



## EMPLOYMENT TRIBUNALS

**Claimant:** Mr T Cowland

**Respondent:** South Western Ambulance Service NHS Foundation Trust

**Heard at:** Exeter **On:** 12-15 December 2022

**Before:** Employment Judge A Matthews

**Members:** Mrs V Blake  
Mr I Ley

**Representation:**  
**Claimant:** In Person, accompanied by his father, Dr G Cowland  
**Respondent:** Mr M Sellwood of Counsel

### RESERVED UNANIMOUS JUDGMENT

1. Mr Cowland's claims that he was subjected to detriment by reference to section 47B of the Employment Rights Act 1996 on the ground that he made a protected disclosure are dismissed.
2. Mr Cowland's claims that he was discriminated against because of the protected characteristic of disability by reference to section 13 (direct discrimination) of the Equality Act 2010 are dismissed.
3. Mr Cowland was subjected to discrimination arising from his disability by reference to sections 15 and 39 of the Equality Act 2010. Mr Cowland was dismissed because of something arising in consequence of his disability and the Respondent has not shown that the dismissal was a proportionate means of achieving a legitimate aim.
4. Mr Cowland's claim that he was unfairly dismissed by the Respondent by reference to section 103A of the Employment Rights Act 1996 because he made a protected disclosure is dismissed.

5. Mr Cowland was unfairly dismissed.
6. Mr Cowland's claim for breach of contract (notice pay) is dismissed by consent, on withdrawal of that claim.
7. The case is set down for a one day remedy hearing on 2 March 2023. This is dealt with in separate orders.

## REASONS

### INTRODUCTION

1. Mr Thomas Cowland's claims and the issues involved were most recently discussed at a preliminary hearing before Employment Judge Smail on 23 August 2022. At the hearing before us, it was agreed that the up to date and agreed list of issues was at pages 113-121 (the "List of Issues") of the bundle of documents produced for this hearing.
2. We will list the issues in a slightly different order to that of the List of Issues. This is the order in which we have addressed them in the Judgment above and our conclusions below, although there is some necessary cross referencing.
3. Paragraphs 1.1 - 1.3.4 of the List of Issues raise several time limitation points in relation to the claims of detriment on the ground of making a protected disclosure and some of the discrimination claims. The time limitation points are raised in the List of Issues in respect of both the section 13 Equality Act 2010 (the "EA") (direct discrimination) and section 15 EA (discrimination arising from disability) claims. On examination, they only arise in relation to the direct discrimination claims. This is because the discrimination arising from disability claim, like the two unfair dismissal claims, relies only on the dismissal. Mr Cowland was invited to and made an application to extend time as necessary.
4. Paragraph 5 of the List of Issues sets out Mr Cowland's claim that he was subjected to detriment by the Trust because he made protected disclosures. We list the alleged detriments in our conclusions.
5. The alleged protected disclosure relied on is set out at paragraph 3.1.1.1. of the List of Issues. This was a document sent by Mr Cowland to Mr Christopher Moakes on 19 January 2020. The content is explored below. The Trust accepts that this document "*disclosed information and that the Claimant believed that this information showed that the health and safety of an individual had been endangered and/or that information tending to show this had been deliberately concealed*" (137-138 in the bundle of documents). Beyond that the Trust makes no

concession as to whether this was a protected disclosure. During the hearing Mr Cowland confirmed that he no longer relied on the document referred to in paragraph 3.1.1.2 of the List of Issues as a second protected disclosure.

6. The Trust accepted that Mr Cowland had a mental impairment, being post-traumatic stress disorder (“PTSD”) and that this had a substantial and long-term adverse effect on Mr Cowland’s ability to carry out normal day-to-day activities. (This was confirmed by Mr Sellwood. Also, see 97 in the bundle of documents). Thus, this was a disability for the purposes of the EA. The Trust also accepted that this was so at all times material for the issues. Further, the Trust accepted that it knew that Mr Cowland was a disabled person and of the effects of that disability on Mr Cowland at all relevant times. The effects were described by Mr Cowland as anxiety and traumatic thoughts and the risk of re-triggering them.
7. At paragraph 7 of the List of Issues Mr Cowland sets out his claims of direct discrimination. Mr Cowland relies on a hypothetical comparator. During the proceedings, Mr Cowland confirmed that he no longer relied on paragraph 7.1.1 of the List of Issues in this respect.
8. Paragraph 8 of the List of Issues records Mr Cowland’s claim of discrimination arising from disability. In this context, Mr Cowland relies on his dismissal as the unfavourable treatment. Mr Cowland points to the effects of PTSD on him (see paragraph 6 above) as the “something arising in consequence” of his disability. Mr Cowland says that “something” was the reason he could not return to his substantive role as a HART Paramedic with the Trust. On behalf of the Trust, Mr Sewell accepted that the dismissal was unfavourable treatment and that the dismissal was because of Mr Cowland’s inability to return to his substantive post as a result of the effects of his PTSD. However, the Trust did not accept that this amounted to discrimination because the Trust says dismissal was a proportionate means of achieving the legitimate aim of ensuring the efficient and proportionate use of public funds.
9. Paragraph 4 of the List of Issues records Mr Cowland’s claim of unfair dismissal because protected disclosures were the reason, or principal reason, for his dismissal. Paragraph 2 of the List of Issues sets out Mr Cowland’s alternative claim of “ordinary” unfair dismissal. The grounds on which Mr Cowland challenges the fairness of the procedure adopted are set out in paragraph 2.4. The issues Mr Cowland raises in relation to the question of whether dismissal was within the band of reasonable responses are recorded in paragraph 2.3.5.

10. Finally, Paragraph 9 records a breach of contract claim. It was agreed that this was no longer live and that it should be dismissed by consent on withdrawal.
11. The Trust, to the extent that it does not concede the claims as recorded above, defends them.
12. On behalf of the Trust, we heard from Mr Christian Stokes (Hazardous Area Response Team (“HART”) Operative), Mrs Magda Mcshane (at the relevant times, an HR Business Partner), Mr Tristan Ellis (HART Paramedic), Mr Robert Dunt (at the relevant times, Investigations Officer), Mr Derek McCullough (at the relevant times, Emergency Preparedness, Resilience and Response North and Air Operations Manager), Mrs Vikki Matthews (at the relevant times, Interim Executive Director of People and Culture – effectively head of the Trust’s human resources function) and Mr Stephen Stonehouse (at the relevant times, Operations Manager for Specialist Practice (Urgent and Emergency Care)). Each produced a written statement.
13. Mr Cowland gave evidence and Dr Geoffrey Cowland gave evidence in support. Both produced written statements. Mr Cowland produced statements from Ms Joanne Fowles (at the relevant times, the Assistant Secretary for the Trust’s Unison branch) and Ms Robyn Bauchop (at the relevant times, a member of the Trust’s Frequent Caller Team (“FCT”)) together with a letter from Mr Jonathan Hammond-Williams (at the relevant times, manager of the FCT). None of these appeared and, whilst we have read the statements and letter, we have given them no evidential weight.
14. There was a 772 page bundle of documentation. References in this Judgment to page numbers are to the pages in the bundle, unless otherwise specified.
15. Several audio recordings were available. They were made by Mr Cowland without the knowledge of the Trust. Whilst we do not encourage this practice, in context we understand Mr Cowland’s perspective in making them. Whilst we have relied on transcripts as evidence, we did not think it proportionate to listen to the audio recordings themselves. We doubted their evidential value, given the availability of transcripts. So far as we are aware, neither party was disadvantaged by this.
16. There was a Reading List. There were also a Chronology and a Cast List, both of which were helpful. They had proved difficult to agree and we have not relied on either as amounting to agreed facts. Mr Sellwood produced concise and helpful written argument.

17. The hearing was completed in four of the seven days allocated to it. This was only achieved on the basis that the Tribunal was to reserve judgment, to decide liability only and then fix a date for a remedy hearing, if required. The time allowance of seven days was realistic had it been used for hearing both liability and remedy, deliberation and judgment. In the event, the Tribunal has taken considerable time to absorb the evidence and papers.
18. The material facts are mostly well documented and tolerably clear. The disputes are over the interpretation that should be put on them. It is understandable but unfortunate that some perspectives became personalised. Some of our findings of fact may assist on that front. The Tribunal's findings of fact are on the balance of probability taking account of the evidence as a whole. There are some other applicable burden of proof rules, and these are explained below.

