EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107802/2020

Held by CVP on 11, 12, 13, 17, 18 May and 2 June 2021

Employment Judge I McFatridge
Tribunal Member J McCullagh
Tribunal Member A Shanahan

Ms G Wemyss	**Claimant** **Represented by** **Mr Percy-Raine,** **Barrister** **Instructed by Messrs** **Thompsons Solicitors**
Scottish Fire and Rescue Service	**Respondent** **Represented by** **Ms MacDonald,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that

1. the claimant's claims of disability discrimination do not succeed. The claims are dismissed; and

2. the claimant's claim under the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 is not well-founded and is dismissed.

REASONS

1. The claimant submitted a claim to the Tribunal in which she alleged that she had been unlawfully discriminated against on grounds of disability. She also claimed that she had suffered unlawful less favourable treatment in terms of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. The respondent submitted a response in which they denied the claims. They did not accept that the claimant was disabled in terms of the Equality Act. In any event, they denied discrimination. It was also their position that the Tribunal did not have jurisdiction to hear those parts of the claim which related to events which occurred more than three months (as extended by the early conciliation provisions) prior to the lodging of the claim. They denied discrimination under the Fixed-Term Employees Regulations. The case was subject to a degree of case management during which it was clarified that the claimant was making claims of a failure to make reasonable adjustments in terms of section 20 and 21 of the Equality Act, a claim of discrimination arising from disability in terms of section 15 of the Equality Act and a claim of disability related harassment in terms of section 26 of the Equality Act. The claimant was also claiming under the Fixed-Term Employees Regulations although it is as well to record at this point that in his concluding submissions the claimant's representative conceded that the claim under the Fixed-Term Employees Regulations could not succeed due to the absence of an appropriate comparator. The hearing took place over six days using the Tribunal's online CVP system. It had originally been set down to take place over five days. By the end of the fifth day the evidence was concluded but there was insufficient time for submissions. The case therefore proceeded to another date where the parties made their submissions. During the hearing the claimant gave evidence on her own behalf and evidence was also led on her behalf from Colin Brown a member of the Fire Brigade's Union who had represented the claimant. Evidence was led on behalf of the respondent from Lynne Susan Milne a Watch Commander with the respondent who had been the claimant's Manager; Marie Claire Coyle a Station Commander (Control) with the respondent who had also managed the claimant; Brenda Ann Gillan a Group Commander with the respondent who line managed the three

Station Commanders including Ms Coyle; and Elizabeth Kathleen Logan, Area Commander with the respondent who gave evidence relating to the respondent's policies both relating to recruitment and also how they deal with competence issues and the effect of absences on their ability to carry out their statutory function.. A joint bundle of productions was lodged. Certain productions were added to this at the beginning of the case by the claimant's representative with consent. On day three of the hearing the claimant's representative also sought to lodge further documents and to recall the claimant to give evidence. The Tribunal were not prepared to allow the claimant to be re-called. One of the additional documents submitted was, after discussion, allowed to be lodged under reservation as to whether the evidence was admissible. As will be noted below the Tribunal did not consider the evidence to be relevant to the claims being made. A chronology and list of issues were also lodged at the commencement of the hearing. These were produced by the respondent. At the outset of the hearing the claimant's representative confirmed he had no issues with these documents.

2. On the basis of the evidence and the productions the Tribunal found the following essential facts relevant to the claim to be proved or agreed.

FINDINGS IN FACT

3. The respondent are Scottish Fire and Rescue Service. They are responsible for operating the Fire Service in Scotland and are set up under statute. They have a number of statutory obligations in relation to the provision of a Fire and Rescue Service. They operate three Control Rooms in Scotland one of which is based in Dundee. The Control Room handles emergency calls to the Fire and Rescue Service from members of the public, directs crews to incidents when required and manages ongoing attendance and resources at incidents. Overall the respondent employs around 8500 people throughout Scotland however the number of people employed in the control function is much fewer than this. There are currently around 169 employees employed on control duties.

4. The claimant commenced employment with the respondent in February 2019 as a Firefighter (Control). She was employed on a fixed term

contract following a recruitment and selection process. At that time it was the respondent's practice that all new entrants to the control function would be employed initially on a fixed term contract. The claimant's offer of appointment and contracts were lodged (pages 41-49). The claimant's fixed term contract was for a period of 18 months and due to end on 31 July 2020.

5. The rationale for using fixed term contracts was that the respondent were formed out of a number of different regionally based fire services. As such they inherited staff from these services. A number of staff required to be employed on specific projects to deal with the integration of the various regional services into a single service. One of these projects was known as CCF. As a result of these two factors the respondent felt there was a degree of uncertainty as to the number of staff they required to recruit going forward. They resolved that they would deal with this by essentially over-recruiting and initially recruiting people on fixed term contracts in the hope that by the time the contract ended they would have a better idea of their future staffing needs. As it happens the respondent decided at the end of 2019 that they would cease the practice and recruit on a permanent basis going forwards.

6. The job of Control Centre Operator is an extremely important one for the respondent. It is extremely demanding and the respondent requires new employees to undergo a training programme in order to ensure that by the end of this they are fully capable of doing the job. The training process takes around three years to complete with employees required to successfully attain three SVQs. They are expected to attain this at red level after the first year, amber level after the second year and green after the third. Only once all three levels have been completed would the employee be recognised as fully competent in the role and able to apply for promotion.

7. The claimant commenced employment with the respondent on 4 February 2019. For the first six weeks she was training at Headquarters. Week one is an introduction which takes place in Cambuslang. From week seven onwards the claimant worked in the Control Room in Dundee. The training in weeks seven to 12 is expected to be carrying out what is called

on-watch consolidation. There is then a consolidation course in week 12,after which the recruit returns to her Control Room for further training. The expectation was that after about 16 weeks the claimant in common with other trainees would be ready to be what is known as counted on watch.

8. Within the respondent's service the role of the Control Room is seen as critical. The Control room requires to ensure firefighter safety. It is essential that the correct information is taken down and acted upon so that the appropriate resources are mobilised. This involves not only accurately taking information from members of the public who phone in but also identifying precisely where the incident is on a gazetteer system and thereafter mobilising the appropriate resources and maintaining communication with the firefighters attending the incident so that information is passed on to them and also that information from them is accurately passed on to the appropriate quarter. There are a substantial number of protocols which require to be learnt and the controller requires to become fully familiarised with the respondent's IT systems including the gazetteer function. Much of the training takes place in what is called a training environment. This is an environment where the trainee is using all of the equipment as if on a live call but instead of a live call from a member of the public there are various fixed training scenarios which are acted out.

9. Weeks two to six are carried out wholly within the training environment. After that trainees work both in the training environment and also in the live environment where they are taking live calls from the public. In the training environment everything is pre-planned and pre-prepared. There is little pressure on trainees in the training environment since the scenarios and anticipated outcomes are known. The point is to get them to be familiar with the various functions. On the other hand the live environment is extremely pressured. If a trainee is taking a call the respondent have no way of knowing in advance what that call is going to be and how serious it is. The Control Operator requires to take the call promptly, record all answers, obtain the necessary information, mobilise appliances and in

order to do this requires to challenge the caller appropriately so as to provide clear information.

10. When the claimant went to the Dundee Control Room in order to start her training she was generally managed by Lynne Milne who was the Watch Commander. Ms Milne was responsible for a shift of eight Control Operators. On each shift there would be two Watch Commanders, a Crew Commander and five Firefighters (Control). The Dundee Control Centre is a busy Control Centre handling around 30,000 calls per annum. Calls are logged on the respondent's mobilising and gazetteering platform known as Vision. There are five watches in total. The Control Room operates 24 hours a day, seven days a week. The five watches operate on a rota system. Employees work shifts. Generally there are two days 8-6, two nights 6-8 then after that four days off. After a set number of such shifts the firefighters get 18 days off.

11. The respondent have a minimum staffing level which is the number of qualified competent staff who are required to be on each shift. Generally speaking the respondent try to operate slightly above their minimum staffing level. If a control firefighter is off sick this places considerable pressure on the system. It can mean that other firefighters have to work overtime in order to maintain the staffing level. It also means it can become difficult operationally for the respondent to show flexibility towards staff since they cannot allow staff additional time off if the minimum staffing level is not being met.

12. Shortly after the claimant commenced work in Dundee Ms Milne noted that the claimant appeared to be having considerable difficulties within the live environment. Ms Milne felt that the claimant appeared to be understanding what was required and she operated to a satisfactory level in the training environment but Ms Milne felt she had difficulty coping with pressure when in the live environment. Ms Milne took various steps to deal with this. The expectation was that after week six trainees would be able to answer calls, call challenge callers and mobilise to a basic address with monitoring from the Crew Commander or Watch Commander. In order to assist with training the Crew Commander or Watch Commander could share a screen with the claimant and other trainees in order to

monitor what they were doing. Monitoring generally continues throughout year one. Ms Milne felt that the claimant struggled with things from the outset. She could answer a basic call and get basic address information if for example the caller stated that there was a fire at a specific address. Ms Milne felt the claimant was very nervous while doing this and she lacked focus. Problems arose where the caller did not give a specific address but instead gave information in relation to the location of the incident. The respondent's gazetteer system which is built into Vision is extremely sophisticated and is designed to allow control firefighters to identify a location from information which may be relayed to them by a caller such as from a road sign. Ms Milne noticed that the claimant appeared unable to do this in the live environment. She became flustered very easily and if she could not find the address immediately she would simply give up. Ms Milne supported the claimant by providing her with exercises in the training environment in order to build her skills in this area. There is a bank of training exercises which one particular watch had developed and which were used throughout by other watches. These were in question and answer format. All trainees used the same exercises. The claimant was taken into the training environment on a regular basis in order to go through these exercises with competent members of staff. Ms Milne made a point of using different members of staff to go through the exercises with the claimant since each member of competent staff has a different personal style and she wanted to make sure that the claimant was not put off by a particular style. Ms Milne found however that no matter who tried to train the claimant the claimant would continue to have the same problems as soon as she was returned to the live environment.

