is not infinitely wide; it is important not to overlook ERA section 98(4)(b); Parliament did not intend the Tribunal's consideration simply to be a matter of procedural box-ticking.

17. Although there can be no hard and fast rules as to what is reasonable and equitable in all the circumstances, in almost all ill-health incapability dismissal cases, the dismissal will not be fair unless: the respondent employer genuinely believed the claimant employee was no longer capable of performing their duties;

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[2] There is a popular misconception – and it is a misconception – that, in light of **Baldeh v Churches Housing Association of Dudley & District Ltd** [2019] UKEAT 0290_18_1103, every discrimination claim about dismissal necessarily incorporates a similar claim about any appeal against dismissal.

[3] A decision also, of course, relevant to the EQA section 15 complaint.

[4] In relation to unfair dismissal at least. That test does not apply to the EQA section 15 claim, although it has been emphasised in cases like **Birtenshaw v Oldfield** [2019] IRLR 946 that weight should be given to the employer's assessment of what is reasonably necessary to achieve its legitimate aims.

adequately consulted the employee; and carried out a reasonable investigation, including as to the medical position. A key question will be whether the employer could reasonably have been expected to wait longer before dismissing the employee.

18. In connection with this, we note that the present case has some unusual features, principally that in one sense it was not an incapability dismissal at all. What we mean is that in the end it was not wholly or mainly a question of whether the Claimant would, in time, get better and be well enough to do his job, with reasonable adjustments if necessary. Instead – a point made during cross-examination by the respondent's witness Mr Watts – a large part of it was that the Claimant's trust in the Respondent, and in particular in the individuals he would have to work with, had irrevocably broken down. His mental ill-health had no doubt caused or contributed to this loss of trust and made a return to work in these circumstances impossible.

19. Turning to the discrimination claim, and whether dismissal was 'justified' as a proportionate means of achieving a legitimate aim, we have sought to apply the law as summarised in the decisions of HH Judge Eady QC [as she then was] in **Birmingham City Council v Lawrence** [2017] UKEAT 0182_16_0206 at paragraphs 11 and 12 and **Ali v Torrosian & Ors (t/a Bedford Hill Family Practice)** [2018] UKEAT 0029_18_0205 at paragraphs 14 to 20. We have had to consider whether dismissal was an appropriate and reasonably necessary way of achieving the Respondent's aims, whether there were (as it were) less discriminatory alternatives to dismissal reasonably available to the Respondent, and how the interests of the Claimant and the Respondent should be balanced.

20. When thinking about alternatives to dismissal in the context of the Respondent's 'justification' defence to the EQA section 15 complaint, we have found it useful to consider the Respondent's duty to make reasonable adjustments in accordance with EQA section 20. Although there is no reasonable adjustments complaint before the Tribunal, and although the claim was not advanced in this way, it is settled law that doing something constituting unfavourable treatment because of something arising in consequence of disability which is a breach of that duty is never, or hardly ever, going to be a proportionate means of achieving a legitimate aim. The aspect of the duty we have looked at in particular is whether some alternative to dismissal – something to "*avoid the disadvantage*" – was a step that it was reasonable for the Respondent to have to take at any relevant time, in accordance with EQA section 20(3). When doing so, we have borne in mind that there is no onus on the employee to tell the employer what steps should be taken, and that "*steps … to avoid the disadvantage*" means steps that could well alleviate the disadvantage.

The facts & other findings up to dismissal

21. In terms of what happened, very little, if anything, of both relevance and importance to our decision-making is in dispute. So far as concerns what the Respondent's decision-makers were thinking when they decided to dismiss the Claimant and reject his appeal against dismissal, their evidence was not substantially challenged in cross-examination, presumably reflecting the fact that

the Claimant does not and cannot know. Neither decision-maker was accused during the hearing of acting in bad faith.

22. We have already made the point that this case is not about the reasonableness of the Claimant's actions. It was a point we also made during the hearing.

23. This is not, then, the typical kind of Employment Tribunal case where the claimant's and respondent's versions of events are quite different, where the outcome depends on the Tribunal's findings in relation to factual matters that are in dispute, and where the Tribunal has to make a detailed assessment of, and compare, the credibility of both sides' witnesses and of their evidence.

24. We heard from only four witnesses: the Claimant (the only witness giving evidence on his behalf); Mr H Watts, at the time the Respondent's Director of Prevent and Protect, who made the decision to dismiss the Claimant; Mr R Barber, the Respondent's Chief Fire Officer since October 2021, who dealt with the Claimant's appeal against dismissal; Mrs S Mills, an HR Manager for the Respondent since 11 July 2022.

25. As she readily conceded, Mrs Mills's involvement was limited and came right at the end of the dismissal and appeal process. The contents of her witness statement provided us with a useful overview, but mostly consisted of chronological narrative of events that she had no involvement in, based on a 'walk through' of documents in the bundle that were neither created by nor sent to nor received by her at the time. The individual from HR who would have had personal knowledge of those events and most of those documents was an HR Business Partner called Ms Baddeley, who no longer works for the Respondent.

26. The hearing bundle ran to 663 pages, including the index. It contained numerous documents that we were not taken to in evidence or otherwise during the hearing. The significant documents were almost all referred to in the Respondent's witness statements. They included occupational health records, notes recording communications between the Claimant and the Respondent during his sickness absence, and documentation relating to the capability process that the Respondent followed from September 2021 onwards, including verbatim (or near verbatim) notes of the capability meetings with Mr Watts and a capability appeal meeting with Mr Barber.

27. The Claimant had also produced a 444 page bundle of his medical records.

28. At the Tribunal's direction, the Respondent had produced a chronology and 'cast list' before the hearing, which the Claimant had not agreed or, as such, rejected, but had annotated. We refer to the annotated version. There is nothing materially inaccurate in the Respondent's un-annotated version. The annotations are worthy of remark principally because they illustrate the strength of feeling the Claimant has to this day about certain matters.

29. In addition, Respondent's counsel helpfully produced a more detailed chronological summary of events in paragraph 10 of her written closing submissions. It is accurate in all relevant respects and we refer to it too.