## **FACTS**

19. The Trust is responsible for providing ambulance services for the NHS across Southwest England. The Trust's headquarters are in Exeter.
20. The Trust's "*Sickness Absence Policy*" is at 747-758. It also had a "*Health and Wellbeing Policy*" at 723-737. The "*Version Control Sheet*" at the back of the Sickness Absence Policy indicates that this policy superseded the Health and Wellbeing Policy in January 2021. Whilst the outcome of this case does not turn on the wording of these policies, we note some of their provisions.
21. The Sickness Absence Policy includes:
- "*Long Term Sickness Absence*" - "*Any period of sickness absence that is more than 28 days*".
  - "*Long Term Trigger Points*" - "*An informal sickness absence review will take place at 28 days. If a return to work date has not been identified by four months then a formal stage two sickness meeting will be held. If a return to work date has not been identified after six months, then a formal stage three sickness absence meeting will be held.*"
  - "*Temporary Redeployment*" - "*Employees can be offered temporary redeployment into an alternative role within the Trust if they are unable to work in their substantive role. Whilst in a longer term seconded role sickness absence management is temporarily suspended. Temporary redeployment should not last longer than a six month period.*"

- Apart from generic references to “*reasonable adjustments*”, there is no reference to the EA or any of its provisions.
22. The scheme of the Policy is that a Stage 1 meeting is supportive, including considering reasonable adjustments, an occupational health referral, setting a date for a return to work within four months of the start of the sickness absence and setting a twelve month review. If the return to work does not happen within the four month period, Stage 2 is triggered. The agenda for this is much as at Stage 1, save that the meeting is formal and looks to achieve a return to work within six months of the start of the sickness absence. *“Where long term sickness absence approaches six months”* a Stage 3 formal meeting is triggered. At the Stage 3 meeting *“possible outcomes may be to extend review period or to dismiss based on ill health capability whilst considering whether suitable alternative employment can be identified.”*
23. We note the following from the Health and Wellbeing Policy:
- *“Equality Act 2010 and Public Sector Equality Duty – SWASFT will act in accordance with the Equality Act 2010, ....”* There are several mentions of “*reasonable adjustments*”.
  - *“4.8 It is important for us to ensure that individuals living and working with long-term health conditions are supported at work.” .... “Living with long term conditions often has an impact on mental wellbeing, personal confidence and daily activities therefore a holistic approach should be taken when supporting our staff.”*
  - *“8.6 Where the Trust can accommodate alternative work to support a Trust business priority it will endeavour to do so to enable the individual to return to work in some capacity. In these instances, staff will continue to be supported with their health and wellbeing under this policy, however their contribution to alternative work will be taken into account. It should be appreciated that unfunded, alternative work is time limited and should ideally be used to enable rehabilitation to aid the individuals return to their substantive employment.”*
  - **“9.2 Long term Sickness Absence”**
  - *“9.2.2 As a guide, to ensure full support is offered, individuals can expect regular contact of at least once a month from their Line Manger. Through both these informal contacts and the formal meetings the focus will be on ensuring open communication about the nature of the health condition and on-going exploration of support and adjustments that may enable the individual to return to*

*employment, either to their existing role, or where this is contrary to health advice, to a suitable alternative role if one can be identified.”*

24. There is also a “*Health and Wellbeing Toolkit*” (759-766). This is mostly concerned with the three stage sickness absence process. We assume it was applicable throughout the sickness absence management of Mr Cowland. We note:

- Stage 1 includes: “*Your Line Manager will also consider possible actions to offer additional support for you, and set a 12 month target to improve your attendance.*”
- Stage 2 includes: “*Having listened to the information, your Line Manager will then consider possible actions/support and set an appropriate target to support you to improve your attendance.*”
  - *Set an appropriate target to improve your attendance. Targets are set for a 12 month period following a return from the episode of sickness that caused your attendance to drop below the required standard.*”
- At Stage 3: “*In reaching their decision, the panel will take into consideration:*”
  - *Your overall attendance record;” ....*
  - “*Any mitigating factors presented by you, for having failed to meet the required attendance standard;” ....*
  - “*The degree to which you may have contributed to failing to meet the standard set e.g. reluctance to accept support, adjustments, advice etc;*
  - *Reasonable adjustments and supportive measures which have been made or not made.” ....*
  - “*Whether possible changes to employment arrangements or any training which might enable you to remain in employment.*”
- At Stage 3: “*Where necessary every effort will be made to identify suitable alternative employment. You will therefore be invited to apply for vacancies and, where suitable, will be guaranteed an interview prior to any other candidate to establish their suitability for the post.*” .... “*Where no suitable alternative employment can be*

*found or, if you unreasonable refuse an offer of suitable employment, the employment contract may be terminated.*

- *Having considered all of the above, the panel must then determine whether to:*
  - *Dismiss, based on the grounds of capability due to poor health or attendance;*
  - *Issue a formal warning and/or further target for improvement to be achieved in a defined period.”*

25. Having worked as a Retained Firefighter with Buckinghamshire Fire and Rescue Service for four years, Mr Cowland joined the ambulance service in October 2013. On 21 November 2016 Mr Cowland joined the Trust as a frontline Paramedic based in Bideford in North Devon. Mr Cowland was dismissed from his employment by the Trust on 21 April 2021.

26. On 16 August 2014, during his early service as an Emergency Care Assistant with South Central Ambulance Service NHS Foundation Trust in the Buckinghamshire area, Mr Cowland had attended an incident where a man had hanged himself from a tree. As a result, Mr Cowland had experienced flash backs and other symptoms. Occupational health services arranged 16 sessions of Cognitive Behavioural Therapy for Mr Cowland. This allowed Mr Cowland to return to frontline service.

27. Around November 2017 Mr Cowland's area manager hanged himself. In August 2018, a work colleague hanged himself. These events caused a recurrence of the flash backs and symptoms Mr Cowland had previously experienced. We think Mr Cowland had some sickness absence and was referred to occupational health as a result, although that report is not in the bundle. (It seems the report was dated 22 August 2018.) Mr Cowland had been temporarily redeployed away from his Paramedic role. (Mr Cowland was in the FCT from 6 November 2018 until 8 February 2019. It was during this period that he first met Mr Dunt – see below).

28. Mr Cowland was also signed off sick between 3 September 2018 and 14 December 2018 (166-170). Mr Cowland was referred for an assessment by Ms Helen Rodway of Optima Health, the Trust's occupational health advisers, on 24 January 2019. Ms Rodway's report is at 171-174. Ms Rodway noted that Mr Cowland had been diagnosed with PTSD, which had recurred. (There were other medical issues, not relevant for our purposes.) Mr Cowland was receiving and benefitting from treatment through Red Poppy. (Red Poppy is an organisation that



assists employees with the effects of stress and trauma.) A return to work was anticipated on 11 February 2019, with adjustments. A particular marker was that Mr Cowland should be assessed if he was exposed to another hanging.

29. Mr Cowland returned to his duties as a Paramedic on or around 8 February 2019.
30. As the acronym suggests, a Hazardous Area Response Team Paramedic is trained to enter hazardous areas to provide patient care. They work, in particular, with the police and fire and rescue services in major incidents. Mr Cowland wanted to become a HART Paramedic, especially given his former time in the fire services. To do so, it was necessary to undertake appropriate assessment and training.
31. The process starts with a technical and clinical assessment day. There is then a second stage of assessment including an independent occupational health screening. If a candidate passes these assessments, the Trust's human resources function provides the Trust's HART trainers with medical information including previous sickness and absence. Provided all is satisfactory, candidates are then enrolled on National Ambulance Resilience Unit ("NARU") foundation courses. NARU is a body independent of the Trust which sets national training competency standards for HART Paramedics. The foundation courses start with six sequential weeks of training. The first two of these are Extended Duration Breathing Apparatus ("EDBA") courses held at the Fire Service College (the "FSC") at Moreton-in-Marsh in the Gloucestershire Cotswolds. As a former Retained Firefighter Mr Cowland was experienced in using EDBA equipment.
32. Whilst waiting for the courses, candidates may join a HART unit to provide them with shadowing experience. It seems that Mr Cowland joined the Trust's HART White Team for this purpose.
33. Feeling more confident in himself after his return to work in February 2019, Mr Cowland applied to be a HART Paramedic in May 2019. Having completed the first stage of assessment on 21 June 2019, Mr Cowland progressed to the second stage on 11 July 2019. It was on this occasion that Mr Cowland first met Mr Stokes, the then HART Training manager.
34. Mr Cowland cleared the second stage assessments. These included the occupational health assessment, at which he disclosed his earlier experiences of PTSD. On learning of this, Mr Mark Woolgar (at the time the Interim Operational HART Manager) and Mr Stokes had met Mr Cowland to discuss the matter. They had explained to Mr Cowland that, as a HART Paramedic, it was likely that he would be exposed to further

hangings. Mr Cowland confirmed that he was aware of this, he was in a much better place on the subject and he felt he would be able to complete the NARU training.

35. Accordingly, Mr Cowland was accepted for the training on 14 October 2019. On 19 December 2019 Mr Stokes signed off Mr Cowland's Course Confirmation Sheet for the first NARU course (197).
36. Mr Cowland attended the course at the FSC on 11 January 2020. On Thursday 16 January 2020, during a "Searching in Darkness and Smoke" exercise, an incident occurred involving Mr Cowland. As far as the incident is concerned, it is neither necessary nor appropriate for the Tribunal to make findings of fact about exactly what happened. That detail is not relevant to the Tribunal's task.
37. On 17 January 2020 Mr Stokes was contacted by the NARU training team to say that Mr Cowland had not completed the EDBA course. The training team told Mr Stokes that Mr Cowland had been acting strangely and questioning whether the job was suitable for him.
38. On 19 January 2020 Mr Cowland contacted Mr Stokes by email, copying in Mr Moakes (the then HART Manager), concerning the incident on 16 January 2020 (241-244). Mr Cowland's account can be referred to for its full content. For our purposes the thrust of the account was this.
39. Mr G (part of the training team for the course, who also happened to be an employee of the Trust) was acting as the Breathing Apparatus Entry Control Officer for the exercise. Mr G assigned the team of four, which included Mr Cowland, the name Alpha 3. The team proceeded into the building exercise area where there was a source of heat. The team were prevented from moving away from the heat source because two other teams were passing by. It then appeared that the Alpha 3 team instructor thought he was allocated to Bravo 3, and this caused further confusion and delay. It transpired that Mr G had allocated Alpha 3 the wrong team designation and the team to which Mr Cowland belonged was, in fact, Bravo 3. It took some 25 minutes for the other two teams to pass and to sort out the mix up. During this time the team to which Mr Cowland belonged had been sitting next to the heat source. The exercise continued but there was further confusion. At one point Mr Cowland was, once again, very near the heat source and became overwhelmed by the heat. Mr Cowland reports that at this point he *"started to get severe palpitations and wasn't able to think straight and had an overwhelming feeling to get out of the building. I proceed up the stairs without doing the correct door procedure as I wasn't cognitively with it and just felt the need to get out and had an overwhelming need to remove my face mask despite being in an irrespirable atmosphere."*

Mr Cowland proceeded to exit as part of the team. It transpired afterwards that Mr G, having realised his mistake, had altered the team designation on the Entry Control Board that he maintained from Alpha 3 to Bravo 3. Mr Cowland went on to explain that, since the incident, he had *“been left with significant anxiety about wearing Breathing Apparatus (BA) in an excessive heat environment with a completely lack of faith in the instructors. I have been left repeatedly waking at night terrified about the thought processes I ended up with whilst in the wear which I believe was caused by heat stress/heat exhaustion.”* Mr Cowland had worn BA on two subsequent occasions before leaving the course, but not in the same heat as he had been exposed to during the incident. Mr Cowland ended by summarising twelve areas in which he felt things had gone wrong.