13. The claimant's week 12 was on 29 April. At that stage the claimant had not met the expected standard. Week 16 was on 27 May. Despite the efforts made by Ms Milne the claimant's standards had not improved.

14. As noted above the expectation was that at some point around the 16 week mark a trainee would be considered sufficiently competent to be "counted on watch". Being counted on watch meant that the employee counted as part of the minimum staffing requirements for the shift.

Ms Milne's view was that the claimant was nowhere near this standard by week 16. Ms Milne continued with the efforts to assist the claimant by providing her with support.

15. The Station Commander at Dundee was Ms Coyle. Normally she would not become involved with trainees. She was however a regular attender in the Control Room. She began to notice the claimant. She noticed that whereas all of the other control firefighters would sit facing their screens at all times the claimant would often sit with her back to the screen talking to other people in the room. Ms Coyle felt this was very unusual. She spoke to Watch Commander Milne regarding this and Watch Commander Milne spoke to the claimant indicating that this was not something that the claimant should be doing. Ms Coyle noticed however that this did not appear to have worked and Ms Coyle therefore spoke to the claimant herself and advised the claimant that it was not acceptable for her to sit with her back to the screen. She said that it was not deemed as professional. She had a discussion with the claimant. The claimant accepted that it wasn't acceptable. She went on to say that she felt that this was "her" time. She had sought employment to meet people and this was the explanation as to why she was talking to colleagues. Ms Coyle told the claimant the Control Room was not a social event. The claimant agreed that she would improve and would focus on the job in future.

16. Ms Milne continued to try to support the claimant and to find a training method or style that would work with her. She felt that there was a basic problem in that whilst the claimant could work effectively in the training environment she did not react well to the pressure of the live environment.

17. On or about 11 July there was an incident which took place where the claimant answered a call in the live environment. It related to a siege incident. The firefighters mobilised to the incident complained that they had not been told in advance that it was a siege incident. A formal complaint was made from an officer who was unhappy with various points regarding the way the incident had been handled by Control staff. The respondent decided to issue a development plan to the claimant. Development plans are used within the respondent to deal with specific issues which arise where it is felt additional training or support is required.

It is not a disciplinary process. The aim is to provide the employee with additional support. The development plan issued to the claimant was lodged (pages 62-63). The claimant was required to familiarise herself with various processes and obtain further training. This was to be done within two to four weeks. By July the claimant was still not counted on watch. This was extremely unusual. In Station Commander Coyle's experience this was unprecedented. She had not known a trainee to require as much support as the claimant.

18. Although the claimant's contract of employment contains a clause indicating that there is a probationary period of six months it was not the respondent's practice at that time to take any action in relation to the end of a probationary period. There was no process of review. The respondent's practice at that time was that if a new recruit was still failing to perform adequately then they would continue to provide support with a view to improving their competence to an acceptable level. This policy is currently being reviewed.

19. The four week development plan which the claimant had been put on in July ended satisfactorily. On 2 August the claimant met with Watch Commander Milne and Evelyn Taylor the other Watch Commander on her watch. By this point Watch Commander Milne and Watch Commander Taylor wondered whether the fact that the claimant was not being counted on watch was holding the claimant back from developing further. By this time all of those who had joined at the same time as the claimant had been counted on watch for some time. Watch Commander Milne felt that although the claimant still required a substantial amount of support and was not performing to the appropriate level it might give a boost to her confidence if she was counted on watch. Ms Milne noted that the claimant could perform to a satisfactory standard in the training environment, the issue appeared to be that she became flustered when put under pressure in a live environment. Watch Commander Milne felt that given that the supports which had been put in place so far had not worked then the confidence boost provided by telling the claimant she would be counted on watch might give her the confidence to push herself further.

20. At this stage the Ms Milne's view was that the claimant had a reasonable call manner. When not flustered, she could answer a very basic call, terminate the call and inform partner agencies if required. She could also answer radio calls competently. She had not however achieved the standard of other trainees. Ms Milne consulted with the Station Commander who agreed that it would be appropriate to give the claimant the chance to see if making her count on watch would get her to sit up and see the seriousness of the job and increase her confidence. The respondent completed a progress report confirming the position on 2 August (page 64-65). This states under achievement that

> *"She has achieved everything required at this stage in development and will now begin to broaden her knowledge with other duties in the Control Room."*

The form does not make any reference to the real reason why Ms Milne and Ms Coyle decided that the claimant should be counting on watch.

21. During the period of her employment with the respondent the claimant was suffering a number of issues in her personal life. A few days before she commenced employment her marriage of 20 years broke down. In addition, her son was extremely ill. Despite this the claimant had continued to attend work.

22. Having been told that she could count on watch the claimant did in fact only attend work counting on watch on one day namely 8 August. Shortly after that the claimant was given bad news regarding her son's health condition. She went off sick on 9 August suffering from low mood. The claimant remained absent until she returned to work on a phased return on 18 October. During this period the claimant was referred to the respondent's Health and Wellbeing Practitioner on two occasions. This is effectively an Occupational Health consultation. The claimant's appointment was on 18 September. A report was issued following this which was lodged (pages 66-68). The background section stated

> *"A face to face consultation was conducted with the above named employee and written consent obtained to release this report to management. We discussed that she is currently on sick leave which*

commenced on 9 August 2019 due to low mood. She confirmed her fit note is due to expire on 7 October 2019. Gaynor has allowed me to report that she has been experiencing stress and anxiety symptoms due to her marriage breaking down. She is understandably emotional due to the circumstances and is trying to adapt to life as a single mother. She stated she is under the care of her GP and is on medication and confirmed she is not experiencing any negative side effects from the medication. She stated she is finding the counselling sessions beneficial and she feels her mood is improving. She has stated her sleep pattern is poor."

23. It was confirmed that the claimant was unfit to work at that point. The claimant attended an absence management meeting under the respondent's Management Attendance Policy on 2 October. The meeting was conducted by Watch Commander Milne. Following this a letter was sent to the claimant stating the outcome (pages 71-72). It set out the various support mechanisms which would be available to the claimant.

24. The claimant attended the respondent's Health and Wellbeing Practitioner again on 4 October. The report from this is lodged at pages 73-74. It was noted that the claimant was fit to return to work on a phased return basis. The phased return was to be implemented by utilising accrued annual leave. The first week she would work one shift followed by annual leave and then two shifts followed by annual leave and so on until a full working week was achieved.

25. On her return to work the claimant attended a return to work interview. At that interview the claimant indicated to Ms Milne that it would assist her to gain confidence in her return to work if she was not immediately counted on watch. Ms Milne agreed that the claimant should no longer count on watch. It was also agreed that the claimant would complete a reflective log at the end of each day setting out her view as to how the day had gone. This would then be passed to the Watch Commanders who would also complete their section setting out their view of matters. This feedback was passed to the claimant. The claimant completed reflective logs for the remaining days in which she attended work. These logs, together with the appropriate feedback are lodged (page 75-87).

26. The feedback for the first day back was lodged (page 76). This states that

> *"Gaynor grasped the content of messages however struggles with terminology, language and spelling. This in turn results in her panicking and subsequently misses part of the messages which leads her having to get the crews to repeat messages. Sometimes the messages relayed on a second time are not always the same as the original message and Gaynor struggles to amend the message. …."*

27. The feedback in each case was relayed back to the claimant. Generally over the period, Ms Milne considered there was no improvement in the claimant. She still became flustered easily when working in the live environment.

28. On 3 November Watch Commander Milne and Crew Commander Gallacher had a lengthy meeting with the claimant to discuss her performance. They completed an observation sheet which was lodged (page 88). This noted that there were areas where further development and support was required. A number of observations were made which are listed on page 88 and 89. The position was summarised on page 90. It stated

> *"Standard of competency – It was highlighted to Gaynor that she is not consistently at the level of competency expected so far as a counted member of the watch. We asked Gaynor if she feels that the pressure of the Control Room environment is an issue for her. Gaynor feels that when there are less people in the room she works better and on positions such as radio she feels more at ease as there is less pressure than 999. Gaynor was asked if being counted on watch is adding pressure to her. She stated yes as she feels she should be at a higher standard than what she is currently. Gaynor suggested that not being counted as part of the establishment may ease the pressure and allow her to develop her confidence but was concerned about what other watch members may think. We explained that not being counted as part of the watch strength is an option that we can discuss with Station Commander Coyle. We highlighted the requirement for confidentiality however advised that other WCs would be informed as*

she is required to work with other watches on mid-shift. We reassured Gaynor that we are here to support her and asked if there were any other support mechanisms that she feels we can put in place for her. Gaynor advised that not counting on the watch may assist her in achieving a competent standard and the application of a development plan would also be of use."

A development plan was agreed with the claimant. This is set out at page 91. The claimant was due to go on a period of leave from 4 November and it was anticipated that on her return she would complete the development plan which was scheduled to last for four to six weeks. The claimant would not be counted on watch during this period. In the event the claimant did not ever return to work after her leave.