30. We start our narrative with the Claimant (and, apparently, one other) being suspended pending an investigation into allegations of gross misconduct in July 2019. We do not know the detail of what occurred, which will be a matter for the County Court, but we understand the allegations to concern defective equipment which was the responsibility of the Breathing Apparatus Maintenance ("BAM") department of which the Claimant was part. In his County Court Particulars of Claim it is stated that, "*The specific allegation against him* [the Claimant] *was that he deliberately removed a part from a set of breathing apparatus.*" It is also there alleged that he "*suffered a mental health breakdown from 26 July 2019 onwards*", that he was "*interrogated twice*" during August 2019 by a senior officer, then a Director, called Mr Luznyj, who investigated the allegations and who since December 2021 has been the Respondent's Deputy Chief Fire Officer, that he was given a written warning (which he did not appeal) in September 2019, and that the suspension and 'interrogation', amongst other things, were breaches of the Respondent's duty of care towards him.

31. We mention all this not because the events of July and August 2019 are in themselves relevant to whether his dismissal in January 2022 was fair and/or discriminatory, but because the Claimant is, and was in 2022, fixated upon them and demanding answers from the Respondent about them. For example, to this day the Claimant insists that it has never been explained to him why he was suspected of gross misconduct and that the Respondent must explain it to his satisfaction[5]. Similarly, he has said things, including in his evidence before us, to the effect that he does not understand why Mr Luznyj acted as he allegedly did in August 2019 and that this is something else that needed to be explained to his satisfaction for him to have been able to move on and return to work. Almost certainly, no explanation that might plausibly have been given would satisfy him. Perhaps even more relevantly to the issues before us, the disciplinary process ended in September 2019.

32. Also, the Claimant's relationship with Mr Luznyj has seemingly, from the Claimant's point of view at least, never recovered from what he perceives happened in 2019. That brings us to the period from September 2019 to February 2020 and the Claimant's relationship with a colleague, Mr Williams, who remains the manager of the BAM department. The Claimant's case, as set out in his County Court Particulars of Claim, is that Mr Williams was incompetent, a bully, and, on 11 February 2020, assaulted him. One of the Respondent's alleged breaches of a duty of care is that it, "*Required, tolerated or permitted the Claimant to be managed by Mr Williams.*"

33. The Claimant went off sick with what he describes as a "*breakdown*" from 11 February 2020, with severe psychological symptoms. He returned to work in June 2020, temporarily in the Community Advice Team ("CAT"). Unfortunately, things did not go well, and he went off sick, again with severe symptoms and what is described as a breakdown, on 12 November 2020. We are not entirely sure what the trigger was for this, but it may have been an incident he described during a capability meeting with Mr Watts where he reacted badly to a fire alarm going off.

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[5] During cross-examination, he suggested that one of the things he was hoping for from legal proceedings was a judge one day compelling the Respondent to provide him with the explanations he wants.

34. The Claimant raised a grievance on 24 June 2020. The Respondent went through a full grievance process with him, including an appeal, which concluded on 26 November 2020. Only one, relatively minor, allegation was upheld. It appears that the Claimant's allegations about Mr Luznyj did not form part of the grievance, but his allegations about Mr Williams did, and the part of the grievance relating to them was not upheld.

35. As with the disciplinary investigation and process in 2019, we do not have to, and do not, adjudicate on the rights and wrongs of what led up to the grievance and then the grievance and appeal process. Their significance to this case is that in late 2021 and into 2022 (and even now) they remained 'live' matters from the Claimant's point of view, but from the Respondent's point of view the Claimant had exhausted its processes and been given a final outcome in November 2020.

36. Just before he went off sick in November 2020, the Claimant had an occupational health appointment which produced a report that identified "*resolution of his grievance and relationship issues with management*" as one of the obstacles to him returning to his substantive BAM role and that included this: "*management need to resolve the grievance and management issues. I cannot comment on the facts of the case but it is important that management deal with his perception and feelings of injustice*". It seems to us that, fundamentally, nothing changed in relation to this from then onwards. It is difficult to see how the Claimant's "*perception and feelings of injustice*" could have been overcome in November 2020, let alone over a year later when he was dismissed, short of the Respondent agreeing with the Claimant about everything, including that he should never have been accused of gross misconduct, never suspended, and not given a warning, and that Mr Williams was an incompetent bully who had assaulted him and should be removed as his manager.

37. The occupational health and other medical evidence shows that the Claimant remained unfit for work, and seemingly unfit even to meet with or discuss things with the Respondent's management, up to May 2021. On 4 June 2021, his GP signed him as potentially fit for work with a phased return and amended duties. However, on 11 June 2021, the Claimant bumped into one of the Respondent's managers called Mr Mills when he was handing in the GP fit note and Mr Mills reported the following to HR in an email: "*Brian* [the Claimant] *is expecting to come back to work but only if we can find him some suitable work to do, and then informed me that the Police Doctor* [meaning occupational health] *has signed him off to the 6th July … I'm concerned that Brian informed me that he hasn't been out of the house for 8 months, and he seemed very nervous talking to me and at times was lost for words. He stated that he was still on medication and wasn't allowed to drive so in real terms … I'm struggling to see how Brian is fit to return to work*".

38. What the Respondent did, and reasonably so, was to have occupational health undertake a further telephone review assessment, on 6 July 2021. It was not entirely clear from the report prepared on the back of that assessment, but occupational health's view seems to have been that, although the Claimant was "*fit to discuss with management how things may be resolved*", he was not fit for work. HR had evidently asked whether the Claimant could potentially return to a CAT / Reception role and the advice was that, "*At present, he could not undertake this role. The reception and face to face contact with the public would be*

particularly difficult. He may be able to consider aspects of the role such as the call centre telephone contact but, at this stage, it is not certain that he would be able to progress to undertake the reception aspect of the role, even in the medium to longer term." Occupational health's recommendation was a further review on 12 August 2021.

39. The Claimant was duly assessed on that date. In the relevant report, prepared on the day, the occupational health doctor stated: "*He is keen to try to return to work but struggles to see how this might happen with Staffordshire Fire and Rescue Service. It is my assessment that he is not yet fit for work. It remains my opinion that he is fit to meet with management to discuss potential solutions and potential roles.*"

40. Further to that occupational health report, the respondent convened a capability meeting with the Claimant. This was the first time there had been any such meeting or other capability process – but, in fairness to the Respondent, for a considerable time the Claimant had not been fit enough even to discuss things with management. Nevertheless, the Respondent had decided that it should be a formal capability hearing and it should be a (final) "stage 3" meeting rather than a stage 1 or stage 2 meeting. This was something that the Respondent's relevant policies and procedures permitted. It was done because the Claimant had already been off sick for such a long time. In the circumstances, we think it was a reasonable thing for the Respondent to do. Although a stage 3 meeting was one where the outcome could be dismissal for incapability, a number of other, more positive, outcomes were eminently possible; and, as the Claimant appears to agree, it was in everyone's interests for some kind of firm decision to be made as to his future.