40. We note that, throughout his account, Mr Cowland’s concerns referred to “we” and “us”, meaning his team of four. Mr Cowland also pointed out that *“at least one other wearer was also overcome by the heat on the exercise which the instructors expressed concerns about....”*
41. It seems from a letter sent by Dr Cowland to Mr Stokes on 19 January 2020 (245-250), that Mr Cowland experienced several panic attacks because of his experiences on 16 January 2020. (Later (at the Stage 3 sickness absence meeting – see 422) Mr Cowland described himself as having had a *“meltdown”* on Friday 17 January and *“a big breakdown”* on Saturday 18 January.) On Saturday 18 January 2020 Mr Cowland had seen a GP and been prescribed medication. Notwithstanding, on Sunday 19 January 2020 Dr Cowland had driven to pick Mr Cowland up from Mr Cowland’s fiancé’s parental home in Buckinghamshire as, in Dr Cowland’s view, his son was in no fit state to drive himself home. Later the same day Dr Cowland reported the incident to the HSE using the online service. That resulted in several exchanges between the HSE, Dr Cowland and Mr Cowland that have only peripheral relevance to the Tribunal’s task.
42. The way Mr Cowland saw both the incident and its effects is important to an understanding of how he puts his case. Mr Cowland says (WS 2.15): *“The only reason I am not a HART operative now is due to the incompetence, negligence and dishonesty of one of the instructors on the BA course.”* However, the question of whether that is so, is not one for the Tribunal to answer.
43. On 20 January 2020 Mr Cowland saw his own GP and was signed off.
44. Mr Moakes and Mr Stokes moved quickly to address matters. By 21 January 2020 Mr Ellis had been appointed as a welfare officer for Mr Cowland and Mr Moakes was in contact with NARU about investigating what had happened (see 351-352). During Mr Cowland’s absence it

was Mr Ellis's role to offer Mr Cowland support and guidance and provide a link with the Trust. There is evidence of that help and support between 23 January 2020 and 21 April at 253-261.

45. At some point after the incident, Mr Cowland contacted the Trust's Staying Well Service (the "SWS"). SWS arranged "rewind" therapy with Red Poppy. In the months that followed, the therapy was disrupted by the Covid 19 pandemic, which prevented face to face treatment. The resultant treatment by video was less satisfactory. With interruptions, Mr Cowland completed six sessions of therapy, the last on 22 October 2020. Both the therapist and Mr Cowland felt further sessions were needed. When Mr Cowland approached SWS about this in November 2020, there was a mix up (see 438-451).
46. What had happened was that SWS had discharged Mr Cowland in May/June 2020 because he had not responded to emails. The emails had been sent to Mr Cowland's work email account, which he could not access until his return to work on 19 June 2020 (see below). In any event, SWS had contacted Red Poppy who, it appears contrary to the therapist's view, had advised that Mr Cowland's treatment had been successful. As a result of the mix up, Mr Cowland appealed direct to Mr William Warrender (Chief Executive of the Trust) (see 452-454) before he secured a further six therapy sessions with the possibility of six more on top of that.
47. There is a transcript of a detailed discussion on the subject between Mr Cowland and a sympathetic Ms Lauren Dunn ((Lead Mental Health Practitioner – Staying Well Service) at 689-706. (Although this is dated 7 October 2022, that is obviously the date of the transcript. The discussion appears to have occurred just after the adjournment of the Stage 3 meeting on 10 November 2021.) It seems that this was the discussion that secured a further six sessions of therapy for Mr Cowland (with, it appears, a different therapist).
48. On 11 February 2020 Mr Parsyab Khan (NARU Training Manager) sent Mr Moakes the NARU report on the incident (268-269). The report itself is at 198-235.
49. Mr Moakes sent Mr Cowland the NARU report on 21 February 2020 (281). This triggered further exchanges between Mr Cowland, Mr Moakes and the HSE.
50. Mr Cowland was referred by his GP to Dr Mynors-Wallis, a Consultant Psychiatrist with Dorset Healthcare University NHS Foundation Trust. Dr Mynors-Wallis saw Mr Cowland on 10 March 2020 and his report of the same date is at 294-296. The diagnosis was PTSD and associated

panic disorder. Dr Mynors-Wallis recommended medication and psychological treatment before a graded return to Mr Cowland's job.

51. On 16 March 2020 Mr Cowland shared his diagnosis with Mr Moakes in an email (297).
52. On 20 March 2020 Mr Moakes, accompanied by Ms Emily Finch (HR Business Partner) held a Stage 1 sickness absence meeting by video conference with Mr Cowland who was accompanied by Dr Cowland. The transcript is at 300-309. A referral to occupational health was agreed. As part of a discussion on returning to work and alternative employment Mr Cowland said that "*.... I think a patient-facing role at the minute is probably not a good idea ....*". In response to a question from Mr Cowland, Mr Moakes confirmed that Mr Cowland would have to do the NARU courses again, if he wanted to return to his substantive post as a HART Paramedic. There was extensive discussion of the fall-out from the 16 January 2020 incident. This included mention by Dr Cowland that he had been in contact with the HSE, and Mr Cowland was consulting lawyers about his legal position in respect of NARU and the FSC. This subject was to be a regular diversion from addressing the issue of Mr Cowland's absence from his substantive post.
53. On 25 March 2020 Mr Moakes wrote to Mr Cowland formally confirming the outcome of the Stage 1 meeting (310-311).
54. On 8 April 2020 Mr Cowland had a telephone assessment with Dr Antony Webb of Optima Health. Dr Webb's letter to Mr Moakes is at 321-322. Extracts include:
  - "*Ultimately his present condition is resolvable given enough time and treatment.*"
  - "*He has had similar episodes affecting his mental health over the past five years, which indicate the likelihood of a level of susceptibility. In view of this and the effect this has at times on his performance of day to day activities, he is likely to meet disability criteria under the Equality Act.*"
  - "*He remains unfit for his substantive role due to his reduced level of confidence with regard to front line work however I would consider him fit for alternative roles.*"
  - (Commenting on when Mr Cowland might return to work) "*At the end of his current fit note in early May to commence the alternate role. Beyond this date it is*

*difficult to predict when he will regain fitness for his paramedic role as that will depend in part on when his therapy course can be completed. An early return to alternative work is likely to assist his recovery and rehabilitation.”*

55. On 28 May 2020 Mr Moakes, this time accompanied by Ms Kathryn Hill from human resources, held a Stage 2 sickness absence meeting with Mr Cowland, again accompanied by Dr Cowland. The transcript is at 339-350.
56. In preparation for the Stage two meeting a report had been prepared and shared with Mr Cowland (351-356). Good work had been done identifying a temporary role for Mr Cowland in Mr Hammond-Williams's FCT. The Frequent Callers Team, as its name suggests, involved contacting people who made frequent calls to the ambulance service to try to understand why they were doing so and, ultimately, to cut down on those calls. Mr Cowland had worked in that Team in 2018/19 (see paragraph 27 above) and Mr Moakes confirmed in the Stage 2 video conference that Mr Cowland would be welcomed back.
57. There is an email chain between 3 and 20 April 2020 at 323-328 and another email at 319 which reflect how the Trust worked on arranging the temporary redeployment. Whilst the chain is inconclusive, it appears that, rather than being seconded, Mr Cowland was temporarily redeployed. (This is important because, had it been a secondment, the Trust's policies provide that sickness absence management be temporarily suspended (see paragraph 21 above).
58. During the Stage 2 meeting Mr Cowland raised his understandable concern that, if matters moved to Stage 3, he might be dismissed. Ms Hill said this in response:

*“Sorry, if I – if I could just quickly interject around the concerns around stage three, Tom, something that we always like to make sure we're taking into consideration at stage 3 hearings is all the mitigation. So, the fact that this is something that is, in a sense, work related will be a huge part of the mitigation for stage 3 and also as Chris says about the fact that you're actively trying to improve your own health, you're reaching out to different kind of support mechanisms and the Rewind therapy and that's something that we'd take on board at stage 3. And so because it's showing that it, it's showing your resilience basically and it's a fact that you're looking to come back to work, you're going to be attempting alternative duties because you want to get back in that kind of routine and that work environment, I'd just like to try and provide some*