29. During her leave the claimant became unwell and she was admitted to hospital on 11 November 2019. She was suffering from severe pain in her abdomen, she was doubled over. She was nauseous. Her medical advisers identified that she had gallstones in her gallbladder. The claimant was in hospital for about a week. She was advised that no surgical intervention was possible until her medical advisers had got the pain and inflammation under control. The claimant was put on pain relief and added to a waiting list for surgery.

30. The pain relief which was prescribed to the claimant was extremely strong comprising a high dosage of Tramadol together with opiates. Even then the claimant remained in a substantial amount of pain. She advised the respondent that she had been admitted to hospital with gallbladder problems. She was unable to return to work after her annual leave completed. The claimant's advice from her doctor was that she was not fit to attend work due to gallstones and an inflamed gallbladder.

31. The claimant was thereafter re-admitted to hospital to receive injections for pain. The claimant is a single mother of two children. She required to move in with her parents so that her parents could help her with looking after the children. The claimant was advised at this time that she would require surgery and would receive a pre-operation assessment on or about 16 December. She was hoping to get her operation soon after. She

was advised that if the operation was a keyhole one then her recovery time would be around two weeks however if the surgery was open surgery then the recovery time would be longer.

32. In early December the claimant had another flare up of her condition and developed jaundice and her liver function was affected.

33. The respondent maintained a log of the contact which the claimant had with management. This was compiled mainly by Lynne Milne. This was lodged (pages 118-123). The Tribunal considered this to be an accurate record of the various contacts which the claimant had with the respondent's managers during the course of her illness.

34. Shortly before Christmas the claimant was admitted to hospital with a view to having her operation. Having spent around six hours in the pre-operation waiting room she was then told that because of the time of year her doctors had decided that they would not carry out the full surgery which she had anticipated might be required. Instead they would carry out a procedure under local anaesthetic to remove the stones from the bile duct. This procedure was carried out and the claimant was discharged on 24 December. At that time the claimant still had very severe pain in her abdomen. She would be doubled up when she had an attack. She was unable to do tasks around the house because of the pain. The claimant found it difficult to get up. She found it difficult to look after her children. She felt that the pain she was suffering was even worse than childbirth. Having been discharged home the claimant felt that the pain relief which she was able to get at home was not effective. The claimant felt she had no quality of life.

35. At that stage the claimant's treatment plan was that she was on a waiting list to have her gallbladder removed. Unfortunately, the claimant required to be taken back into hospital at the beginning of January 2020 because of her ongoing pain issues. On 14 January she was diagnosed as being in the early stages of sepsis. She required to attend hospital for a day in the High Dependency Unit. She was then operated on the following day. Although the plan was to remove her gallbladder the surgeon discovered that part of her gallbladder had attached to her bladder and that part

required to be left in place. Following her operation the claimant had a lot of infection in the wound site. She had three drains left in place for a period of around six weeks after the operation. She was discharged home with these three drains in place. This was on the basis that the claimant was a single parent and was required for her children albeit that the claimant's parents and other members of the family helped her out greatly with the children.

36. In the meantime the respondent's manager Ms Milne had been dealing with keeping in contact with the claimant and managing her attendance. They had been due to carry out an attendance management meeting on 11 December but this could not take place because the claimant was ill. The claimant sent various texts confirming the position. The claimant had been able to have a meeting with Watch Commander Milne on 4 January. This was by telephone with the respondent's Occupational Health department on 31 December.

37. As a result of her ongoing issues with infection the claimant was readmitted to hospital at the end of January. On 3 February 2020 she was contacted by Crew Commander Clark who asked if it would be possible for Crew Commander Clark to visit the claimant in hospital to do a welfare check and catch up the following day. The claimant was extremely upset when Crew Commander Clark spoke to her on the telephone.

38. Crew Commander Clark visited the claimant in hospital the next day and dropped off a present of a notebook and a get well soon card sent from Control. During this visit the claimant was confused as a result of the medication which she was on. She felt threatened by Crew Commander Clark's visit. The claimant had previously worked with Crew Commander Clark since Crew Commander Clark had been responsible for part of her training.

39. The claimant was returned home albeit still with her main drain in place. She had to attend hospital once or twice a week. Watch Commander Milne spoke to the claimant on 11 February 2020. The gist of this telephone call is recorded on page 124 of the notes.

40. The claimant was able to attend an attendance support meeting with Watch Commander Milne on 21 February. She advised that she was not yet fit to return to work because she still had the drain in place. The claimant attended a further telephone consultation with the respondent's Health and Wellbeing Practitioner on 24 February. The report produced after this was lodged (p103-104). It identified that the claimant was unfit for work but stated

"I advise it may take another 2 to 4 weeks of recuperation before Gaynor may be fit to return to work."

41. Unfortunately, on 27 February the claimant required to be re-admitted to hospital because the drain fell out. She was given further treatment. On 28 February the claimant was invited to a Stage 1 meeting in the claimant's formal capability process. (105). The respondent's capability process contained within their Managing Attendance Policy which was lodged (pages 147-188). The claimant was advised of her right to be accompanied. The claimant chose not to be represented or accompanied at the meeting. The meeting was with Station Commander Coyle and took place on 6 March 2020. At the meeting the claimant provided an update on her current health issues. The claimant indicated that she was due to attend hospital on 10 March and was hoping to be able to return to work soon after. Following the meeting Ms Coyle wrote a letter to the claimant dated 11 March 2020. This was lodged (pages 106-107). In this letter Ms Coyle recorded what was said about the claimant's return to work. In this letter Ms Coyle confirmed with the claimant that

> *"The red phase assessment was a goal to aim for and that due to you not counting towards watch staffing figures you would not have been in a position to sit this at this time."*

She then went on to state that she anticipated the claimant being able to return to work on a phased return basis. She went on to state

> *"We discussed your concerns about your existing development plan and you returning to work after a lengthy period of absence. I confirmed with you that we would work through a reintegration plan during your phased return and that once you were on watch we would*

re-address your development plan. The goal is to have you counting towards staffing figures."

During the meeting we discussed the support mechanisms currently available to you. You advised that you required no support at this time however you continue to attend Health and Wellbeing. At your next appointment on 11 March 2020 I have requested that you discuss your return utilising a phased return and seek advice on this.

I confirm the outcome of our discussions that I have set a target of returning to work on a phased return within four weeks, this will be confirmed on advice from Health and Wellbeing. I have explained fully the requirement to meet this target and the consequences if there are further absences within this period. Due to your level of absence I have confirmed with yourself that any further absences will potentially progress to a Stage 2 interview being conducted. You confirmed you understood this.

I therefore hope to see a sustained improvement in your attendance levels but if this does not occur you will be seen under the second stage of the capability process to further discuss your position. You should be aware that this may ultimately lead to your employment being terminated on the grounds of capability."

42. The claimant attended Occupational Health on 11 March following which a report was issued (page 108-109). At that stage a further review was planned for 23 March 2020. This duly took place. By this time the Covid-19 pandemic had broken out and the claimant was in fact in a period of self-isolation having suffered what she believed may be Covid-19 related symptoms. The report on this review was lodged (pages 110-111). The Health and Wellbeing Practitioner considered that the claimant was still unfit for work at present but that she should consult with her GP once her 14 days of isolation were complete so that blood tests could be conducted and results sent to her specialist so that they could decide on the next course of action. A review was fixed for 20 April. The claimant had hoped to return to work at the end of March.

43. Unfortunately, the claimant had another attack of abdominal pain at the end of April and required to be re-admitted to hospital. She emailed the

respondent's Ms Coyle on 1 April 2020 advising her of this (page 112). She stated she was still in a lot of pain and had been prescribed strong painkillers.

44. The claimant was thereafter discharged from the hospital. It was considered that it was safer for her to be at home and manage her pain than be in hospital. At this point the hospital had started admitting Covid-19 patients.

45. From this point onwards the claimant's contact with her medical advisers was solely by telephone and this made things more complex and difficult than they might otherwise have been. In addition the claimant was made aware that due to Covid-19 a number of medical procedures which would normally take place very quickly would be delayed as a result of the pressure on the health service due to the pandemic.

46. On 15 May the claimant emailed Ms Coyle to update her on the position following a discussion the claimant had with her consultant. (p117) The claimant was advised that her consultant had recommended an MRI scan to ascertain why the claimant was still suffering from pain following the operation which she had had in January. She stated

> *"…. They are going to try and avoid removing the remaining part of the gallbladder due to how difficult an operation it is and from his experience it causes more problems. There is a few things he wants to rule out first he feels there is a possibility a stone is stuck in the tube that runs from gallbladder to stomach which is causing the pain and the MRI will confirm this. If MRI comes back as clear next it will be an endoscopy (he thinks there may be an ulcer) which could also give me the pain I've been suffering.*
>
> *If this is also clear he said five out of 100 people after having the operation I got can be left with chronic pain (he really hopes and feels it won't be this but he needs to let me know)."*

47. On 23 April the claimant attended Occupational Health. The report was lodged (pages 130-131). It was noted that the claimant was still unfit for work and it was difficult to predict when she would be ready to return to

work as a specialist still required test results to allow them to develop a treatment plan.

48. On 24 April the claimant sent an email to Ms Coyle confirming that she had now been told her MRI scan would take place on 30 April.