41. The letter inviting the claimant to the capability meeting was sent on 3 September 2021. Objectively, there was nothing untoward about the letter, which was evidently in a standard form and said all of the things that we would expect such a letter to say. It was sent together with relevant material from the Claimant's file: documentation running to over 100 pages, including things like occupational health reports and forms detailing contact the Claimant had made with the Respondent during his period of sickness absence. The reason that material was included was because it was relevant to the issues that would be discussed at the capability hearing. Including it with the invitation to the meeting was part of following a fair process. Had it not been included and had a decision been made at or immediately following the meeting that the Claimant should be dismissed, the dismissal would in all likelihood have been procedurally unfair.

42. There are at least two noteworthy things connected with the capability meeting invitation, both of which illustrate the extent of the Claimant's vulnerability. The first is that the Claimant had an extremely negative psychological reaction to it.[6] Secondly, the plan was to have the meeting at the Respondent's headquarters, which had been the Claimant's workplace, but the Claimant could not cope with it being there.

43. The meeting duly took place on 24 September 2021, away from the Respondent's headquarters. It was a relatively long meeting, lasting well over an hour and

[6] He also brought a grievance about it.

possibly over two hours. We can see from the meeting notes what the Claimant communicated to Mr Watts and the Respondent that over the course of it.

43.1 The Claimant was unclear in his own mind as to whether he wanted to come back to work for the Respondent at all, in any capacity; and, similarly, as to whether he thought he would be able to do so. In theory the Claimant had wanted a meeting with the Respondent to discuss returning to work since the GP fit note of 4 June 2021. However, the first time he was asked, near the start of the meeting, what he saw the way forward as being, his reply was, "*I honestly don't know. Because of obvious discrimination I've faced in* [the] *past* [there is] *no way now I can further my career with* [the] *fire service. I don't know if I will work again. I don't know if I'm going to get better*".

43.2 He expressed similar sentiments later in the hearing as well. For example, after a monologue from the Claimant in which he was highly critical of the Respondent, Mr Watts asked him whether he wanted to work for an organisation like that and his answer was, "*Does anyone?*" A further example is that when discussing the comment in the occupational health report of August 2021 about him struggling to see how he might return to work for the Respondent, his answer to the question, "*Is this somewhere you want to come back, is that what* [you are] *striving for* [– to] *come back to any work?*" was not even a qualified 'yes'. Instead it was, "*It's the triggers I'm worried about*".

43.3 Moving onto those 'triggers', during the meeting it became clear that the following were potential triggers for severe psychiatric symptoms in the Claimant (in addition to receiving meeting invitation letters and being at the Respondent's headquarters): hearing Mr Luznyj's voice; hearing someone speaking in a similar Stoke accent to Mr Luznyj; logging on to the Respondent's IT system.

43.4 The gist of much of what the Claimant was saying was that he had been and still was very unwell. For example, he told Mr Watts that he was sufficiently unwell to have been prescribed some Diazepam for use in extremis, and that, "*Only problem with that is by the time I've taken it, it takes an hour to work and I'm passed point of controlling self so panic turns into mania where I have absolutely no control.*"

43.5 The Claimant was repeatedly going over what he had perceived had happened in July and August 2019, despite him finding this upsetting. Amongst other things, and as already mentioned in connection with how he has been more generally, this involved him seeking explanations for things that it would almost certainly be impossible to explain to his satisfaction. For example, he wanted an explanation for why he was suspended that was something other than the explanation provided by the Respondent, namely that he was at the time genuinely suspected of gross misconduct. Seemingly, from his point of view the allegations against him had to be malicious because they were false and the explanation he wanted was an admission to the effect that they were malicious, an admission he was never going to get because, from the Respondent's point of view, it was not true. That, at any rate, was the impression he gave from what he was telling Mr

Watts. He was evidently incapable of drawing a line under what had occurred and moving on. From the Respondent's point of view, those events had concluded in September 2019. No employer in the Respondent's position could reasonably have been expected to re-open them more than 2 years later.

43.6 The previous point is exemplified by the following exchange between Mr Watts and the Claimant:

Mr Watts: I worry you won't get answers from [the] *service that you want.*

Claimant: I will, it may take another 2 years but I will. [The reference to 2 years was to the – rather optimistic – timescale the Claimant's solicitors[7] had given him for the duration of legal proceedings.]

Mr Watts: In which case, can we let this capability process and absence go on for another 2 years?

Claimant: If you're not going to tell me, yes.

43.7 The Claimant was also ruminating over a number of the things he had unsuccessfully brought a grievance about in 2020 and it's clear one of the things he wanted was for, in effect, the grievance process to be re-opened, a year after the grievance appeal had concluded, and for the grievance to be upheld in full.

43.8 The Claimant attributed his mental ill-health to the Respondent allowing him to be bullied and assaulted by his line manager, and/or failing to prevent this; and appeared to be making his return to work conditional upon the Respondent making sure it did not behave in a similar way in the future. But this was in circumstances where the Respondent had examined and rejected his allegations of bullying and assault as part of a full grievance process.

43.9 The clear impression the Claimant gave was that he was only interested in going back to working in BAM. He never suggested he had any desire or willingness to work anywhere else and when Mr Watts in terms asked him about returning to the CAT team (which, as above, the occupational health doctor had anyway indicated in August was probably not something the Claimant could do), the Claimant's response was, "*Not really. End of the day, I'm an engineer.*" However, at the same time he indicated that he thought his colleagues were incompetent, in particular his line manager Mr Williams, and that he could not work with Mr Williams, who would need to be replaced if he were to come back to BAM. At some points in the meeting, he himself seemed to recognise that his feelings about the other members of the BAM team would prevent him working there, for example when he said: "*I'm not prepared to go in where a manager can assault me, deny it and you not investigate it.*" (To be clear: it appears to be untrue that the

[7] In 2021 the Claimant had the same solicitors for his (then prospective) personal injury claim as he has now, but for a time he also had another firm of solicitors assisting him in relation to his employment situation and potential Tribunal claim.

Claimant's allegation of assault was not investigated at all; it was, but, from the Claimant's point of view, inadequately so).

43.10 In terms of medical evidence, the Claimant was preoccupied about the fact that the Respondent did not have and had not asked for a complete set of his medical records. We are unsure why he thought that would assist the Respondent, given that what was important was not the past medical history but the prognosis; nor why, if he thought there were particular parts of his medical records the Respondent did not have that showed he was capable of returning to work, he or his solicitors didn't simply provide them to the Respondent. He did not refer to anything in his bundle of medical evidence. The Employment Judge asked him a question along the lines of whether there was anything specific in his records he thought the Respondent should have obtained before deciding to dismiss him that would have helped his cause. The gist of his answer is that the Respondent would have seen how much progress he had made, but that there was nothing the Respondent did not already have that showed he was or would in time be able to return to work.