*reassurance in that sense that it's not a dismissal at all stage threes and that we do look at kind of all circumstances within that."*

A little after there was a further discussion between Mr Cowland and Ms Hill:

TC *".... I'm very hopeful that the therapy would, will work and that I'll be able to get back to HART and that, because that's where I want to be, but just in terms of it doesn't, where does it where do I stand then?"*

KH *".... we do have some, we can support you to find alternative employment within the Trust. So, we'd get you on something called the Redeployment Register, or some people call it the Risk Register, and it would give you kind of priority interviews for any other roles within the Trust that you're suitable for, we'd also actively get in touch with any kind of heads of or managers for areas that you're particularly interested in and have conversations with them about what's coming up. So we'd continue to support you to find out any kind of alternative roles that you might be suitable for that you're looking to join."*

59. On 10 June 2020 Mr Moakes wrote to Mr Cowland to confirm the outcome of the Stage 2 meeting (357-358). The letter included:

*"You raised concerns about possible dismissal at your Stage 3 Formal Attendance meeting if we got to this. It was causing you some anxiety. Both Kathryn and I tried to reassure you this was not the case. We explained that a Stage 3 attendance meeting structures part of the Health and Wellbeing policy, to ensure we're meeting with staff to discuss treatment, support and recovery. At a Stage 3 we would often look for where staff have engaged, actively tried to improve their health and show an interest or ability in returning to work in some form. You have demonstrated all of those things, and as such we reassured you that this would be considered at a Stage 3 attendance meeting if you were to reach that point.*

*The outcome of this Stage 2 Attendance meeting was to set a 12 month review period. If you could not return to work before the trigger point of 6 months a formal Stage 3 Attendance meeting would be held."*

60. Taking stock at this point in time, we see Mr Moakes, Ms Hill and Mr Cowland working together to get Mr Cowland back into the workplace.

We also see strong reassurances that, if Mr Cowland can get himself back into the FCT, all may be well, although that was not set in stone. Further, it appears that Mr Moakes was setting a twelve month review period. Considering all that, what happened subsequently is something of a surprise. It ultimately reflected a change of emphasis by those in the Trust who later took over managing the issue.

61. Mr Cowland had been fit for “*amended duties*” from 30 April 2020. However, it was not until 19 June 2020 that the Trust was able to arrange his full time return in the FCT, working from home (see 329, and 333-338). Covid, IT and a place to work from were all issues. From his return to work until his dismissal, Mr Cowland had no sickness absence.

62. Mr Cowland had not, however, returned to his substantive post of HART Paramedic. The Trust, therefore, proceeded as though Mr Cowland was absent from his post through sickness (see 361-365). Efforts were made to encourage Mr Cowland to apply for alternative posts. However, no-one appears to have provided the proactive support mentioned by Ms Hill: “*we’d also actively get in touch with any kind of heads of or managers for areas that you’re particularly interested in and have conversations with them about what’s coming up.*” This inaction is, perhaps, evidenced by the fact that, due to an oversight, Mr Cowland was not placed on the At Risk Register for some time. Basically, what happened, was that Mr Cowland returned to work in the FCT and was then left alone apart from support from Mr Hammond-Williams as his manager. Unless Mr Cowland could find another post, it was inevitable that matters would move to a Stage 3 meeting.

63. In August 2020, encouraged by Mr Hammond-Williams, Mr Cowland applied for a Band 7 Clinical Lead role in Somerset. Mr Cowland was on the lower Band 6 at the time. Although little turns on it, we think it fair to infer that, at this stage, Mr Cowland was particularly interested in promotion to Band 7 because this would help to offset the loss in income, he would experience in Band 6 roles because of not receiving unsocial hours pay as he was no longer working as a Paramedic. (See 368 - without going into detail on this subject, Mr Cowland was not receiving his unsocial hours payment at this stage, but this was later made up in back pay). Mr Cowland interviewed for this post on 9 September 2020, but his application was not successful (see 398).

64. Mr Hammond-Williams also encouraged Mr Cowland to apply for a Band 7 Quality Lead role. The job involved carrying out investigations in specific areas of the Trust’s operations to ensure the quality, safety and efficiency of its services. On 19 August 2020, Mr Cowland sent an email to Mr Dunt asking if Mr Dunt had any tips or suggestions. Mr Dunt



was away on leave and was not able to reply before the deadline for the application had passed. In any event, the only advice Mr Dunt could offer was to read up on the Trust's Review, Learn and Improve policy (370). Mr Dunt asked if Mr Cowland would be interested in the Band 6 role of Assistant Quality Lead. (Apparently, there were two such vacancies at the time – see 385). Mr Cowland's reply was that he had seen Assistant Quality Lead roles had come up, but he had not applied for them because he did not want to be rejected for Band 7, although he would probably take the Band 6 role if it was offered. The exchange can be seen at 366-371. Mr Cowland applied for the Quality Lead post.

65. On 9 September 2020 it occurred to Mr Dunt that Mr Cowland ought to be on the At Risk Register and he asked Mr Cowland about this in an e-mail (383). (As noted above, Ms Hill had mentioned this at the Stage 2 meeting on 28 May 2020.) Having seen Mr Dunt's email, Mr Cowland sent an email to Mr Moakes asking if he should be considered for it (394). On 15 September 2020 Mr Moakes confirmed to Mr Cowland that he would be added to the At Risk Register (392).
66. The Trust's usual practice is that an employee is added to the At Risk Register on the recommendation of occupational health or at Stage 2 of the sickness management process (Mcshane WS 2.2). Mrs Mcshane explains why Mr Cowland was not already on the Register (WS 2.2). In short, because Mr Cowland had returned to work, albeit not to his substantive post, he was not showing as absent on the system. Mrs Mcshane sees this as an administrative error although accepting that it was the reason that he was not shortlisted for the Quality Lead role. The error meant that Mr Cowland was not on the At Risk Register from 28 May 2020 (the date of the Stage 2 meeting) to on or around 15 September 2020; a delay of three and a half months. We know that, by 2 October 2020 Mr Cowland had been placed on the At Risk Register (see 375).
67. On 30 September 2020, as a prelude to a Stage 3 meeting, Mr Cowland had a telephone appointment with Dr Webb of Optima. Dr Webb's report is at 399-400. It includes this:

*“Unfortunately face to face therapy, which was recommended after a specialist assessment in March, has been suspended due to Covid restrictions and an attempt at conducting therapy over the telephone has not proved successful. A further attempt over Zoom is scheduled in October with the hope that therapy can then resume, as face to face therapy has been suspended for a further six month period.” ....*

*“His condition is resolvable with appropriate therapy. Not every individual will respond positively to rewind therapy that*

*he is currently having but alternative therapies are available, which have also proven very helpful.” ....*

*“His present psychological difficulties seem to be related to the alleged incident that occurred in his HART training course and are consistent with post-traumatic stress disorder.”*

Dr Webb expressed the same view on disability as he had expressed in his report on 8 April 2020 (see paragraph 54 above).

*“He remains unfit for his substantive role due to his reduced level of confidence and susceptibility to stress related symptoms if exposed to front line work. He seems to be coping well with his non-patient facing role and I would consider him fit for an amended role of this nature.” ....*

*“Although recovery from his present stress condition is achievable it is difficult to predict when he will regain fitness for his paramedic role as that will depend on the delivery of, and his response to, appropriate therapy. Assuming that his rewind therapy can be successfully delivered by Zoom and he responds positively to it, a reassessment of his fitness would be appropriate in about three months. Clearly he has great misgivings about returning to a role that has the potential to trigger further similar stress responses but his fitness for his role should be assessed when he has recovered psychologically and is feeling well, as this may change his perspective.”*

68. On 1 October 2020 Ms Anna Rowsell (HR Services Administrator), in response to a query from Mr Cowland, informed him that the Quality Lead role had been filled. Ironically, the appointee had come from the At Risk/Talent Pool Register (376).
69. At the conclusion of the Stage 2 meeting on 28 May 2020 Mr Moakes had specified a trigger point at a further six months for a Stage 3 meeting if Mr Cowland had not, by then, returned to work. Mr Cowland had, of course, returned to work but, giving Mr Moakes the benefit of the doubt, we assume he meant that Mr Cowland should return to his substantive post. In any event, the Stage 3 meeting seems to have been held a fortnight or so early, on 10 November 2020.
70. The meeting was chaired by Mr Stonehouse, who was at the management grade required by the Sickness Absence Policy. Mrs Mcshane had returned from maternity leave and taken over the human resources advisory role. There was, therefore, a change of personnel

dealing with Mr Cowland's absence from his substantive post. It seems to us that the change of personnel, ultimately, brought with it a change of approach. We do not think this was calculated. It reflected that, by Stage 3 of the process, matters had to be moved to some sort of conclusion and decisions could not be put off. However, we think that Mr Stonehouse's inexperience chairing Stage 3 meetings did not help. Although Mr Stonehouse had chaired "*numerous Stage 1 and Stage 2 Absence Management meetings*" (WS 1.2), it seems this was his first experience chairing a Stage 3. Mr Stonehouse received one hour's training with Mrs Mcshane in preparation. Mrs Mcshane also sent Mr Stonehouse some guidance notes (412-413). These are mostly about process. Certainly, in the reconvened Stage 3 outcome meeting on 3 March 2021 (which we will come to), Mr Stonehouse was clearly uncomfortable with the role.