49. On or about 7 May the claimant was advised verbally that she was being called to a Stage 2 meeting in terms of the respondent's Managing Attendance (Capability) Policy. On that date the claimant sent an email to Ms Coyle (page 116). She stated

> *"Thanks for your call today and I fully understand and appreciate the procedures the Fire Service need to follow.*
> *I knew this news would be coming my way and had been dreading it since I was last admitted into hospital."*

50. The claimant received the formal invitation to the Stage 2 meeting on 11 May. This was lodged (page 132). The claimant was told at this meeting

> *"You will be given the opportunity to explain the reasons for your absences and provide details of any underlying issues, any contributing factors and to make any suggestions as to how to improve the situation. It is the aim of the Scottish Fire and Rescue Service to assist you whenever possible in improving your attendance to an acceptable level."*

51. On 15 May the claimant wrote to Ms Coyle stating that she had met with her union rep. She went on to state

> *"I've had the results back from my MRI scan and they are not good at all. Basically there are stones in the remaining part of my gallbladder (this was my fear). My consultant informed me we have no choice but to operate again this is a decision he hasn't taken lightly due to the risks and possibly life changing conditions I may have to deal with.*
> *This was devastating news for me because all I want is to be back at work.*
> *My consultant is looking to carry this operation out in 4-6 weeks' time (he has put me on his list as a matter of urgency but due to Covid it may be six weeks' time). This will be open surgery and recovery is*

months (his words). I have really struggled since getting this news however it is something I need to get me head around and deal with it just cannot believe this is happening to me. If you want more in depth information re risks etc or any other information please let me know and I will email as much as I can. My consultant is writing a letter for me for work explaining what's happening." (page 117)

52. On 21 May the claimant attended a further telephone consultation with the respondent's Health and Wellbeing Practitioners. The report from this was lodged (pages 133-134). Given that this was the last review before the claimant's second stage hearing it is probably as well to set out the content in full. It states

"A telephone consultation was conducted with the above named employee and verbal consent obtained to release this report to management. This report should be read in conjunction with the previous reports dated 31/12/19, 24/2/20, 11/3/20, 23/3/20 and 23/4/20. We discussed she is still under the care of her GP and specialist and since her last OH consultation she unfortunately was readmitted again to hospital at the end of April 2020 due to severe abdominal pain on her right side. She stated she had a telephone review consultation with her specialist on 12 May 20 to discuss MRI scan results. Gaynor stated the MRI scan took place on 30 April 2020 and she has allowed me to report that unfortunately the results show that gallstones remain in the section of the gallbladder that was left behind after her first operation in January 2020. She stated the open surgery is due to take place in six weeks' time and that her surgeon has advised that her recovery could take months. She stated she is currently on prescribed pain relieving medication to help with her pain during the day but also the pain she is experiencing at night which can be worse. She stated her abdominal area is tender and the pain relieving medication is helping to reduce her abdominal pain but the medication is not completely taking the pain away. She feels anxious about what lays ahead and feels frustrated that her health is delaying her return to work.

My recommendation and advice to Gaynor is that in my opinion she is unfit for work at present due to the current circumstances. I planned to write to her specialist for a medical report but Gaynor has informed me that her specialist is already in the process of constructing a medical report for her employer to explain Gaynor's treatment plan and provide guidance on her recovery timeframe. In my opinion Gaynor may be able to return to work at some point over the next 6-12 months post operation given that Gaynor's absence commenced on the 14th November 2019 it is for the organisation and management to decide whether this timeframe is acceptable."

The Health and Wellbeing Practitioner noted that she planned to review the claimant again on 9 July.

53. In the meantime the claimant's consultant had written to the claimant's GP Practice on 19 May confirming his view of the present position following a consultation which she had with the claimant on 12 May. (p261-262). This letter was at no point shared with the respondent prior to the commencement of the present proceedings. The letter confirmed the discussion that the consultant had had with the claimant regarding surgery. He set out the risks involved in surgery. He stated

"First of all I highlighted there is potentially a high chance that despite surgery her pain will continue. This is because it is possible that the pain is not secondary to the remnant gallbladder and stones but is neurogenic in origin. I understand that she has been started on Pregabalin which to some extent resolved some aspects of her pain particularly the hyper-sensitivity and tenderness over the previous drain site.

The second thing I highlighted was that during the surgery it is possible that the surgeon may feel that progressing to a complete cholecystectomy is too much of a risk because of the gross fibrosis of the Calot's Triangle.

The third thing highlighted was the associate risk of the completion cholecystectomy and in particular I highlighted the risk of bile duct injury. I told Mrs Wemyss that the risk of this normally is in the region

of about 1 in 250 but is considerably higher in the case of laparoscopic or open removal of the remnant gallbladder."

He confirmed that despite this the claimant had voted for the operation. He then went on to state

"We also discussed the timing of the procedure. I told Mrs Wemyss that currently Tayside only allows urgent P1 cancer and P1 benign cases. I would categorise Mrs Wemyss as P2 (high priority) I told Mrs Wemyss that there might be some delay in sending for her and she may require to go through the current elective pathway which includes two weeks of strict self-isolation at home and negative swab tests prior to surgery.

*With her agreement I will put her on my waiting list. I will also make arrangements to speak to her in about four weeks' time to monitor her progress and have a further discussion about the issues mentioned in this letter. I will also be sending a separate letter to Mrs Wemyss regarding the decision for an operation so that she can present that to her current employer." (*page 261-262)

54. The consultant also sent a letter which was meant to be passed on to the claimant's employer. The letter was not, in fact, passed on to the respondent at any point prior to the present proceedings. The letter was lodged (page 264). It states

"To whom it may concern

This is to certify that the above named patient has now been listed for a laparoscopic removal of the remnant gallbladder. Due to the coronavirus pandemic there might be some delay in this being carried out and because of the complexity of the procedure several months of recovery might be required following surgery. The operation is indicated because of the most recent MRI scan findings and the patient's continual chronic pain with acute exacerbation requiring multiple hospital admissions."

55. The claimant duly attended the stage 2 meeting on 22 May. It was conducted via Skype. The claimant was accompanied by Colin Brown and Terry Whyte of the Fire Brigade's Union. The meeting was conducted by

Brenda Gillan, Group Commander and Jackie Brown of the respondent's HR department also attended. Following the meeting Ms Gillan agreed that the meeting would be continued and reconvened after four weeks at which reconvened meeting the claimant's situation would be reviewed. It was hoped that by then the claimant's specialist might have been in touch regarding surgery and that there might be more details known of her recovery time. It was however made clear to the claimant that there was a high likelihood that her contract would not be renewed. Following the meeting Ms Gillan wrote to the claimant confirming the position. This letter was lodged (page 135-136). She set out her understanding of the history of the matter. She also set out her understanding of the claimant's medical condition. It stated

> *"You advised you attended an MRI scan on 12 May and as a result your consultant has conveyed to you further more invasive open surgery is required. Indications at present are this could take place over the next 4-6 weeks with months of recovery thereafter. You also stated your consultant is currently drafting a letter to SFRS to convey your current health situation.*
>
> *I fully understand and sympathise with the health issues you have been experiencing but you will appreciate that your inability to return to work is adversely affecting DOC service delivery and is unable to be sustained in the longer term.*
>
> *At this stage I would normally set a three month monitoring period however as your temporary contract ends on 31 July, 10 weeks from now and taking into account your extended absence period over your employment to date and your update regarding a further operation with a longer recovery period this is not an option for you.*
>
> *Furthermore, I have to take into account you are not yet accounting as part of the watch strength, you are also on a development plan and yet to sit your Red Phase Assessment. This all adds up to the fact the service is not in a position at this stage to renew your temporary contract when it ends on 31 July 2020.*
>
> *I then started to discuss the next steps would be to give you one month's notice at the end of June of our intention not to renew your temporary contract on 31 July 2020 ensuring all annual leave owed to*

you is taken into account. I then invited yourself and your FBU representative to ask any questions.

Colin Brown (FBU) requested if it was possible to extend your current contract and it was explained the SFRS were not in a position to facilitate this due to the information provided on your current health situation and your progress as a Firefighter Control. Colin also enquired if you could work from home utilising LCMS packages etc in an attempt to progress with her development plan however I explained the practical elements of your plan could not be completed at home nor assessed. I have since the meeting ascertained what percentage of the development plan is related to practical application and this reads as 90% which supports the decision working on LCMS packages would not support progress in this area.

Colin Brown FBU further requests that we review your situation in four weeks' time when your specialist may have been in touch with your surgery details and more may be known on the recovery time for your surgery. I agreed to this request and will send you out a letter inviting you to a Stage 2 review meeting in four weeks' time. …."

56. On 8 June the respondent wrote again to the claimant advising her that the four week review meeting would take place on 24 June. In advance of the meeting the claimant emailed the Station Commander Coyle. The email is dated 17 June and was lodged (page 138). She stated that she wanted to let Station Commander Coyle know how she was and went on to say

"Basically I am still waiting on my operation appointment. I am contacting Ninewells on a weekly basis in order to get a cancellation for my health and also to allow me to get back to work as soon as possible, cannot believe how much I am missing work!

I have my next Skype meeting with Brenda on 24 June at 9.30 I'm hoping the union will have managed to work things out for me before that date otherwise I'll be getting issued my four weeks' notice. This will be gutting for me if this is the case."