43.11 He suggested there was a good prospect of his psychotherapist[8] signing him off as fit to return to work, with amended duties and a phased return, with effect on 1 October 2021, i.e. just a week after the meeting. He also said he had an appointment with a psychiatrist on 28 October 2021.

44. The capability meeting was adjourned so that the Claimant could go and see the psychotherapist and the psychiatrist, with the intention of it being reconvened as soon as possible after 28 October 2021.

45. A few days after the meeting, on 28 September 2021, the Claimant spoke to HR over the phone, expressing gloomy thoughts, in particular that he didn't feel like he'd ever work again.

46. In a welfare call with a manager on 7 October 2021, the Claimant (as recorded in a 'contact monitoring form'), "*confirmed he had seen his Doctor* [presumably his psychotherapist] *as arranged on 01/10/21 and his Doctor stated he would not sign him as being OK to return to duties in a modified capacity. His Doctor is referring him to a prescribing Psychiatrist to change his medication with a view to enabling him to return to work in some capacity, but this may take some time to achieve.*"

47. On 20 October 2021, the Claimant was invited to a reconvened capability hearing on 9 November 2021, to be held at a location other than the Respondent's headquarters. The invitation letter included this: "*At the meeting we agreed for you to attend your GP appointment on 1st October 2021 to review your medication and a further appointment with your psychotherapist*[9] *on 28th October 2021 prior to us reconvening to review the best way forward. I would therefore request that you share any outcomes or documentation which you believe would assist in*

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[8] It turned out not to make any difference to what occurred, but we think that a psychotherapist, unless also a [medical] doctor, would probably not be qualified to assess the Claimant's fitness to return to work.

[9] This should perhaps be "psychiatrist", but precisely who, if anyone, the Claimant was going to see, and saw, on 28 October 2021 is unclear to us.

determining a suitable way forward." The only additional thing the Claimant provided at or prior to the reconvened meeting was a letter from a psychiatrist dated 19 October 2021 in which it was stated that the Claimant, "*has had problems with anxiety for a long time. This particular episode is clearly exacerbated by his job situation. I am not sure how effective medication change maybe as long as there is a stressor that perpetuates the anxiety.*"

48. The contents of that letter were clearly what the Claimant had in mind when, on 22 October 2021, during a general welfare call, he, "*stated he was not too good. He has seen a prescribing psychiatrist who has changed his medication. … he will be on medication for the rest of his life and he will never be fully well again. He is also not sure how effective the medication will be especially with a stressor in his life which he stated in this case is work. He* [worries] *now that his anxiety will bring about panic attacks which leads to hospitalisation. He stated this was all linked to PTSD from work.*" What told the Respondent was that his employment was making him ill. During the hearing, he (and his representative on his behalf) sought to suggest that the problem was in fact him – as he saw it – not being permitted to return to work. That was not, though, what was being communicated objectively.

49. After rescheduling so that the Claimant's chosen companion could be there, the reconvened capability meeting took place on 15 November 2021. An accurate summary of it would be that it was more of the same, e.g.:

    49.1 The apparent uncertainty in the Claimant's mind as to what he wanted and as to his ability to return to work, as well as the Claimant going over in his mind things that happened up to February 2020, continued. For example, he made particular reference to the psychiatrist's letter and to the fact that work was a stressor perpetuating his anxiety.

    49.2 Further examples come from the following things said during the meeting:

    Mr Watts: What we want to do is get you back to work with support you need.

    Claimant: But this is what [I am] *saying – support was put in last time and it failed.*

    Mr Watts: So I need to work out if [it's] *feasible that you will come back to work and I haven't seen anything that gives* [a] *forecast of when …* [there is / seems to be a] *cycle of anxiety about* [the] *job.*

    Claimant: This is why it failed last time, I'll leave email from Mike Williams on 20th I was not aware of. You will see as the previous emails, he tells lies.

    [That is, we believe, a reference to an email from Mr Williams of 20 February 2020, getting on for 2 years' previously.]

    Mr Watts: What can we do to make sure it doesn't fail?

    Claimant: Listen to me. Again with … the grievance. It's about gas lighting. This is what was going on, after I came back after suspension. I was questioned on my own sanity, I was going to HR and saying get me out of here and they were saying there's nothing we can do. I'll resubmit that. …

[In other words, the Claimant's suggested way of avoiding a return to work making him acutely ill, as had happened between June and November 2020, was for the Claimant to re-submit his grievance and for the Respondent give him a different outcome.]

Claimant: …. Mike Williams lied … That's what I was going into daily.

Mr Watts: Will this prevent you coming back to work?

Claimant: This will prevent me working in BAM. What you don't understand is I have done [a] *decade in that department … Now I've been* [i.e. in July 2019 I was] *suspended for* [the] *actions of others …*

….

Claimant: Do I go back to [a] *job I love and risk an assault? I know Mike Williams has denied it …* [The Claimant then effectively suggested that Mr Watts re-open and reinvestigate his grievance about Mr Williams, concluded after an unsuccessful appeal, in November 2020, by speaking to various people].

…

Claimant: You can't have me working on life critical equipment when I can't trust my own judgment. I would never live with myself if anyone got hurt. If I can't trust myself to drive, you can't trust me to drive or work with life critical equipment.

49.3 In terms of 'triggers':

49.3.1 attending the Respondent's headquarters remained problematic for the Claimant, which was why the meeting was not taking place there;

49.3.2 the Claimant orally raised a grievance about the invitation to the previous part of the meeting, because the information and documentation accompanying the invitation (which, as above, the Respondent had to send to ensure a fair process) was 'triggering';

49.3.3 the Claimant stated that the "*problem with PTSD is, your mind keeps running over things, there are triggers that set it off, feelings of absolute terror.* [I have] *spoken about Glynn Luznyj and the interrogations*" and, later spoke about having had "*severe nightmares, recurring nightmares of Glynn Luznyj … to the point I was scared to go to sleep.*";

49.3.4 the claimant identified going to his work locker to get something as a trigger.

49.4 The Claimant made clear he remained seriously unwell and might have an acute episode at any time, for example near the end of the meeting when he was asked whether, given that he had attended the meeting by himself, he was all right to get home, he replied, "*yes, my partner has taken the day off. Unfortunately no one knows how I react …*" and earlier in the meeting, he stated, "*One thing I can't do is relapse again as it's now happened 3 or 4 times*".