71. In preparation for the Stage 3 meeting a Sickness Absence Report was prepared (402-410). Mr Cowland's sickness absence was recorded as 151 days (being 20 January to 18 June 2020). It was noted that, although Mr Cowland had returned to work, he was unable to carry out his substantive role as a HART Paramedic and he was, therefore, continuing to be managed under the Health and Wellbeing Policy.
72. The minutes of the Stage 3 meeting are at 421-427. The meeting was held by video conference. Mr Stonehouse had Mrs Mcshane in attendance and Ms Fowles accompanied Mr Cowland. Mr Cowland confirmed that he was still not ready for a patient facing role. Whilst his goal remained to return to his substantive post as a HART Paramedic, the more he thought about it the more he thought it was unlikely. Mr Cowland explained that he was aware his "*time is ticking*". He had applied for three roles: violence reduction lead, clinical lead and one in Somerset. He was actively looking for another role and was prepared to consider Band 6 and above. Ms Fowles reminded the meeting that the medical reports had expressed the view that Mr Cowland was "*likely to meet the Equality Act 2010.*" All sides recognised that Mr Cowland was in an "*unfunded position*" and Mr Cowland acknowledged that the Trust "*cannot magic a job.*"
73. We can see Mr Stonehouse's conclusion after the meeting on 10 November 2020 in his notes at 426-427. The Stage 3 meeting was to be adjourned for three months. This was principally to make up for the three month or so delay in putting Mr Cowland on the At Risk Register. The adjournment would allow Mr Cowland more time to find an alternative role within the Trust. It would also allow more contact with the medical support sources and for Mr Stonehouse to investigate any report about the incident on 16 January 2020. The formal outcome letter is at 433-435. The letter mentions "*reasonable adjustments*", not a phrase that the Tribunal sees appearing in the minutes of the

meeting. As Mr Stonehouse confirmed at the reconvened meeting on 24 February 2021, no targets were set (see 546). Again, what it boiled down to was Mr Cowland continued in the FCT for the time being but was otherwise pretty much left to his own devices as far as redeployment was concerned. There was no sign of the sort of support Ms Hill had envisaged at the Stage 2 meeting on 28 May 2020, over five months previously.

74. Mrs Mcshane and Mr Stonehouse did do something to look for redeployment opportunities for Mr Cowland (see 428, 429 and 458-460). However, as Mrs Mcshane comments (WS 3.7) *“To reach out regarding potential roles was unusual and is not an HR function.”*
75. Regarding redeployment, Mrs Mcshane also says this (WS 3.8): *“I believe the Claimant had his sights set on a band 7 position in order to match his Paramedic salary, which attracted an “unsociable hours” uplift, as was commonplace moving away from such roles.”* Whilst, as we have observed (see paragraph 63 above), we think there might have been something in this until the Stage 3 meeting on 10 November 2020, we do not think the evidence supports that conclusion thereafter. By the time of the Stage 3 meeting, Mr Cowland was clear that he would consider any job at Band 6 and above and we see no reason to doubt that (see paragraph 72 above).
76. On the same subject, Mr Stonehouse says this in his witness statement (WS 2.10 and 3.4): *“2.10.... The Claimant was grateful that we were trying to find other roles, but as the months progressed it appeared to me that he only wanted to work for the FCT.” “3.5 .... Unfortunately, it was clear to me that the Claimant had anchored his future career on a post within the FCT, a post that ultimately did not exist.”* Mr Stonehouse was there, and we were not. However, based on the contemporaneous paperwork, we think that goes too far. It may have been Mr Cowland’s preferred outcome (see, for example, Mr Cowland’s grievance letter 563-564, paragraph 89 below). However, Mr Cowland had made it clear that he would consider any job at band 6 and above.
77. Mr Cowland had had his last scheduled session with the Red Poppy therapist on 22 October 2020. As explained above (see paragraphs 45-47), Mr Cowland secured a further six sessions of therapy after the adjournment of the Stage 3 meeting.
78. On 11 January 2021 Mr Hammond-Williams sent an email to Mr Moakes and Mr Stonehouse to clarify Mr Cowland’s position in the FCT (458). In it, Mr Hammond-Williams was very complimentary about Mr Cowland, writing that he would welcome an application from Mr Cowland if Mr Hammond-Williams was successful in expanding the FCT. On 12 January 2021 Mr Hammond-Williams wrote to Mr

Stonehouse, copied to others (457): *"If you're happy, I am very happy to continue to support Tom in my team until there is more of a clear plan moving forward. I am happy to mentor him and develop him to increase his chances of getting roles elsewhere. I believe working for my team not only helps Operations and reduce the impact on the Trust as we are seeing so much pressure lately but, I also think it helps him to understand more about how different teams work together and gives him an opportunity to collaborate and link with external partners, too."* Mr Stonehouse replied *"I am happy to support from this end. I'll have a chat with Magda and see where we go from here."*

79. On 2 February 2021 Mr Stonehouse sent an email to Mr Cowland touching base and asking if Mr Cowland wanted another occupational health referral prior to the reconvening of the Stage 3 meeting (463). Mr Cowland's response is at 462. Mr Cowland gave a general update. Mr Cowland had secured a further 6 sessions with Red Poppy through SWS of which he had had four. SWS had indicated a further six could be available. Mrs Mcshane had been very helpful in highlighting job opportunities, but part time hours or location had made them unsuitable. Mr Cowland wrote: *"It is worth noting that the funded substantive position in the Frequent Caller Team, which is currently on a 12 month secondment, ends in May 2021 so provided I haven't been successful in gaining another role or my contract hasn't been terminated, this is a position I will apply for."* Regarding an occupational health referral, Mr Cowland wrote: *".... nothing has changed since the last referral and I continue to get support from Red Poppy as mentioned above so I am not sure that a new OH referral will provide any new information however I am happy to engage with any assessment if you feel it would help for your report."*
80. On or around 12 February 2021 Mr Cowland received a "plaudit" letter signed by Mr Warrender (473). This had resulted from some work Mr Cowland had done with a "frequent caller". Notwithstanding, it was addressed to the FCT, as a whole. Mr Cowland took exception to the template letter but, reading between the lines, the real issue was that he had not been singled out for the plaudit. Mr Warrender addressed this in a further letter on 1 March 2021 (567).
81. Following the Stage 3 meeting, although not until 12 February 2021 and after having been reminded by Mr Cowland, Mr Stonehouse made some enquiries of Mr Greg Leeson (HART Manager) to clarify what steps the Trust had taken to investigate the 16 January 2020 incident (436-437). Mr Leeson confirmed that he had been told by NARU that the HSE had been involved but did not provide a report. On 22 February 2021 Mr Stonehouse sent the NARU report to Mr Cowland who, of course, had already seen it. The exchange is at 477-478. Mr

Cowland remained dissatisfied and pressed for the HSE report that he believed existed and more information on what action the Trust had taken regarding Mr G. Mrs Mcshane advised Mr Stonehouse that this did not affect the reconvening of the Stage 3 meeting. Mrs Mcshane pointed out, in terms, that the focus was on the reason for the absence, not what had caused it. In this, Mrs Mcshane's view is at variance with that of Ms Hill, who appeared to consider this was a factor (see paragraph 58).

82. On 24 February 2021 Mr Stonehouse pursued the issue of a report on the 16 January 2020 incident with Mr Dave Bull of NARU. The exchange is at 488-489. Mr Bull confirmed there was no HSE report so far as he was aware. The recommendations from the NARU report had been the subject of an action tracker that had been shared with the HSE. On 24 February 2021 Mr Stonehouse relayed this information to Mr Cowland including a copy of the action tracker (501-502 - the action tracker is at the unnumbered pages between 502 and 505).
83. The Stage 3 sickness absence meeting reconvened by video conference on 24 February 2021. The purpose of the meeting was set out in a letter from Ms Lauren Marsh to Mr Cowland dated 11 February 2021 (471-472). In preparation for this the Sickness Absence Report presented to the original meeting on 10 November 2020 was updated (505-513). The extent of the updating was minimal. It appears to be the extra paragraphs 3.19 and 3.20. In the extra paragraph 3.20 the report noted: *"Tom was offered a further OH referral prior to the hearing for an up to date medical advice, however as his situation has not changed, it was agreed that further OH referral was not necessary."*
84. There is a transcript of the reconvened Stage 3 hearing at 543-561. Mr Stonehouse was supported by Mrs Mcshane and Mr Lewis Connell (Emergency Preparedness, Resilience and Response Business Manager) took the note. Mr Cowland was accompanied by Ms Fowles.
85. We note the following:
- Mr Cowland explained that, as far as treatment was concerned, he was five sessions into six sessions with Red Poppy.
  - .2 In answer to questions from Mr Stonehouse, Mr Cowland said that he would love to go back to the Paramedic role. However: *".... my mental health has definitely kind of improved as a result of that support but it is still not at a level sufficient to return to a front line role currently."* Further, Mr Cowland did not think

he had the resilience to go back into the front line clinical work of the “*clinical hub*”. This was an area that both Mr Stonehouse and Mrs Mcshane explored in some depth with Mr Cowland. Eventually Mr Cowland conceded that he could give it a try as an observer and see how he got on. When asked by Mr Stonehouse if she had any questions, Ms Fowles said this: “.... *I was just thinking maybe if we can get Tom up on the clinical desk to sit in on stuff and then see how it goes. Maybe do an Oc Health report after he has been up there a few weeks or whatever just to get their opinion on how it’s going with him ....*” Mr Stonehouse replied that “.... *I’d like that as a plan, you know if Tom’s in agreement with that, I’d definitely like that as a plan going forward, if we can.*” Mr Cowland’s response was not overwhelmingly enthusiastic, but he allowed it as a possibility.