57. The claimant duly attended the stage 2 review meeting via Skype on 29 June 2020. Once again she was accompanied by Colin Brown of the Fire

Brigade's Union. Jackie Brown of the respondent's HR department was also there. The claimant confirmed that she was still awaiting a date for her operation and that the medical position was essentially the same. Ms Gillan did not see the letter at page 263 from the claimant's consultant. She worked on the basis that the claimant had said that there was potentially "months" of recovery after the operation. Following discussion, Ms Gillan confirmed that the claimant's contract would not be continuing beyond its end date of 31 July. Following the meeting Ms Gillan issued a letter to the claimant dated 29 June 2020 confirming the position. She set out the background and then stated

> *"Your last Health and Wellbeing review dated 21 May 2020 has also confirmed you remain unfit for your current role with the expectation this position would not change in the near future and post-operative recuperation could take many months.*
> *We also discussed the fact we were not counting as part of watch strength and had not yet completed the development plan put in place to assist you. This development plan covered core aspects of the role of a Firefighter Control e.g. gazetteer address searching, call challenging, not terminating calls prior to obtaining an address. Additionally you had not completed your Red Phase assessment.*
> *Taking into account both your performance issues and your medical condition I write to confirm the conversation we had on our Skype call of 22 May and 24 June whereby I advised that as you have not been able to attend for duty your skillset is not of the level that it should be at the point of renewing your temporary contract. In light of the above your contract will not be renewed after 31 July 2020. …"*

The respondent then wrote formally to the claimant giving her notice on 30 June 2020 (page 141). The claimant was advised of her right of appeal.

58. The claimant wrote to the respondent formally appealing the decision. The letter was lodged (page 143-144). It is not dated but was clearly sent sometime between 30 June and 15 July. The claimant set out the history of the matter. She then stated six bullet points at page 144.

"
- *My first period of absence was related to my son's disability for whom I am primary carer.*
- *My own health situation has been affected by the current Covid-19 pandemic which has impacted my ability to access the scans and treatment for my medical requirements.*
- *To extend my contract to allow me time to return to my Firefighter Control position I believe would support the financial costs the service have already invested in me through recruitment and training to potentially retain my skills and attributes for the role.*
- *The financial cost to the service to extend my contract would be minimal in line with the Managing Attendance Policy I am currently on half pay and due to progress to no pay two months beyond my current end of contract date 31 July. Should my treatment not be completed and return to work in place by then which I would hope not to be the case.*
- *The current CCF project that fixed term contracts were employed to cover is still ongoing and therefore I believe there is a requirement for my current post within OC structures. This is further substantiated by the confirmed recruitment for OC staff in August.*

To continue with the crucial support the service have invested through SFRS managing attendance to help me return to full time employment as this support would also be terminated prematurely on 31 July."

59. The claimant's appeal was considered on the papers by a David Young a District Area Commander with the respondent. He decided not to uphold the appeal. He set out his decision and reasons in a letter sent to the claimant on 15 July (page 145). He has since left the employment of the respondent and did not give evidence at the hearing.

60. The claimant remained absent from work due to ill health for the remainder of her contract. Her contract was not renewed on 31 July which was her last day of employment. Of the cohort of trainees who started at the same time as the claimant all apart from the claimant and one other person were

transferred to permanent contracts on the termination of their fixed term contract. The respondent also advertised for new trainees in or about August 2020. These employees were to be employed on permanent contracts. The reason for this is that the respondent felt sufficiently confident in their succession planning to be able to do this rather than follow their previous practice and over-recruit in order to ensure that they would have enough people when the time came.

61. The claimant remained on half pay for the remainder of her contract.

62. The respondent suffered another episode of acute pain at the beginning of August 2020 which led to her being taken to hospital by emergency ambulance and admitted to the acute surgical unit. Following this she was discharged on 7 August 2020 but was moved on to a high priority waiting list for her cholecystectomy. The claimant eventually underwent the cholecystectomy on 18 September 2020. She was discharged home on 21 September 2020. The surgery went well however the claimant suffered further episode of being unwell on or about 9 October. By December the claimant had recovered from the cholecystectomy however still experienced bad diarrhoea every time she ate something. This is a well known sequela to having a cholecystectomy. The claimant described it as her body unable to process food and the food goes straight through her. It does not impact on her ability to do things so long as she is able to get to a toilet quickly. The claimant remained signed off as unfit for work at the date of the hearing in May 2021. Apart from one or two days helping out waiting in a family owned café business the claimant has not carried out any work since leaving the employment of the respondent.

63. The claimant's representative lodged with the tribunal a letter from the claimant's GP dated 22 April 2021 (p289-290) which had been sought in connection with the tribunal case. It set out their understanding of the progression of the claimant's illness. They set out their position that the claimant's impairment had lasted between 11/11/19 and January 2021. They set out their view that her impairment would have severely affected her ability to carry out day to day activities during this period. They stated that:

"the physical impairment lasted 14 months but that as the patient has now

had surgery to cure the problem there should be no recurrence" They stated that the effect of the impairment was:

"Constant gall bladder pain experienced over this period would have affected her mobility, co-ordination, and ability to lift. Her concentration may have been impaired by taking strong painkillers. These issues should have resolved by December 2020, by which time her only issue was diarrhoea"

Observations on the evidence

64. The Tribunal were generally satisfied that all of the respondent's witnesses gave evidence that was credible and reliable. The only comment the Tribunal would make was that as might be expected in a uniform organisation the witnesses were rather "silo-d" in their approach in that all were careful only to give evidence relating only to their own involvement and when asked questions about the bigger picture were unable to assist. This is not a criticism but it did mean that it was not until close to the end of the evidence when we heard from Ms Logan that we were advised of the rationale for the respondent recruiting on a fixed term and the overall approach to staffing levels by the respondent and thus why the claimant's absence had a potential adverse effect on service delivery.

65. The Tribunal were less happy with the evidence of the claimant. It is clear to us that the claimant has had an extremely difficult time over the past 18 months. She has suffered a succession of adverse life events culminating in an extremely painful and debilitating illness which she is only just now recovering from. The Tribunal had great sympathy for her and a degree of admiration for the way she has dealt with these events. The respondent's representative criticised the claimant for giving evidence which was over-dramatic. We did not entirely agree with this criticism but did agree that some of the evidence which she gave was not credible. It was unsupported by other evidence. In many cases the evidence was contradicted either by documentary evidence, by the evidence of other witnesses or even by subsequent evidence which the claimant gave herself. The Tribunal also noted that in some cases the claimant's evidence diverged from the case stated in the pleadings.

66. The claimant gave evidence in relation to the hospital visit referred to in our findings in fact. Her position was that she woke up to find this person at the end of her bed that she barely knew. She described the visit as intimidating. She referred to being given a notebook to write her goals in and felt the interaction was entirely inappropriate. The Tribunal did not accept this evidence. The Tribunal preferred the description of the visit set out in the contact notes. It was clear that the claimant had met the person who visited her beforehand. It appeared to the Tribunal that the claimant's version was not believable. The Tribunal were also concerned that the claimant's evidence appeared to be that she was relying on this as an incidence of harassment where that had not been pled.

67. The claimant also referred in her evidence to inappropriate comments and foul language having been used by WC Milne at the Stage 1 meeting. Her position was that Watch Commander Milne had stated that it was "just ticking f….ing boxes or words to that effect." There was no reason given as to why WC Milne would say this and the claimant had not made the allegation at any point before giving evidence. She also alleged that there was a conversation during this meeting whereby either the claimant or Station Commander Coyle had said that the watch was at full capacity. The Tribunal did not accept either said this since it does not appear to be the case and it is not mentioned in the note. It would appear to be a very strange thing for either party to have said. We would also agree with the respondent's representative that this does not appear to be a terminology used within the service.

68. During her evidence in relation to the stage 2 meeting the claimant said that it would not have cost the respondent anything to keep her on at this time because she was already on zero pay. The claimant repeated this assertion several times. The claimant was then extensively cross examined on the subject and eventually accepted that she had in fact remained on half pay right up until the end of her contract. The Tribunal agreed with the respondent's representative that this was somewhat concerning given that the claimant elsewhere said she was extremely concerned about her financial position. The Tribunal were of the view that the claimant would have known whether she was on half pay or zero pay.

The claimant also gave evidence that at the Stage 2 meeting she had made two further suggestions which were not mentioned in the outcome letter namely that she would return to work on zero pay until she reached the relevant standard of performance or that she be taken back at the next recruitment drive without having to go through the assessment process and start training again. It is clear that the claimant had never mentioned beforehand that these suggestions had been made at the meeting. They were not covered in the note. They were not put to Brenda Gillan in cross examination nor were they mentioned by Mr Brown in examination in chief. We would also agree with the respondent's agent's position that it does not appear credible that the claimant would have been prepared to work for zero pay given the other points she made regarding her financial situation.

69. Finally, the claimant's position with regard to her current state of fitness was slightly confused. In her impact statement the claimant clearly states that she remains unfit for work. The claimant also explicitly stated this in her evidence in chief. It appeared to the Tribunal that having given this evidence the claimant then decided that this was not helpful to her case. When questioned about it during cross examination the claimant sought to withdraw from that position and then went on to say that she would have been able to come back to work shortly after her operation so long as she had access to a toilet. This was entirely contrary to the position she had adopted in evidence in chief.

70. The claimant's evidence was completed following re-examination on the second day of the hearing. At the beginning of the following day the claimant's representative sought to recall the claimant to give further evidence which the Tribunal assumes was in relation to the point of whether or not she was fit or unfit to work at the present time given that by this stage it was clear to all that her evidence was contradictory and unclear. The Tribunal did not agree to this.

71. We did not consider that there was anything the claimant could say by this time which would do anything other than further obfuscate the issue.

72. Immediately prior to calling Mr Brown to give evidence the claimant's representative sought to lodge two further documents. One was a copy of the respondent's capability policy relating to performance matters, the second was an email which bore to be notes of an HR liaison meeting which took place on 2 June 2020. These were internal fire brigade union notes of the meeting. Bullet point nine of the meeting related to the claimant albeit the claimant was not mentioned by name.