49.5 As at the previous meeting, he gave no indication that he was willing (or able) to work anywhere other than in BAM and his suggestion as to how this could be achieved was for Mr Williams to be removed as his manager.

50. Mr Watts also raised at the reconvened capability meeting the possibility of ill-health retirement, but the Claimant made clear he was not interested. It was raised again by the Respondent in correspondence after the meeting, with a similar result.

51. In a general welfare call with the Respondent on 25 November 2021, the Claimant reported having suffered an anxiety attack the previous weekend when 'out and about' because he saw a senior Director of the Respondent.

52. In terms of medical evidence, during the reconvened meeting and after it, the Claimant's only suggestion was that the Respondent obtain all of his medical records. However, as already mentioned, there was nothing in particular that he wanted them to see that would have helped Mr Watts make a decision. At the same time he was strongly pressing for a decision. For example: in an email of 30 November 2021, he alleged that the Respondent was in breach of its capability policy in terms of timescales and demanded an outcome by 3 December 2021; in an email to (amongst others) the Police, Fire and Crime Panel Monitoring Officer at the County Council of 4 December 2021, the Claimant stated that the Respondent was "*trying to delay any decision on my future*" and that he could not "*deal with this any longer. It's making me too ill and I fear that I relapse again. I find it unreasonable for Staffordshire Fire and Rescue to be … in breach of their own policies*". The Respondent had also seen the letter from the Claimant's psychiatrist of 19 October 2021 suggesting that the "*job situation*" was exacerbating and perpetuating his anxiety and an email from the Claimant of 22 November 2021 stating that "*an end needs to be agreed in order for me to move on and try and get some closure*".

53. On 6 December 2021, the Claimant's partner telephoned the Respondent to say that the Claimant was very unwell and had been hospitalised and that "*no further contact was to be received from Staffordshire Fire and Rescue Service from now on and that any future contact must be exchanged and passed through Brian's* [the Claimant's] *solicitors.*"

54. The Claimant was dismissed by a letter from Mr Watts of 17 January 2022, to which we refer. It was not suggested to Mr Watts during cross-examination that he did not genuinely believe what he wrote to the Claimant in the letter. It included this: "*My conclusion is that there remains no realistic prospect of you returning to work for Staffordshire Fire and Rescue Service in the foreseeable future. I have considered alternative options such as redeployment however I do not believe that this is a viable option as it is the presence in the Service, which is causing you, distress. … neither your psychiatrist nor OH has been able to indicate when you might be well enough to return to work. … You suggested that you might be able to return to the workplace if there was a change in the management team however, this is not a viable option due to the small team and nature of the role. … due to your understanding of the last three years, and the complete breakdown of trust between you and the Service, I do not feel you could return to work in Staffordshire Fire and Rescue in the workplace in the foreseeable future. In particular, you have made it clear that you are unable to work with Glynn Luznyj,*

Deputy Chief Fire Officer, because of your feelings about how he handled the disciplinary hearing in 2019. You have said that you feel triggered by hearing his voice. I have considered whether it is possible for you to work in an environment where you will not come into contact with Glynn, and I have concluded that, given his role within the Service, this would be impossible."

55. In substantially unchallenged witness evidence, Mr Watts explained that, in his view, the Claimant's "*feelings about historic events (which had already been dealt with by the Service) seemed to be trapping him in an endless cycle of stress and anxiety, which continued to be exacerbated by his ongoing employment with the Service. I could not see a way that he could return to the workplace in a way that would not further expose him to triggers which would further exacerbate his feelings of stress and anxiety. Nor could I see how Brian's health could possibly improve whilst he continued to remain employed by the Service.*"

EQA section 15 complaint

56. The issue we have to deal with to decide the remaining discrimination complaint, which (see paragraph 14 above) relates solely to the Claimant's dismissal in January 2022, is whether dismissal was a proportionate means of achieving the respondent's legitimate aims, identified in paragraph 11 above. On the facts before us, dealing with that issue comes down to whether there was a reasonable alternative to dismissal, with the question of reasonableness being looked at objectively rather than by reference to the 'band of reasonable responses' test. If there was such an alternative, then, weighing the discriminatory effect on the Claimant against the reasonable needs of the Respondent, the scales tip in the Claimant's favour; and if there wasn't, they tip the other way.

57. The Respondent has two key points.

58. The first is that – even putting to one side the risks to the Claimant's health of him returning to work – it was simply not feasible for him to do so.

59. The Respondent's case is straightforwardly to the effect that, in practice, the Claimant did not want to work anywhere other than in the BAM team and, by his own admission, he could not work there unless Mr Williams were replaced as his line manager. That would not have been a reasonable thing to do, in circumstances where the Claimant's complaints about Mr Williams had been investigated and not upheld (meaning it would be unfair to Mr Williams, and possibly a breach of his contract, to move him) and where this was a very specialist team and there weren't alternative BAM managers who could be brought-in from elsewhere.

60. We agree with that part of the Respondent's case. However, we think we do need to explore this issue in a little more depth.

61. This was not how the Claimant put it, but it could have been argued on his behalf that: the Respondent had to explore alternatives to dismissal as part of its duty to make reasonable adjustments; the Respondent was under a duty to come up with reasonable adjustments for itself, regardless of whether the Claimant came up with any; the fact that the Claimant had not himself expressed any interest in working elsewhere than in BAM was therefore irrelevant; accordingly, the

Respondent should have explored alternatives to BAM in more depth, perhaps by writing to the Claimant with a list of vacancies that he might conceivably be interested in and able to do, asking him to say whether he was interested in any of them, and then, if he was, taking occupational health advice as to whether he could, with adjustments if necessary, undertake any of the roles in which he had expressed an interest.