- Mr Stonehouse acknowledged that Mr Cowland was doing a good job in the FCT and asked if there were any opportunities there. Mr Cowland explained that there was a possible role coming up and Mr Stonehouse said he had known about that and just wanted to make sure Mr Cowland was aware of it.
- Mrs Mcshane mentioned the possibility of a job in the Patient Safety Team, which Mr Cowland confirmed he would be very interested in.
- Mr Cowland mentioned that he was seeking legal advice both in respect of a personal injury action relating to the incident on 16 January 2020 and the possible termination of his employment.
- In answer to a question from Mr Stonehouse about whether or not he had had an occupational health report Mr Cowland replied: “*Yeah, I didn’t feel that I needed to have one but as I say, I can happily engage with one if you feel that it would be helpful for you but as I say, I don’t feel like, I don’t feel like a huge amount has changed that they would be able to offer anything differently that’s currently going following the last two conversations that I have had with them but as I say, if you feel it would be helpful, I am happy to engage with them in that.*”

- It was agreed that the outcome of the meeting would be discussed at a further meeting in a few days' time.

86. The next day, 25 February 2021, Mr Cowland sent an email to Mrs Matthews setting out grievances (562-564). It was headed "Sickness Procedure Grievance." The sickness procedure was, indeed, what it was all about. In broad terms, the Trust dealt with it by extracting the issues that were separable from the sickness absence process, dealing with those in the grievance process and leaving the others to be dealt with as part of the sickness absence process. That was a logical and sensible approach, although the two were inextricably intertwined.

87. Given the positive tone of the reconvened Stage 3 meeting on 24 February 2021 and that he was waiting for a further meeting to find out what the upshot was, the timing of Mr Cowland's grievance email might have been tactically ill advised. Mr Cowland seems to have been sensitive to this. On 2 March 2021, in an email to Mrs Mcshane, copied to Mr Stonehouse and others, Mr Cowland wrote that his grievances were "not a direct reflection on either you or Steve as I am aware that you are bound/limited by process." (565). Perhaps Mr Cowland and/or Ms Fowles thought the grievance might be a good way of reinforcing Mr Cowland's position and escalating matters to Mrs Matthews. Mrs Matthews was, of course, the head of human resources.

88. Although the grievance became something of a sideshow, it includes a useful summary of Mr Cowland's perspective at the time:

*"I have now had two Stage 3 meetings of which I have received both verbal and written information that, despite being in this position directly contributed to by a SWAST member of staff, despite a PTSD diagnosis, despite receiving multiple commendations for the work that I have been undertaking, despite having to go to the CEO to get further support, despite applying for a job and not being shortlisted as I should have been due to an administrative and despite still continuing to received support from the Staying Well Service that the Trust is considering whether to terminate my employment because I am yet to return to my substantive role. I have expressed in both Stage 3 meetings how I have now hit a stumbling block whereby I am unable to return to my substantive role due to my mental health having not improved to a sufficient level but whereby it is unlikely to improve to that level whilst I have the overarching threat of my employment being terminated and therefore being unemployed, during a global pandemic and unable to support my family. The Trust states that Stage 3 meetings are there to support my wellbeing but this is far from reality.*



*I am now at the point whereby, despite putting my all into the role I am doing, I have remained in “limbo” not knowing whether my employment is going to be terminated for 5 months. How this is meant to be supporting me and meant to assist in improving my mental health I am not sure.”*

89. Mr Cowland summarised specific points of grievance and continued:

*“Potential solutions to this grievance:*

- Allow me to continue doing the job I am doing without the recurrent short timelines and without the continued threats of terminating my employment which are currently preventing an improvement in my mental health.*
- Fund a frequent Caller Paramedic role within the Frequent Caller Team, which is desperately needed, in which there is sufficient evidence that I am capable of doing.*
- Terminate my employment - I will take this to employment tribunal for constructive/unfair dismissal”*

90. What was, perhaps, particularly unwise about the grievance email was that it did not seem to allow for the various other redeployment options Mr Stonehouse and Mrs Mcshane had taken some trouble to explore the previous day.

91. Mrs Mcshane followed up on the clinical hub possibility and, on 1 March 2021, sent an email to Mr Cowland (566). Mr Rich Garment had agreed to arrange some listening in to calls.

92. On 3 March 2021 the Stage 3 meeting reconvened for the third time to share the outcome. In relation to the decision he had to make Mr Stonehouse says this (WS 3.2 and 3.3):

*“3.2 Before reaching my decision, I discussed the evidence and my concerns in detail with Magda Mcshane to assess whether there was any alternative solution that I had not yet considered. Magda reminded me that, ultimately, the Claimant was unable to return to his substantive role and had been unsuccessful in finding any alternatives. The main question for me to consider was whether the Claimant could fulfil his substantive role as a paramedic. I was concerned that by returning the Claimant to a patient facing role we would be putting his health at further risk. The role of paramedic is*

*stressful; we see more trauma in a year than most people see in a lifetime.*

*3.3 Unfortunately, being a public body, we have limited funds available to us and we did not have the luxury of creating a role for the Claimant or allowing him to continue in his unfunded FCT role. It was not reasonable to utilise public money to further fund the Claimant, who had been in an unfunded role for almost one year. As a public sector body, the Respondent must carefully balance the needs of its staff and the safety of its patients. When viewed holistically, there had to be an end to supporting the Claimant with these public funds, particularly as such funds are lacking in any event.”*  
[We note that this articulation of the justification for dismissing Mr Cowland was not made in those terms at the time.]

93. There is a transcript of the third iteration of the Stage 3 meeting at 569-574. We think this was another video conference attended by Mr Stonehouse, Mrs Mcshane, Mr Cowland and Ms Fowles. Mr Stonehouse’s note at 426 records, in short, what the decision he was going to communicate was:

- *“Unable to fulfil your substantive role of paramedic. TC unable to give a timeframe for recovery which is understandable.*
- *Unable to find alternative (suitable employment) within and outside of the trust. Current role does not have funding attached to it.”*

94. From the meeting itself we note:

- Mr Cowland agreed that working in the clinical hub would not be an option in the short term. The trial in the clinical hub was not explored further in the meeting.
- Not long after the meeting started, Mr Stonehouse told Mr Cowland that he was being dismissed on capability grounds with seven weeks' notice. During the notice period Mr Cowland would remain on the At Risk Register and would be supported by Mr Hammond-Wiliams and Mrs Mcshane in efforts to find redeployment. The immediate rationale, supported by Mrs Mcshane, seems to have been that extending the period seeking redeployment would make Mr Cowland feel worse and deny him closure see 571).

- Mr Cowland confirmed he was pursuing his personal injury claim and would be taking the matter to tribunal.
- Mr Stonehouse mentioned the vacancy coming up in the FCT. Ms Fowles observed that, if the period seeking redeployment had been extended this would give more time to explore this.
- *“MM You said it yourself, you needed closure and an extension of another three months was just not something that will you know will support your mental health....”*
- Mr Stonehouse, in terms, agreed with Ms Fowles when he said *“.... it is a ludicrous system that we have to adhere to, it’s policies and things like that....”*. Perhaps Mr Stonehouse was simply trying to empathise. Otherwise, the Tribunal sees this as a surprising statement. Mr Stonehouse was the officer in the driving seat. There is no evidence that he had been instructed what to do by someone else in the management chain. He had the full powers available to him under the Trust’s policies, including that of setting a further target (see paragraph 24 above).
- Mr Stonehouse continued: *“.... you’ve got a mental illness Tom and it’s an illness and that illness is stopping you doing your paramedic job at the moment and I had to be really sort of like subjective in what I was doing, so if I had a clinician with a bad back who cannot work anymore, I’m trying to adhere mental illness and a physical illness because it should be under the same umbrella as we agree, mental illness is an illness and it is stopping you doing your job as a paramedic so please take it to appeal....”*
- Later there was this exchange between Mr Cowland and Mr Stonehouse: *“TC: I don’t think you are recognising the fact that the Trust did this to me.” .... “SS: Okay Tom, I understand that you believe the Trust did that to you. I looked at your sickness record for the last five years and you had an episode of stress before you went onto this course, as well, so I did look at that as well so we probably did it to you, we probably shouldn’t have put you on the HART course really so because of your mental illness. They shouldn’t, you know we should have looked at that and said actually*

*Tom, did we have a conversation about your mental illness before this course, before we put you on a HART course where you've got to be in confined spaces which probably would cause you mental stress."* [In his witness statement Mr Stonehouse says he made this statement in ignorance of Mr Stokes having discussed the position with Mr Cowland before Mr Cowland went on the NARU course on 11 January 2020 (WS 3.8).]

- At the end of that exchange, we see this:

*"TC Yeah, my area manager hung himself.*

*SS Yeah, and he was one of my closest friends.*

*TC Yeah, so...how is that ...*

*SS And how many people went off in North Devon with sickness because, poor Colin."* [During the hearing before us, Mr Cowland's evidence was that the word "And" was, in fact "But".]