73. The respondent objected to both document being lodged. After discussion by the panel the panel agreed that the capability policy relating to performance management should not be allowed to be lodged late. The respondent's position was that this policy had not been used by any of the decision makers in the case. It may well be that the claimant's position is that it ought to have been used but this point could be made without the necessity for lodging the policy. With regard to the other document the Tribunal were unclear as to its relevance however the Tribunal agreed to admit it as a production under reservation on the basis that we could only work out its relevance once we had heard evidence about it. In the event the Tribunal did not find this document in the least bit useful. It is a record of a high level meeting between which takes place between senior members of the fire brigade union and the respondent's management and HR department. Any information which was given to this meeting in respect of the claimant's case could only have come from the claimant. There appears to have been a discussion as to whether or not the Scottish Government's policy that individuals should not suffer detriment during Covid-19 was engaged given that there was a suggestion the claimant's absence was lengthened due to the fact that her operation was delayed due to Covid-19 restrictions. The Tribunal did not consider that it was our role to police the Scottish Government's policy on this matter albeit that the issue raised might be of relevance when considering overall issues of reasonableness and proportionality and was considered by us as part of our decision relating to these issues below. The document lodged was not of any assistance to us in that regard. Finally on the issue of evidence it was the claimant's evidence that essentially she believed that the performance issues which had been raised by the respondent in the period prior to her going off were relatively minor. The Tribunal's view was that

we accepted the evidence of the respondent's witnesses that there were serious concerns relating to the claimant's performance and in particular the fact that her performance in the live environment was not improving. We did have concerns as to how much these concerns were communicated to the claimant. We appreciated that it is often a difficult balancing act when managing an employee who is underperforming between providing them with clear feedback that their performance is well below that required and at the same time providing them with encouragement and the feeling of making progress. In this case we felt that the claimant may well not have realised how serious her performance shortcomings were. Whilst the Tribunal could understand the respondent's management reasoning in allowing her to be counted on watch albeit just for one day we accepted the claimant's evidence that she felt this meant she had actually attained the standard of competence required at that point.

Issues

74. The claimant claimed that she had been unlawfully discriminated against on grounds of disability. The respondent did not accept that the claimant was a disabled person at the time of the alleged discrimination. It was also their position that even if the claimant was so disabled the respondent had neither actual nor constructive knowledge of her disability nor did they have knowledge that the PCPs relied upon by the claimant placed her at a particular disadvantage because of her disability. The Tribunal therefore required to rule on the issue of disability as a preliminary point. The Tribunal also required to rule on the issue of knowledge of disability. The claims were under section 15 (discrimination arising from disability), under section 20 (failure to make reasonable adjustments) and s26 (harassment) . The only pled act of harassment was the dismissal itself. The claimant in her evidence referred to other matters which she described as harassment however the tribunal could not consider these since they were not in the pleadings and the claimant's agent did not refer to them in his submissions. In any event we did not find that these additional allegations made by the claimant in evidence (relating to the hospital visit and the stage 1 meeting) were founded in fact. The claimant

had also claimed that she had been treated less favourably in breach of the Fixed Term Workers (Prevention of Less Favourable Treatment) Regulations but during the course of submissions the claimant's representative withdrew this claim. He accepted that the claim could not succeed given the failure to lead evidence relating to a comparator.

Discussion and decision

75. Both parties submitted written submissions which they expanded upon orally. Rather than attempt to summarise these they shall be referred to where appropriate in the discussion below.

76. As noted above the first preliminary issue which the Tribunal required to rule upon was the issue of whether or not the claimant was disabled at the time of the alleged discrimination or not. The Tribunal then required to rule upon the issue of knowledge of disability and finally the Tribunal had to rule upon the claimant's claim that the respondent had failed to comply with a duty to make reasonable adjustments in terms of section 20/21 of the Equality Act, the claim that they had unlawfully discriminated against her for a reason arising from her disability in terms of section 15 of the Equality Act and the claim that her dismissal amounted to an act of harassment under s26 of the Equality Act.

Discussion and decision - disability

77. In order to succeed in her claim of disability discrimination the burden of proof is on the claimant to show that she was disabled at the relevant time. The relevant time is the period over which the discrimination is said to have occurred. The Tribunal considered this to be the date on which the decision was made not to renew her fixed term contract given that this is the date that the reasonable adjustments contended for ought to have been made or in the event that these amounted to omissions are deemed to have been made in terms of section 123(4) of the Equality Act. We agreed with the respondent's representative that we were looking at the period May/June 2020. Section 6 of the Equality Act provides

"(1) A person (P) has a disability if –

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

The Tribunal accepted that the claimant's gallbladder issues amounted to a physical impairment. It is for the claimant to show that the impairment had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities.

78. The Tribunal accepted that the claimant was in severe abdominal pain for the period between November 2019 and around December 2020. The medical report lodged by the claimant dated 22 April 2021 was compiled for the purpose of these proceedings and sets out the relevant history. It notes that the claimant had a laparoscopic removal of the remnant of her gallbladder on 21 September 2020 and that this was uncomplicated. It notes that she was reviewed again three weeks later with abdominal pain but the bloods were reassuring. The Tribunal understood from the claimant's own evidence that there was no recurrence of a severe abdominal pain which the claimant had earlier suffered from following her final operation in September 2020.

79. The Tribunal accepted her evidence that whilst the claimant was suffering from this acute abdominal pain she was sometimes doubled over. She was unable to carry out day-to-day tasks looking after her house and children. The pain impacted on her mobility, co-ordination and ability to lift. It would have been more severe but for the medication she was taking. In the event we also accepted the strong painkillers she was taking had an effect on her concentration. The Tribunal accepted that this amounted to a substantial adverse effect for a period of about thirteen and a half months between 11/11/19 when her symptoms began and the end of December 2021. This was based on the medical report dated 22/4/21 and the claimant's own evidence. The Tribunal did not accept that as a matter of fact the continued diarrhoea which the claimant suffered from was a substantial adverse effect. The claimant's own evidence in relation to this was somewhat sketchy and contradictory. Her evidence was that following her operation she had effectively made a recovery, she then went on to say that she was still unfit to work as at the date of the Tribunal. Clearly, the issue is whether her impairment was still having a substantial

adverse effect on her ability to carry out day-to-day activities not her ability to work. The claimant's evidence however was that so long as she was near a toilet her impairment had no real effect. She said that she would have been able to return to work if she had access to a toilet close by.

80. The above having been said the test is of course whether as at the date of the discrimination the claimant was disabled. This means that the Tribunal requires to look at matters as at the date of the alleged discrimination in May/June. The position is that in May/June 2020 the claimant had been suffering from the impairment since November 2019. At that point the effects had been substantial for the whole of the period since November 2019 in that they were more than minor or trivial. The key question is whether or not the claimant has established to the satisfaction of the Tribunal that as at that date the effects were long term. Paragraph 2 of Schedule 1 of the Equality Act 2010 provides that a long-term effect of an impairment is one which falls within one of the following categories:-

(a) it has lasted at least 12 months,
(b) the period for which it lasts is likely to be at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.

It is clear that by the date of the discrimination the adverse effects had not lasted at least 12 months. There is no suggestion here that the adverse effects were likely to last for the rest of the life of the claimant. The medical report is quite clear that following the operation there should be no recurrence. The question for the Tribunal therefore is whether as at the date during which the discrimination took place in May and June 2020 were the adverse effects likely to last at least 12 months.

We agreed with the claimant's representative who referred us to the case law which provides that in this context 'likely' means 'may well be' or "could well happen" rather than 'more likely than not'. We were referred by the respondent to the cases of ***McDougall v Richmond Adult Community College*** [2008] IRLR 227 and ***All Answers Ltd v W and another*** [2021] EWCA civ 606. At paragraph 26 of the latter case the court stated

"The question therefore, is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date."

81. In this case the Tribunal considered that the important evidence was that of the Occupational Health report dated 21 May 2020. The letter from the claimant's Consultant to the claimant's GP lodged as part of the claimant's medical records at pages 261-262 and the to whom it may concern letter which was prepared by the claimant's Consultant at page 264 albeit these two medical letters were not actually sent to the respondent. The tribunal also considered that the claimants emails and comments made at the time were also of some relevance although less so than the medical evidence. The key point is that the tribunal requires to look at the medical facts and circumstances existing at the time so far as we can ascertain, not just those which the respondent was aware of

82. The Tribunal's understanding of the medical position at this time from these documents is that

(1) the claimant was still in considerable pain. She was still suffering the substantial adverse effects referred to above as a result of her impairment.

(2) Following discussions with her medical advisers the claimant had elected to have a further operation to remove the remnant of her gallbladder.

(3) There were risks associated with this procedure which the claimant had decided to accept.

(4) If the claimant's pain was nerve pain then there was a possibility that removing the remnant of her gallbladder would not make any difference to her pain going forward. In her email at p117 the claimant puts this risk at 5%

(5) If open surgery was required in order to remove the remnant gallbladder there would be a lengthy recovery period from this which could last 6-12 months.

(6) If minimally invasive surgery was carried out (as did happen) then the claimant should make a recovery from this within a few weeks.

(7) In normal times the gallbladder surgery which the claimant had elected to have would be carried out quickly as a matter of priority. Due to the Covid pandemic the operation was delayed. The position in May was that the claimant was P2 which was high priority but the health board were not scheduling any operations in this category since they were only doing P1 cancer and P1 benign cases.

(8) There was a possibility that if the claimant did not have the operation but remained simply taking Pregabalin then her symptoms might simply go away of their own accord

83. Whilst the Tribunal had some sympathy with the respondent's position that the claimant had not led as much evidence as she could have done in relation to this matter the Tribunal did feel that there was just sufficient evidence that the facts and circumstances as at May/June 2020 were such that on a fair reading of the evidence it could well happen that the claimant's impairment lasted for a total of 12 months.