62. If that argument had been put forward, we would have rejected it. These steps, or any steps along those lines, were not reasonable ones for the Respondent to have to take in December 2021 / January 2022. This is because:

62.1 it was clear to the Respondent, from what the Claimant had said to Mr Watts when Mr Watts had tried to discuss with him the possibility of working elsewhere, that the Claimant was not interested in working outside of BAM, so it would have been a waste of time for the Respondent to have gone through this process;

62.2 had the Respondent attempted to go through this process, the Claimant would, as the Respondent knew, almost certainly have reacted strongly negatively to it and there was a significant risk of it severely exacerbating his ill-health;

62.3 at the time, the Claimant appeared not to be well enough to go back to work for the Respondent in any capacity. As detailed above, the capability meeting in September 2021 had been adjourned because the Claimant was hoping to be signed as fit to return to work by his psychotherapist and/or to be given an improved bill of health by a psychiatrist[10] he was apparently seeing at the end of October 2021. Unfortunately, as the Claimant candidly told the Respondent on 7 October 2021, the psychotherapist did not do this and the only psychiatrist's advice the Claimant passed on to the Respondent was the contents of the letter dated 19 October 2021 (see paragraphs 47 and 48 above). The Claimant was encouraged in the invitation to the reconvened capability meeting to provide the Respondent with evidence that supported a return to work and he did not do so. We can – and the Respondent could at the time – infer that that was because there wasn't any. We again note that when, during this Tribunal hearing, the Claimant was asked by the Employment Judge (not in so many words; this was the gist) to highlight any particular piece of medical evidence that was not taken into account by the Respondent that might plausibly have changed the decision to dismiss, he was unable to do so.

63. That brings us to the second key point the Respondent makes on the issue of proportionality: the risk to the Claimant's health and well-being, and associated risk to the Respondent, of the Claimant returning to work.

64. The Claimant was already, prior to dismissal, alleging that the Respondent had failed to take sufficient care for his health and safety and that this had caused his mental ill-health. He had highlighted during the capability meetings and outside of them the extent to which he was still very ill, as well as the fact that episodes of acute ill-health, including severe, life threatening symptoms, were readily triggered

[10] See footnote 9 above.

by all kinds of things that could not in practice be avoided. A previous return to work after sickness absence, in June 2020, to what seemed to be a less stressful and triggering working environment, had ended less than 6 months later with the Claimant suffering a breakdown. If the Respondent permitted him to return to work, there was a real risk that something would trigger him, that this would severely exacerbate his condition, and that the Respondent might reasonably be held responsible for that exacerbation and criticised and accused of negligence for running that risk. It is easy to imagine how permitting the Claimant to return to work for the Respondent could have the direst consequences for both parties. The Respondent was, to adopt a phrase Mr Barber used in evidence, in a 'lose-lose situation': not wanting to dismiss an experienced and valuable employee, and knowing it would likely be accused, as it has been, of disability discrimination and unfair dismissal, if it decided the Claimant could not come back to work; simultaneously, justifiably fearing what could well happen if it decided otherwise.

65. We find that point compelling. At the very least, this was an entirely reasonable attitude for Mr Watts and the Respondent to take.

66. The Claimant says that the Respondent should nevertheless have obtained further medical evidence. We don't agree, particularly given how hard the Claimant was pressing for an outcome after the reconvened meeting. We note that what the Claimant seems specifically to have had in mind at the time, and what he was inviting the Respondent to do, was not to go out and commission a psychiatric report, with all the attendant delay, or anything like that – he just wanted the Respondent to look at his medical records. We have already explained how that would not have assisted the Respondent and would not have helped the Claimant show he was well enough safely to return to work for the Respondent, in December 2021 to January 2022, or at all.

67. Further, we can with reasonable confidence speculate as to what any further medical evidence would have shown, on the basis of the medical evidence we now have. This included the medical evidence the Claimant has provided from his own medical records, which, as we have said, does not assist him; as well as a report that was commissioned by the Respondent from occupational health in July/August 2022 – as to which, see the next section of these Reasons.

68. Often where a claimant with severe mental ill health is dismissed for incapability after a long period of sickness absence, dismissal greatly exacerbates their condition, meaning that medical evidence from after dismissal paints a false picture of how things were beforehand, and of the pre-dismissal prospects of a return to work. That was not the case here. The Claimant was expecting to be dismissed and, on the evidence we have, beyond the immediate term, his health, if anything, slightly improved afterwards.

69. The Claimant has made much of what he sees as an unreasonable delay between his GP suggesting he could come back to work in June 2021 and his dismissal in January 2022. In so far as he is arguing that this made it a discriminatory dismissal – or an unfair dismissal for that matter – we disagree. To talk of a "delay" from June to January is a misrepresentation of the position. The Claimant's GP was necessarily only appraised of the workplace situation from his point of view. The occupational health advice available to the Respondent in June 2021 did not support him returning to work and it remained negative in this respect in August

2021, even in relation to the CAT role. The most the Respondent could reasonably do was what it did do: to meet with the Claimant to have a discussion about his long-term future, including whether he was ever, realistically, going to be able to return, what work he was willing to do, the possibility of ill-health retirement, and so on. We have already – paragraph 40 above – decided it was reasonable to have that discussion in the format of a stage 3 capability hearing. The Respondent could have made a decision at the end of September or beginning of October, but did not do so because it wanted, in the Claimant's own interests, to give him an opportunity to gather supportive evidence from his treating healthcare professionals.

70. It is true that the Respondent's performance and capability policy and procedure states, in relation to stage 3 meetings, that, "*The Hearing Officer will notify the employee of the outcome of the hearing and … will usually do so within 7 working days of the conclusion of the hearing.*" It is also true that the Respondent probably could have moved quicker by, for example, holding the first part of the stage 3 capability meeting sooner and by Mr Watts giving his decision in late November or early December 2021. However, this was very far from being a usual case and there is a contradiction between the Claimant, on the one hand, criticising the respondent for delay and, on the other, suggesting that the Respondent should not have started the capability process at stage 3 and should have obtained additional medical evidence after the November 2021 meeting and accusing the Respondent (as his representative did in closing submissions) of rushing to judgment and of a knee-jerk reaction to come to a pre-planned[11] outcome. Any unnecessary delay in connection with dismissal has not in practice led to any unfairness to the Claimant. And if the Respondent had moved quicker, the result would simply have been the Claimant being dismissed sooner than he was.

71. In conclusion, dismissing the Claimant in January 2022 was a proportionate means of achieving the aim of having employees who were capable, practicably, of attending work and carrying out their duties and of doing so without this entailing a significant, reasonably unavoidable risk to their health. The complaint under EQA section 15 therefore fails.

Claimant's appeal & unfair dismissal

72. The Claimant appealed against dismissal by emails of 9 and 17 February 2022. We cannot decide the fairness of dismissal in accordance with ERA section 98 without considering what happened with and in relation to the appeal. Further, as we wrote, in paragraph 14 above, when outlining the issues, we think we should, for the sake of completeness, consider what the position would be if there were a similar discrimination complaint about the appeal decision to the one that has been made about dismissal.