95. The outcome of this meeting is surprising. As late as the meeting on 24 February 2020, Mr Stonehouse and Mrs Mcshane had adopted a positive and proactive approach to redeployment. Three possibilities had been left on the table: a trial in the clinical hub, the FCT and the Patient Safety Team. We know what happened concerning the clinical hub. We do not know what happened to the FCT and Patient Safety Team possibilities. It seems that something had hardened attitudes. We do not see any evidence of outside influence. The most likely explanation is that offered by Mr Stonehouse and Mrs Mcshane to Mr Cowland. In essence, Mr Stonehouse and Mrs Mcshane had concluded the process was better ended for the sake of both the Trust and Mr Cowland. As far as Mr Cowland was concerned it appears to have been Mr Stonehouse's and Mrs Mcshane's common view that this would bring "closure" for Mr Cowland. We suspect, however, that the grievances and Mr Cowland's grudging reaction to the possibility of trialling the clinical hub had also hardened their position. The Trust was beginning to have to deal with a disaffected employee.

96. On 10 March 2021 Mr Stonehouse confirmed the outcome to Mr Cowland in a letter (575-580). The letter left open the clinical hub as an option and the possibility of listening to calls there was subsequently taken forward. It also left open the prospective post in the FCT, if that came up. Otherwise, Mr Cowland's last day with the Trust would be 21 April 2021. (In fact, this was a miscalculation of the notice Mr Cowland

was due. This was later remedied.) In the meantime, Mr Cowland would remain on the At Risk Register. Mr Cowland was also put on a similar system for jobs in the wider NHS.

97. Mr Stokes' evidence is that, in March 2021, a new cohort was joining the Trust's HART unit. There was a premium on locker space. Mr Stokes knew that Mr Cowland was working with the FCT and understood that Mr Cowland was not returning to the HART unit. Mr Stokes notified the then HART Manager, Mr Dan Lea, that some of Mr Cowland's effects were still in a locker. Mr Lea in turn, in the week commencing 8 March 2021, asked Mr Ellis to follow this up with Mr Cowland. On 11 March 2021 Mr Ellis texted and spoke to Mr Cowland about this on the telephone. Mr Cowland is recorded as agreeing that he was happy that Mr Ellis had been asked to empty his locker (see 256 and 260-261). On 18 March 2021 Mr Cowland complained to Ms Fowles, copy to Mr Hammond-Williams that this was evidence that the outcome of his appeal had been predetermined (586). The exchanges on the subject continued at 584-585. Whilst there may have been a misunderstanding between Mr Cowland and Mr Ellis, Mr Ellis was entitled to take from his conversation with Mr Cowland that there was no objection to clearing the locker at the time. Mr Cowland says that he thought Mr Ellis envisaged clearing the locker if Mr Cowland's appeal was unsuccessful. If Mr Cowland did think that he did not say it to Mr Ellis at the time. Unaware of the full exchange between Mr Ellis and Mr Cowland, Mrs Mcshane subsequently apologised to Mr Cowland with reassurances on the process.
98. On 24 March 2021 Mrs Mcshane wrote to Mr Cowland about his grievances (595-596). Mrs Mcshane explained that some of the grievances would be dealt with as part of the Stage 3 absence process. The matters to go forward for a grievance hearing were the support received from the Trust, a plaudit for work done by the FCT and the lack of action against Mr G concerning the incident on 16 January 2020.
99. On 7 April 2021 Mr Cowland was back in contact with Mr Dunt. Mr Cowland had secured an interview for a full time Band 7 Quality Lead role. Mr Cowland asked Mr Dunt if he could help find the official ethos of the Review Learn and Improve policy (599). This was factual information, apparently easily available. Mr Dunt replied that he felt "*it would be a real conflict of my interests to be involved at any level with this process*" (598). In the exchanges between the two at the time Mr Cowland expressed understanding and appears not to have seen anything sinister in this. However, Mr Cowland has come to see it as

evidence, as Dr Cowland put it, that his card had been marked. In short, someone had told Mr Dunt not to help Mr Cowland.

100. It is evident that Mr Dunt's supportive and helpful approach in the autumn of 2020 was not replicated in the spring of 2021. The question is why? We note Mr Dunt's email to Mr Cowland at 597: "*Thanks - if things were different I would be helping you as much as possible, you know that right?*" An immediate reaction to that email is that the reference to "*if things were different*" was a reference to Mr Cowland being under notice of dismissal. However, with contextual information it is clear that it is a reference to the conflict of interest.
101. In his witness statement Mr Dunt puts forward his explanation of the difference in the way he treated Mr Cowland (WS 3.8). The person who had secured the six month secondment to the Quality Lead post in the autumn of 2020 was applying for the full time role in the spring of 2021. (It seems he/she was also on the At Risk Register.) Mr Dunt did not want to be seen helping one over the other. He therefore offered no support to either. (On this subject see also: Mr Alex Sharp's exchange with Mr Cowland during the appeal hearing on 14 May 2021 at 641 and Mr Dunt's e-mail to Ms Michelle Stevens (Head of Employee Relations) of 30 September 2021 at 672.)
102. On 9 April 2021 Mr McCullough chaired Mr Cowland's grievance hearing by video conference. Mr Dean Carless (HR Business Partner) was in attendance to give HR support to Mr McCullough and Ms Fowles attended to accompany Mr Cowland. The minute is at 605-610. After the meeting Mr Cowland sent Mr McCullough a supplementary mail (603-604).
103. Mr Cowland's last working day with the Trust was 16 April 2021 and his dismissal took effect on 21 April 2021.
104. On 22 April 2021 Mr McCullough met Mr Cowland to present his conclusions on Mr Cowland's grievance. These were summarised in a letter of the same date (617-621). Mr McCullough partly upheld Mr Cowland's grievance concerning the mix up with SWS. The grievance concerning the plaudit was not upheld. The third grievance, concerning the lack of an investigation into Mr G's part in the incident on 16 January 2020, was also not upheld. In terms, Mr McCullough explained that, although Mr G was a Trust employee, when he was working on NARU courses it was for NARU to manage him. This was why the Trust had not conducted a "Review Learn & Improve" ("RLI") exercise into the incident. Mr McCullough did, however, agree that as the incident had led to Mr Cowland's absence from work, a "Datix" should have been raised to reflect the impact the incident had on Mr Cowland. The Datix system records "near misses" to identify any lessons that can be

learnt from them. Mr Cowland was offered the opportunity to appeal against Mr McCullough's decision.

105. Mr Cowland did appeal against Mr McCullough's decision, specifically relating to the lack of an investigation into Mr G's part in the incident on 16 January 2020. The e-mail of appeal dated 24 April 2021 is at 624-625. Mr Cowland's view, maintained during this hearing, was unequivocal:

*"... an employee, who has shown dishonesty, remains an employee of SWAST with no reprimand or disciplinary investigation having taken place whilst I, on the other hand, have been dismissed from the Trust on capability grounds due to psychological injury, an injury directly contributed to by this employees actions."*

106. We have not been able to locate Mr Cowland's appeal against his dismissal. We see that Mr Cowland sent something relevant to Mrs Mcshane on 24 March 2021 (588) but cannot identify any attachment. However, Mrs Matthews heard the appeal by video conference on 14 May 2021. This was over two months after Mr Cowland had been given notice and three or so weeks after his last day of employment. That was unfortunate in that, by that time, Mr Cowland had found another job and there was probably no real way back. Mrs Matthews' evidence was that the appeal panel's task was to deal with the points of appeal, not to make the decision afresh. The grounds of appeal were (Matthews WS 2.1):

- *"Investigation and substantiation of issues (adequacy and sufficiency);*
- *Procedural (regularity and fairness); and*
- *Action (unreasonable)."*

107. Mrs Matthews was accompanied by Mr Alex Sharp, (Senior Improvement Clinical Lead - who we think, together with Mrs Matthews, formed the appeal panel) and Nicola Griffiths (HR Business Partner). Mr Connell took a note. Mr Cowland was accompanied by Ms Fowles.

108. The minute (it looks like a transcription) is at 634-644. We note:

- The appeal ground *"Investigation"* was about Mr Cowland's insistence that something more should be done by the Trust to investigate the incident on 16 January 2020.

- Mr Cowland explained that he had been dismissed before his course of therapy had been completed which, as he saw it, was against the occupational health advice that his ability to fulfil his role should be assessed three months after any therapy. Since his dismissal it seems that Mr Cowland had completed the last session of therapy on 4/5 March 2021.
- When asked about it, Mr Cowland said that he could not yet go back to his substantive role.
- Mr Cowland made a specific point about not having succeeded at an interview for the Clinical Lead role. Essentially, he was questioning whether adequate account had been taken of his disability.