84. At that stage there was no real indication as to when the claimant would have her operation. The current position was that the operation was not going to take place unless the rules changed. Whilst this was due to Covid rather than anything intrinsic to do with the claimant's impairment we did not feel this was material. If the claimant did have her operation then the best outcome was the one which in fact happened which was that after a few weeks the claimant's abdominal pain went away. At least two of the other outcomes would have involved the claimant remaining suffering from abdominal pain for a period which would take her beyond 12 months. If the operation did not take place then there was a chance as noted by her Consultant that simply staying on Pregabalin might mean that over time her pain went away. This was not something which was in any way guaranteed. The claimant's own assessment of the matter at the time meant that she was prepared to take on the risks of an extremely risky operation rather than try this out. In the circumstances therefore the Tribunal considered it established that the claimant was in fact disabled as at the relevant time.

85. Given that the test in respect of knowledge of disability is slightly different in respect of each head of claim the Tribunal have dealt with that below. Suffice to say at this stage that the Tribunal noted that the only information which the Tribunal had as at the relevant time was that contained in the Occupational Health reports and in particular the report lodged at page 133 dated 21 May 2020. This states that

> *"In my opinion Gaynor may be able to return to work at some point over the next 6-12 months post operation given that Gaynor's absence commenced on 14/11/2019 it is for the organisation and management to decide whether this time frame is acceptable."*

Section 15 claim – discrimination arising from disability

86. Before dealing with the section 15 claim the Tribunal requires to deal with the issue of knowledge of disability.

87. Section 15 provides

> *"(1) A person (A) discriminates against a disabled person (B) if –*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."*

It is appropriate to deal with subsection (2) first.

88. In this case it is the respondent's position that they did not know that the claimant was disabled. The Tribunal generally accepted this evidence. Ms Gillan gave evidence to the effect that often the respondent's Occupational Health Advisers will spontaneously state whether an employee is likely to be considered to be disabled or not. They did not do so in this case. In addition, the various Occupational Health reports which were lodged were clear that the claimant was experiencing a one-off

problem with her gallbladder which was expected to resolve itself. At each stage the information provided to the respondent was that the claimant would be having an operation which was expected to resolve the matter once and for all. This was the gist of the occupational health reports and the claimant's own communications with the respondent. The Tribunal accepted that the Occupational Health reports prior to the report of 21 May all indicated that the claimant was having a problem with her gallbladder which required an operation. There was no suggestion of an ongoing disability which would continue beyond the date of the operation other than a vague statement that recovery could take months. The Tribunal accepted the evidence that the decision makers in this case were unaware that the claimant was disabled. The real question is whether the respondent has established that they could not reasonably have been expected to know that the claimant had a disability.

89. As noted above this was a somewhat unusual case. The position was that the claimant was suffering incapacitating abdominal pain as a result of the issues with her gallbladder. The message which the claimant conveyed to the respondent was that this was a temporary state of affairs and that matters would resolve once the claimant had an operation.

90. In the view of the Tribunal the respondent must be deemed to have knowledge of the law on this subject and the question therefore is would it have been reasonable for the respondent to have known in May/June 2020 that the facts and circumstances were such that it was likely that the claimant's impairment would last more than 12 months. The respondent would in fact have to carry out in May/June the exercise which the Tribunal has just carried out in the present case. The crucial difference is that whereas the Tribunal has had access to the email from the claimant's specialist to Dr Little which refers to the fact that as things stand the claimant's operation is not going to take place because of its low priority in the Covid pandemic this information was not available to the respondent at the time.

91. The view of the Tribunal was that respondent's understanding of the position at the time was that the claimant had a problem with her gallbladder. They had been told it would resolve after she had an

operation. She has had two operations and still hadn't resolved but they were being told that a third one was to be happening and the claimant was confident she would be able to return to work after that. The claimant said that she was pressing for the operation and in fact referred to trying to get a cancellation.

92. We know that as things turned out the claimant did not have her operation until September. Even then the medical evidence from the claimant's GP states that the period during which she suffered the substantive adverse effects was only 13 and a half months and that a recurrence after that was unlikely. Looking at matters in June, a key point would be when was the operation going to take place. The respondent would be aware in general terms that the claimant's treatment was being disrupted because of Covid but did not have access to the clear statement from Dr Alijani that the claimant's operation was in priority P2 (high priority) and currently nothing below P1 was being allowed. Without this key information the Respondent could not reasonably be expected to know that it could well happen that the claimant's adverse effects would last for more than 12 months.

93. The Tribunal's view was that in those circumstances the Tribunal could not make a finding that the respondent ought reasonably to have known that the claimant was disabled.

94. In addition to this we accepted the respondent's argument based on the case of ***SCA Packaging Limited v Boyle*** that there was no evidence which sets out the expectation of when the claimant's pain would be resolved in the information which the respondent had at that time. It should be clear that we rejected this argument in respect of the principal issue of whether or not the claimant was disabled and that we felt the evidence contained in the letter to Dr Little at page 263 was sufficient however given that this letter was not at any stage given to the respondent we do not see how the respondent could be deemed to have this information from which they could reasonably have come to the view that the substantial effects of the claimant's impairment were likely to last at least 12 months.

95. Given that we have decided that the respondent had neither actual nor constructive knowledge that the claimant was disabled for the purposes of

section 15 that is the end of the claimant's claim of disability arising from discrimination. Just in case we are wrong in that however the Tribunal went on to consider the claim itself.

96. The claimant referred us to the case of ***Panaiser v NHS England*** and commended the approach in that case. It was their position that the unfavourable treatment in this case was the act of dismissal itself. It was the respondent's position that the dismissal (in this case by non-renewal of a fixed term contract) was due to something arising from the claimant's disability. That something was her long term sickness absence.

97. Although the claimant's pleaded case did not specially state this there was also a suggestion in the claimant's submissions that the claimant's performance issues were something which arose from her disability. The tribunal found on the evidence that this was not the case. The claimant's performance issues all arose before her symptoms of impairment first manifested themselves in November 2019. The suggestion that the claimant did not meet the appropriate performance standards because of her disability is simply factually incorrect.

98. In any event, the Tribunal accepted that the claimant's significant long term absence was something which arose from her disability and that her dismissal did amount to unfavourable treatment. Her dismissal arose from her sickness absence in the sense that it was one of, but not the only reason, for the non-renewal of her contract. We accepted the claimant's evidence that she wished to continue in the job and indeed had hoped that she would receive a full time contract when her fixed term contract ran out. The non-renewal of her contract was therefore unfavourable treatment.

99. The Tribunal then had to consider whether the claimant's dismissal was a proportionate means of achieving a legitimate aim. The Tribunal was in absolutely no doubt in this case that it was. The Tribunal noted that we required to carry out a comparison exercise as stated in ***Allonbay v Accrington and Rossendale College*** [2001] ICR 1189. The respondent argued that it was pursuing a legitimate aim being (1) maintaining satisfactory attendance levels, (2) maintaining performance standards and (3) maintaining appropriate staffing levels in order to perform its statutory

function. The Tribunal accepted that all of these were legitimate aims. We accepted the respondent's argument that the first two requirements were aims which would clearly be legitimate aims to be pursued by any employer but that in the case of the respondent the requirements were even more acute due to its requirement to perform at statutory functions. With regard to the final point we were referred by the respondent to section 9 of the Fire Scotland Act 2005. We accepted the evidence of the respondent's witnesses regarding the need to maintain appropriate staffing levels. We did not accept the contention of the claimant that it was sufficient to maintain the minimum staffing level for reasons given by the respondent's witnesses.

100. So far as proportionality is concerned the first point is that the claimant was on a fixed term contract which was due to end on 31 July. When the time came for the respondent to consider whether that contract should be renewed or not the position was that the claimant had been on long term sickness absence for around seven months and had absolutely no return date. The only evidence the respondent had was that the claimant was due to have an operation at some point and that she might perhaps return to work 6-12 months after that. In view of the Tribunal it was not in any way proportionate for the respondent to carry out any of the alternative non-discriminatory actions proposed by the claimant. This was not a case where it would have been proportionate for the respondent to wait longer. There was nothing before them to suggest this was going to make any difference. If the respondent had done as the claimant suggests and extended her contract so that she could attend a Stage 3 meeting then the claimant would still have been dismissed since by the time of the Stage 3 meeting there would have been absolutely no change. In the view of the Tribunal it was also relevant that the claimant was at the time she had gone off sick still failing to perform to the level expected of her. We accepted the evidence of the respondent's witnesses that this was something which they found unprecedented. Even if the respondent had decided that they would extend the claimant's contract for a period of 6-12 months to enable her to return to work the respondent would still be in a position where the claimant was unable to meet the performance standard which she would have expected to attain after around 16 weeks.

For those reasons the Tribunal considers that the claim under section 15 would fail in any event.

Failure to make reasonable adjustments

101. Before the Tribunal deals with this claim it is appropriate to look at the issue of knowledge of disability. So far as the duty to make reasonable adjustments are concerned the provisions regarding knowledge are contained in paragraph 20 of Schedule 8 to the Equality Act. This provides

> *"(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know –*
>
> *…..*
>
> *(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."*

In this case the Tribunal has already decided that the respondent did not know and could not reasonably have been expected to know that the claimant had a disability. Paragraph 20 imposes a further requirement in that the employer must either know or be reasonably expected to know that the claimant was likely to be placed at the disadvantage referred to in the first, second or third requirement. In this case the Tribunal's view was that had the respondent reasonably been expected to have known that the claimant was disabled then they could reasonably have been expected to know that the claimant would have been placed at the disadvantage alleged by the PCPs alleged in this case. Given however that the Tribunal's view was that the respondent did not have either actual or constructive knowledge that the claimant was disabled at the relevant time the claim of a failure to make reasonable adjustments must also fail. That having been said, the Tribunal considered it appropriate to look further at this claim in the event that we are incorrect in our view.