73. If the Claimant had not appealed the decision to dismiss him, this would have been a fair dismissal. Although a dismissal which is a proportionate means of achieving a legitimate aim in accordance with EQA section 15, and is non-discriminatory for that reason, is not necessarily a fair one in accordance with ERA section 98(4), in the present case we have concluded this was (putting the appeal to one side) a

[11] Nothing to this effect was put to Mr Watts or Mr Barber during cross-examination.

fair dismissal for the same reasons we decided that dismissal was proportionate. This goes not just for substantive fairness, but procedural fairness too. In coming to this view we have looked at all potential procedural issues, and not just the procedural points raised by the Claimant, already explicitly dealt with, *viz.*: that the Respondent was both too quick to activate stage 3 and that there was a rush to judgment, and that there was excessive delay; that the Claimant should not have been sent the documents he was sent together with the invitation to the first part of the capability meeting; and that additional medical evidence should have been obtained.

74. Generally so far as concerns the appeal, what we would say, in summary, is that nothing changed during or in relation to it to it to alter or materially add to the substance of the information the Respondent had on which to base a decision as to the Claimant's future.

75. In his emails appealing dismissal, and later during the appeal process, what the Claimant was telling the Respondent was very much the same kinds of things as what he had said and written previously.

76. In his email of 17 February 2022, he wrote

> *Due to* [mental health] *problems … I'm going to have problems in the appeal meeting. I don't think I will be able to convince anyone that I will be fit to return but I will give it a try. I think it's obvious as some days I can't leave the house because of fear and the depression is getting much worse due to this. I'm taking the view that at 54 I'm not in the financial position to retire but too disabled to return to work. I take it you are still refusing to tell me why I was suspended for Gross Misconduct as this will greatly help with the PTSD, to close the linen cupboard doors?*

77. In common with what he told Mr Watts, in this email: he appeared unsure as to whether he was well enough to return to work; he emphasised how unwell he was – to the extent that he predicted having difficulties dealing with the appeal meeting; what he wanted most was an explanation for why something had happened 2½ years earlier.

78. There was an appeal meeting on 10 March 2022 between the Claimant and Mr Barber, with HR, a note taker, and the Claimant's chosen companion (Ms Dunleavy, apparently Inclusion and Diversity Officer[12]) also in attendance. It was substantially a replay of the meetings with Mr Watts the previous September and November, with a great deal of rumination over the events of July and August 1999 and the subject matter of his grievance in 2020. We note the following things that were said in particular:

    78.1 *Mr Barber: Do you believe there is further medical evidence available that suggests you are fit to return to workplace?*

    Claimant: BM I do not.

    78.2 In the following exchange, the Claimant agreed that the Respondent was making him unwell, and his proposed solution to that was to reopen a

[12] Her official job title may have been something else.

grievance that went through a full process, including an appeal, that ended in November 2020.

Mr Barber: In terms of SFRS being a stressor, I have read from Dr that work is the stressor and is causing…

Claimant: Still is … I am having a lot of [treatment] *sessions, explaining what's going on. It's going right back to the grievance … I know I'm not wrong.*

78.3 During the meeting, he mentioned having had a panic attack in a Morrisons supermarket – emphasising that he remained really unwell and that objectively innocuous things could 'trigger' him.

78.4 The only way forward he proposed was to return to the BAM department with a new manager. He described the existing manager, Mr Williams, as a "*psychopath*" and made clear that that was his considered view, and that in no circumstances would he work under him.

78.5 It seems to us that had he been at all interested in anything other than his old job back he would, in his appeal emails and at some stage during the meeting, have said so, or at listed hinted that that might be the case, and he did not do so. On the contrary, he put the matter beyond reasonable doubt during the appeal meeting:

Mr Barber: Another question then – hypothetically, could you work at SFRS doing another role outside of BAM?

Claimant: No. I don't see why I should have to. I have done nothing wrong.

78.6 He was asked a second time about an alternative role and gave a similarly negative answer. Matters were left with him going away to think about this and to speak to Ms Dunleavy. We can safely assume that if he had been interested, he would have raised this subsequently during the appeal process.

78.7 Mr Barber again told him that ill-health retirement was an option; and the Claimant again made clear he was not interested in that.

79. Following the meeting, there was some delay, not all of which was fully explained. However, this was delay after dismissal and does not make unfair what would otherwise be a fair dismissal, nor does it make discriminatory what would otherwise not be.

80. Because the Claimant was keen for the Respondent to do so, Mr Barber, in or around April 2022, wrote to the Claimant's GP asking about the Claimant's diagnosis and prognosis, as well as what reasonable adjustments might facilitate a return to work. On 5 May 2022, the GP replied, stating they did not have the expertise to answer his questions and suggesting the Respondent get advice from an occupational health physician.

81. On 1 June 2022, the Claimant presented his Employment Tribunal claim form and at the same time his personal injury solicitors sent a formal pre-action protocol letter of claim. We do not have a copy of the letter of claim, but we assume it was

substantially an abbreviated version of the County Court Particulars of Claim of 17 November 2022. The claim form and letter of claim confirmed to the Respondent that the Claimant was blaming his ill-health on things it had long before investigated to its satisfaction and individuals who it had cleared of wrong-doing, in particular Mr Williams. He was also accusing the Respondent of breaching its duty of care to him by expecting him to work in in a department and environment and under a manager that he was, by his appeal, effectively asking to be returned to.

82. On 15 June 2022, Mr Barber wrote to the Claimant stating that, "*On recommendation from Occupational Health I propose the best way forward is to now obtain an independent psychiatric opinion*" and explaining why that was the preferred way forward. Obtaining such a report, from an independent provider called Nuffield Health, remained the plan until around 29 July 2022.

83. There had been a further, short and less formal, capability appeal meeting on 26 July 2022 between the Claimant, Mr Barber and Mrs Mills, who had recently joined the Respondent and taken over HR responsibility for the Claimant's case. At that meeting the Claimant was told there were two options: a psychiatrist's report or a further occupational health report. He said he wanted whichever of these would be faster.

84. On 29 July 2022, Mrs Mills ascertained that there would be a further 6 week delay before the Claimant could have an appointment with a Nuffield Health psychiatrist. She spoke to the Claimant that day and the two of them agreed that, in the interests of speed, a further report would be obtained from an occupational health doctor. The Claimant himself ensured that occupational health had access to all his medical records in preparation for his consultation with them, which took place face-to-face on 18 August 2022.

85. We should emphasise that the reason the Respondent was obtaining additional medical evidence was not that it accepted such evidence should have been obtained before Mr Watts made his decision, nor – at least not really – that Mr Barber thought he needed a further report in order to make a decision. Instead, it was that the focus of the appeal was Mr Watts's alleged failure to obtain sufficient medical evidence to justify his decision, and that the Claimant was suggesting that the Respondent had to get further evidence.

86. There was some kind of miscommunication between Mrs Mills and occupational health. Occupational health did not realise that the option of a report from Nuffield Health was no longer being pursued and they either did not withdraw a referral that had already been made or made a referral. It also appears that the Claimant was himself directly in contact with Nuffield Health in early August 2022. This was despite him knowing that he had an occupational health appointment coming up which had been arranged with a view to obtaining a report as an alternative to a psychiatrist's report, an appointment and occupational health report that would be pointless if the Nuffield Health option was still being taken. As a result, unbeknownst to Mrs Mills and HR, the Claimant was on 17 August 2022 sent by Nuffield Health an appointment with a Nuffield Health psychiatrist, to take place on 20 September 2022. The email containing the appointment (which was on the face of it sent directly to, and only to, the Claimant) referred to a telephone conversation that had taken place the previous week between the sender and the

Claimant. We are not criticising the Claimant in relation to this, merely highlighting what actually happened in response to heavy criticism he has levelled at the Respondent, and at Mrs Mills in particular, in relation to the Nuffield Health appointment.

87. After the occupational health appointment on 18 August 2022, the occupational health physician prepared a report on the same day. The crucial part of it was: "*In my opinion, Brian is fit to return to work. … To facilitate a return to work, I would advise the management to address all the issues which Brian has raised which led to his mental health deteriorating in the first instance. … If these issues are not addressed appropriately, I do not envisage him returning to work for the foreseeable future as all the main stressors initially were work-related issues as highlighted by him. … Once all the issues are addressed by the management, I would expect that he should be able to return to work in his substantive role as BA maintenance technician*". Other than a phased return, no adjustments were recommended or suggested.

88. It would be an understatement to say that this report was unhelpful. It did not begin to explain to the Respondent how to alleviate the obvious risks of the Claimant being triggered by seemingly innocuous and unavoidable things if he returned to work, nor how, in practice, the Claimant might return to his substantive role given that he thought his manager was an incompetent psychopath, that his other colleagues in BAM were incompetent, and that the Claimant himself could not contemplate a return to work without his line manager, at least, being replaced.

89. Be that as it may, there was no conceivable way in which "*all the issues which*" the Claimant had "*raised which led to his mental health deteriorating in the first instance*" could reasonably be addressed by the Respondent. Those issues included his perception of how he had been mistreated by Mr Williams and Mr Luznyj, something that couldn't realistically be overcome other than by Mr Williams being dismissed or moved, and, in practice we suspect, Mr Luznyj as well. They also included issues that had been dealt with in a full grievance and grievance appeal process, the outcome of which was that all bar one of the Claimant's issues were misplaced, and a disciplinary process that had concluded nearly 3 years' previously with a warning that had not been appealed.

90. In conclusion, the additional material put before Mr Barber that was not before Mr Watts served only to reinforce the Respondent's reasons for dismissal and in particular:

    90.1 there was no practical way in which the Claimant could return to his BAM role, which was the only role he wanted;

    90.2 the risk of the Claimant returning to work and then his psychiatric state deteriorating because of something that happened at work, with potentially very serious consequences for him and the Respondent, remained.

91. Mr Barber wrote to the Claimant rejecting his appeal against dismissal on 13 September 2022. His letter speaks for itself. His reasoning and conclusions are, we think, entirely reasonable, not just in the sense of being within the 'band

of reasonable responses', but fully objectively so. The start of the conclusion section in the letter particularly resonates with us:

> *It is the belief of the SFRS that all of your issues have been considered and responded to at various points of your employment however, as you continue to raise these I believe that you feel that these are not resolved to your satisfaction and/or you wish for differing outcomes to the issues. However, as was explained to you during the capability hearing, it is not possible for you to return to work in the same role but with a different line manager, due to the size of the team and the nature of your role. It is also not possible for SFRS to ensure that you have no interaction with Glynn Luznyj, due to his senior position within SFRS. I have considered these issues again and I do not consider that anything has changed since the capability hearing; it would still not be possible for you to return to the same role with a different line manager, or to ensure that you have no interaction with Glynn Luznyj.*
>
> *On that basis, I cannot see how the issues can be addressed in a way that you will be satisfied with. I feel that we are an impasse where we will not be able to get the issues resolved in a manner which enables you to return to the workplace.*

92. The Claimant learned of the appeal outcome not by reading the letter but by speaking to Mrs Mills on 16 September 2022. She called him because he had emailed the Respondent the previous day asking about the Nuffield Health psychiatrist's appointment on 20 September 2022.

93. We do not accept, in so far as the Claimant is alleging this, that the way in which the appeal outcome was communicated to him made the dismissal unfair or discriminatory. What happened is accurately set out in paragraph 25 of Mrs Mills's witness statement. The likelihood, based on the Claimant's own oral evidence at this hearing, is that the letter had arrived before 16 September 2022, but that his partner removed it so that he wouldn't see it and get upset by it. Mrs Mills wasn't to know that when she and the Claimant spoke on the telephone. We think that when he said to her – as he did – that he wouldn't open the letter, what he meant was he wouldn't have opened it had he seen it. Understandably, though, she took him to be saying that he had it but wouldn't open it.

94. Mrs Mills has been accused as acting callously and thoughtlessly by reading part of the letter to him. He has characterised what she did as phoning him up to dismiss him. That accusation and that characterisation have no objective basis and are unfair and unjustified. She did not phone him up to dismiss him, or even to communicate to him that his appeal had been unsuccessful. She phoned him up to tell him that the Nuffield Health appointment was not taking place. She only read out any part of the letter because he asked – almost begged – her to.

95. The sad fact that receiving this bad news precipitated an acute mental health crisis in the Claimant further illustrates how inappropriate him returning to work for the respondent would have been, because of the risks to his wellbeing of doing so.

96. In summary and conclusion in relation to the appeal:

    96.1 the process the respondent went through in connection with the appeal against dismissal and the decision taken at the end of that process do not

make this an unfair dismissal in accordance with ERA section 98. On the contrary, they reinforce its fairness;

96.2 if there were before the Tribunal an EQA section 15 complaint about the appeal decision similar to that made about the decision to dismiss, that complaint would have failed on the basis that, for essentially the same reasons the section 15 complaint about dismissal failed, rejecting the appeal was a proportionate means of achieving a legitimate aim.

Employment Judge Camp

29 February 2024