102. It was also the respondent's position that even if the claim could proceed on the issue of knowledge of disability that the claim was time barred in any event. The respondent referred to the terms of section 123 of the Equality Act 2010 and in particular section 123(3). It was their view that

on that basis the claim based on a failure to make reasonable adjustments was out of time. We consider this was correct. The respondent decided against extending the contract following the second stage meeting on 24 June 2020. This was confirmed by letter on 30 June 2020. It is clear evidence that the decision had been taken on that date in terms of section 123(3). The Tribunal considered that this approach to fixing the date of the failure to make reasonable adjustments was in line with the approach set out in the case of ***Matuszowicz v Kingston-upon-Hull City Council*** [2009] ICR 1170. If we assume that the decision was made at the latest by 30 June when it was conveyed to the claimant then the claim ought to have been brought at the latest by 29 September 2020 or at least ACAS conciliation commenced by that date so as to obtain advantage of the extension of time permitted by the Early Conciliation Regulations. In this case ACAS conciliation was not commenced until 28 October. The claim of a failure to make reasonable adjustments is therefore out of time.

103. In this case the claimant led no evidence so as to support the argument that it would be just and equitable to extend time in terms of section 123(1)(b). In submission the claimant's agent made reference to various points which he considered supported the claimant being allowed to proceed with her claim on just and equitable grounds. The Tribunal did not consider that these were sufficient to allow an extension of time in this case. The claimant's first point was that there was no forensic prejudice to the respondent. It is noted that one of the individuals involved in the claim namely the officer who dealt with the appeal was no longer available to give evidence. As well as being factually incorrect we did not consider the claimant's argument on this point to be valid. The same could be said in any case where the respondent are able to mount a proper defence to the claim. The second point made was that the section 15 claim which was in time overlapped with the section 20 claim. The Tribunal did not consider that this was any reason to allow in the section 20 claim. If anything the existence of this claim tended to indicate that the claimant would not be without a remedy and undermined her case for a just and equitable extension. Similarly, we did not accept that the prejudice to the claimant in refusing an extension of time was significant. The claimant's principal claim was under section 15 and that was in time. We were

referred by the respondent to the well-known case of ***Bexley Community Centre v Robertson*** [2003] EWCA civ 576. The assertion in that case that

"…time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion has considered a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse." (paragraph 25) is still good law. In this case we consider that the claimant has not shown any good reason for the delay. She gave no evidence at all in relation to this. We accept that the case of ***Rathakrishnan v Pizza Express [2016]*** IRLR 278 provides that the Tribunal should still look at matters even in the absence of any such good excuse. The absence of any reason given by the claimant is certainly something the Tribunal can take into account. In addition, the Tribunal notes from the evidence that the claimant was advised by a trade union official at the meetings in question and had access to this advice at the relevant time. As noted above the prejudice to the claimant is slight because she still does have a claim under section 15. The Tribunal's view is that it would not be appropriate for us to exercise our discretion to extend time in this case.

104. The above having been said it is probably as well that we express our view shortly regarding the merits of the reasonable adjustments claim even although we have decided that for two reasons (lack of knowledge or constructive knowledge and time bar) this claim cannot succeed. In brief, we accepted the respondent's view that the adjustments to the PCPs which were proposed were not reasonable. As noted above, the respondent is charged with various statutory responsibilities under the Fire (Scotland) Act. The claimant was employed as Firefighter (Control) in order to assist them with meeting these duties. She was employed on a fixed term contract which was due to come to an end on 31 July. As at the date the respondent made their decision not to renew or continue the claimant's fixed term contract the claimant had been absent from work for a period of seven months. She had no return date. In addition to this the claimant had, before she went off work, been struggling in performance terms. She had not met the required performance standard and the

respondent felt that she had not been improving despite the supports they had been giving her. The PCPs in this case were a requirement to maintain a certain level of attendance, that the claimant be fit to undertake the duties or her role and that the claimant be able to fulfil the performance standards required. The Tribunal agreed with the respondent's representative that effectively the PCPs were the requirement that the claimant be able to carry out the essential functions of her job. The claimant was at a substantial disadvantage in meeting those as a result of her disability because her disability had led to her being absent from work for a period of around seven months. As noted above however the claimant's failure to meet the appropriate performance standard was not a result of her disability. The claimant was not meeting the standards and was well behind the stage expected before she was absent due to her gallbladder issues. The proposed adjustments were extending the claimant's contract of employment and following all stages of the respondent's Capability Policy. The second adjustment would in fact require the first adjustment since normally the respondent would not have proceeded to Stage 3 until some 2-3 weeks after the claimant's contract had expired on 31 July.

105. The first point to be made is that as it turns out continuing the claimant's employment would not have made any difference to the outcome. The claimant would still have suffered the disadvantage of being dismissed. If her employment had been continued for a few weeks so as to enable her to attend Stage 3 of the Managing Attendance Policy the situation is that by this time the claimant would still not have been in a position to give a fixed date to return to work. The claimant's own evidence albeit somewhat confused was that she was still not fit to return to work as at the date of the Tribunal in June 2021. For that reason alone the adjustments would not have been reasonable. In any event, the Tribunal were of the view that the adjustments would not have been reasonable for other reasons. The Tribunal considered the respondent's argument quoting ***O'Hanlon v Commissioners for HM Revenue and Customs*** [2007] EWCA civ 28. The Court of Appeal noted that it is not for the Tribunal to usurp the management function of the employer to decide what is financially viable or feasible in terms of the demands of the business which the employer is

better placed than the Tribunal to know. It is not for the tribunal to be quick to place onerous requirements which may well apply to employees in the future and have significant implications. The facts in this case are stark. The claimant was on a fixed term contract. By the time the contract was due to end the claimant was off sick with no return to work date in contemplation. Prior to going off work the claimant had not met the performance standards required and was way behind the stage she should have been at. The respondent have statutory obligations which they required to meet. In the view of the Tribunal it would indeed be placing an unduly onerous burden on an employer to say that in those circumstances they required to extend the claimant's contract of employment beyond its planned expiry date. This is particularly the case when even absent the claimant's ill health related absence the claimant had capability issues. It was clear to the Tribunal that to some extent the respondent used the fact they recruited people on an initial fixed term contract as a substitute for a probationary period for new employees. This is not a particularly good practice, a point which the respondent now appear to have recognised and rectified. So far as the claimant is concerned however it was clear to the Tribunal that even without her absence there would have been a considerable question mark at the very least as to whether her employment would have continued beyond 31 July 2020 in any event. The respondent gave evidence that one other recruit who had performance related issues had not had her employment contract renewed or converted to a permanent contract at the end of the fixed term. We considered that the quotation from the O'Hanlon case mentioned by the respondent was apposite where they state (paragraph 69)

> *"As the Tribunal pointed out the purpose of this legislation is to assist the disabled to obtain employment and to integrate them into the workforce. The act is designed to recognise the dignity of the disabled and to require modifications which will enable them to play a full part in the world of work, "*

During her evidence the claimant suggested additional adjustments which were not part of her pleaded case. These were not taken up by her representative in submission however for the purpose of

completeness we should say that we did not consider that these further adjustments would have been reasonable for the reasons given by the respondent in their submissions.

Harassment

106. There was some dubiety regarding this claim. The claimant's position in her ET1 was that the decision not to renew her fixed term contract was unwanted conduct relating to her disability which was an afront to her dignity. The claimant however did not support this in her own evidence. In her evidence she referred to the way she was spoken to at the attendance support meeting and in relation to the visit to the hospital by CC Clark. We did not accept the claimant's evidence in relation to either of these two incidents. In any event we accepted the respondent's argument that these incidents were time barred and that it would not be just and equitable to extend time essentially for the same reasons as given above. With regard to the claim made in the ET1 the Tribunal agreed with the respondent that given that a person does not generally wish to lose their employment a contract not being renewed might well be regarded as unwanted conduct. It meets the first part of the test for being an act of harassment but in this case it does not meet the second part of the test which states that it must be "related to a protected characteristic".

107. The claimant's contract was due to end in any event. The decision not to renew it was not made because she had a disability. Logically it could not have been because we have found above that the respondent had no knowledge of her disability.

108. In any event the decision was made because she was not meeting the relevant performance standards and because she had been absent for a considerable period of months with no return date in contemplation. We agreed with the respondent's submission that the claimant did not give any clear evidence which suggested that her perception was that her contract being terminated violated her dignity. Her main concern in evidence was the financial impact and also her position that she felt continued employment with the Fire and Rescue Service would give her

financial security in the future. The Tribunal did not consider the decision not to renew her contract violated her dignity in any way.

109. The conduct complained of was the dismissal of the claimant. It was a dismissal in terms of section 39(7) of the Act because it was the termination of her employment by the expiry of a period. The Tribunal simply do not see how this could be said to be conduct related to a relevant protected characteristic i.e. her disability. For this reason the claim of harassment fails.

110. For the above reasons we consider that none of the claimant's claims are well founded. The claims are dismissed.

Employment Judge: **I McFatridge**
Date of Judgment: **05 July 2021**
Date sent to parties: **06 July 2021**