109. Mrs Matthews reconvened the appeal hearing on 28 May 2021 to deliver the panel's decision and confirmed this in a letter on 1 June 2021 (645-654). The appeal was dismissed. We note:

- Mrs Matthews acknowledged the Equality Act in some degree: *"You went onto say that the OH report in April 2020 advised you may be covered by the Equality Act and therefore expected the Trust would have been more supportive in finding you another role." .... "It was clarified that in terms of reasonable adjustments, there was nothing that could be changed about your HART Paramedic role which would have enabled you to return to it, you were added to the Trust's Redeployment Register and were supported in undertaking a non-funded position for a significant period of time."*
- The issues arising out of the lack of a Trust investigation were not addressed as these were one of the subjects of Mr Cowland's grievances.
- The position regarding Mr Cowland's not having secured the Clinical Lead role had been investigated. The marking was explained as was the interviewing panel's conclusion that: *"In regards to your "at risk" status, the interview panel confirmed that whilst they were aware of this, it was felt that your knowledge and your experience were not sufficiently developed for the panel to be able to consider appointing you below the benchmark score with additional training."*



- The rest of the appeal points were dismissed, with reasons.
- In summarising, Mrs Matthews wrote this: *The panel recognise the significant challenges that you have faced and we understand that this is an incredibly difficult situation. However, there was little evidence to support that you will be fit to work as a HART Paramedic in the future. Alternate, funded roles such as working in the Clinical Hub have been discussed with you but you have confirmed that you do not feel this to be a suitable option. For almost a year, since June 2020, you have been supported to work in the Frequent Caller Team, a non-funded role, continuing to receive your 25% unsocial in the hope that you would either make a recovery to enable you to return to your role as a frontline HART paramedic or that you would be able to secure a new role, better suited to support your health and wellbeing. In the Stage 3 meeting notes, it states that you felt the only reasonable outcome was to support you in a temporary role for a further 12 months. As explained, this protracted period of time is significantly beyond the 6 months outlined in the Sickness Absence Policy and as a publicly funded organisation, we cannot sustain individuals carrying out roles which are not funded when they are not able to fulfil their contracted role. Unfortunately, a trajectory to return has not been established and you have not secured a more suitable internal role to move into. Therefore, I find the Stage 3 panel's decision to dismiss you from your substantive role as a HART Paramedic on the grounds of capability due to poor health and attendance to be appropriate.*

110. The grievance appeal was heard by Mx Jo Gadsden (Deputy Head of Clinical Hubs – North) on 1 June 2021. The minutes are at 643-644. The outcome letter is at 658-659. There is what we think is an earlier version at 656-657. Nothing turns on the different versions. Mx Gadsden did not uphold the appeal.

111. Mr Cowland compares the way he was treated with the way two other employees were dealt with (WS 2.29). Mr Cowland says that the two people concerned were already on temporary redeployment to the FCT due to medical or mental health issues when he arrived in it on 19 June 2020. As at October 2022 Mr Cowland says they were both still there.

112. The first is a Ms A. The only evidential information we have about Ms A is contained in Mrs Mcshane’s witness statement at 3.18. Ms A was diagnosed with PTSD but also required workplace adjustments for dyslexia, which took time because of procurement and IT issues. Ms A was redeployed at her Stage 3 meeting but has since restarted a sickness absence management process. We do not see that we can draw any conclusions from this.
113. The second is Ms Bauchop. In Ms Bauchop’s case we have a witness statement of no evidential weight and testimony from Mrs Mcshane. Ms Bauchop had an injury requiring surgery that was delayed by the Covid pandemic. Apparently, Ms Bauchop is due to return to full duties in January 2023. Apart from the required surgery, there seems to have been no impediment to Ms Bauchop returning to her substantive role. Again, we do not see that we can draw any conclusions from this.
114. The Trust’s Annual Report and Accounts for the year ended 31 March 2022 are at 768-772. They were produced in accordance with the relevant provisions of the National Health Service Act 2006. As such they are subject to many adjustments that make them impenetrable to a lay reader. With that caveat, they show an “*Adjusted financial performance surplus*” of £242,000. As far as the balance sheet is concerned, there is an increase of £1,482,000 in “*Taxpayers’ equity*”, the equivalent of shareholders’ funds. The cash flow shows an operating surplus of £459,000 before adjustments.
115. Mr Cowland began ACAS conciliation on 29 April 2021 (1). The Early Conciliation Certificate was issued on 10 June 2021. Mr Cowland’s claim form was lodged with the employment tribunals on 4 July 2021 (2).

### **APPLICABLE LAW**

**116. Protected disclosure – unfair dismissal and detriment**

117. Section 43A of the Employment Rights Act 1996 (the “ERA”) provides:

***“43A Meaning of “protected disclosure”***

*In this Act a “protected disclosure” means a qualifying disclosure (as defined by section 43B which is made by a worker in accordance with any of sections 43C to 43H.”*

118. Section 43B ERA, so far as it is relevant, provides:

***“43B Disclosures qualifying for protection***

*(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-*

*(a) that a criminal offence has been committed, is being committed, or is likely to be committed,*

*(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,” ....*

*“(d) that the health or safety of any individual has been, is being or is likely to be endangered,” ....*

*“(e) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.”*

119. Section 43C ERA, so far as it is relevant, provides:

***“43C Disclosure to employer or other responsible person***

*(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure -*

*(a) to his employer,”*

120. Section 47B ERA, so far as it is relevant, provides:

***“47B Protected disclosures***

*(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*

*(1A) A worker (“W”) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done-*

*(a) by another worker of W’s employer in the course of that other worker’s employment,”....*

*“on the ground that W has made a protected disclosure.*

*(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker’s employer.*

*(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker’s employer.”*

*“(2) this section does not apply where-*

*(a) the worker is an employee, and*

*(b) the detriment in question amounts to dismissal (within the meaning of Part X)."*

121. Section 103A ERA provides:

***"103A Protected disclosure***

*An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."*

122. Section 48 of the ERA, so far as it is relevant, provides:

***"48 Complaints to employment tribunals"....***

*"(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B"....*

*"(2) On a complaint under subsection"...."(1(A)"...."it is for the employer to show the ground on which any act, or deliberate failure to act, was done."*

*....*

*"(3) An employment tribunal shall not consider a complaint under this section unless it is presented-*

*(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or*

*(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.*

*(4) For the purposes of subsection (3)-*

*(a) where an act extends over a period, the "date of the act" means the last day of that period*

*(b) a deliberate failure to act shall be treated as done when it was decided on;*

*And, in the absence of evidence establishing the contrary, an employer" .... "shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done."*

123. **Disability Discrimination**

124. Section 4 of the EA, so far as it is relevant, provides:

***"4 The protected characteristics***

*The following characteristics are protected characteristics-” ....*

*“disability”*

125. Section 6 of the EA, so far as it is relevant, provides:

***“6 Disability***

*(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.”*

126. Section 13 of the EA, so far as it is relevant, provides:

***“13 Direct discrimination***

*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”*

127. Section 15 of the EA, so far as it is relevant, provides:

***“15 Discrimination arising from disability***

*(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.”*

128. Section 15 of the Equality Act 2006, so far as it is relevant, provides:

***“ 15 Codes of practice: supplemental” ....***

*“(4) A failure to comply with a provision of a code shall not of itself make a person liable to criminal or civil proceedings; but a code-*

*(a) shall be admissible in evidence in criminal or civil proceedings, and*

*(b) shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant.”*

129. The scheme of section 15 of the EA (as opposed to section 15 of the Equality Act 2006) is that unfavourable treatment because of something arising in consequence of a person’s disability will only amount to discrimination if (in this case) the employer cannot show that the treatment is a proportionate means of achieving a legitimate aim. This is often referred to as “objective justification”.

130. The higher courts have considered what section 15 of the EA means and how it should be applied on many occasions. The Equality and Human Rights Commission: Code of Practice on Employment (2011) (the “EHRC Code”) also has something to say on the subject. The following principles are relevant:

- The purpose underlying discrimination law “*is to secure more favourable treatment for disabled people and it requires employers to assess on an individual basis whether allowances or adjustments should be made for them.*” (HHJ Richardson in *Buchanan v Commissioner of Police of the Metropolis* [2017] ICR 184).
- The test for objective justification is a two step test. Is there a legitimate aim and, if so, was the treatment a proportionate means of achieving it?
- The test for objective justification is an objective one and not a band of reasonable responses test, familiar in the context of unfair dismissal. Tribunals must engage in critical scrutiny by weighing an employer’s justification against the discriminatory impact, considering whether the means correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question and are necessary to that end.
- In the case of *Birtenshaw* referred to below, Soole J said this: “*The Tribunal’s consideration of that objective question should give a substantial degree of respect to the judgment of the decision-maker as to what is reasonably necessary to achieve the legitimate aim provided he has acted rationally and responsibly: see O’Brien.*”
- The EHRC Code covers “*Discrimination arising from disability*” (that is, section 15 of the EA) in Chapter 5. However, on the subject of “*When can discrimination arising from disability be justified?*” it refers back to Chapter 4 on the subject of “*Indirect discrimination*”. Whilst paragraphs 4.25-4.32 and 5.11 are all relevant, we record the following:
  - “*5.12 It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisations.*”

- *“4.29 Although reasonable business needs and economic efficiency may be legitimate aims, an employer solely aiming to reduce costs cannot expect to satisfy the test. For example, the employer cannot simply argue that to discriminate is cheaper than avoiding discrimination.”*
- As Underhill LJ observed at paragraph 83 in the *Heskett* case referred to below (a case concerning indirect age discrimination): *“... the essential question is whether the employer’s aim in acting in the way that gives rise to the discriminatory impact can fairly be described as no more than a wish to save costs. If so, the defence of justification cannot succeed. But, if not, it will be necessary to arrive at a fair characterisation of the employer’s aim taken as a whole and decide whether that aim is legitimate. The distinction involved may sometimes be subtle” .... “but it is real.”* At paragraph 104 Underhill LJ said this: *“.... I would take some convincing that it was illegitimate for a government department or agency to seek to keep its pay budget within the limits imposed by the Treasury or a parent department.”*
- There is no rule that objective justification must be limited to what was consciously and contemporaneously considered in the decision making process. An employer can establish justification by reference to material before the employment tribunal. However, the burden of proving objective justification becomes more onerous in such circumstances.

131. Section 39 of the EA, so far as it is relevant, provides as follows:

**“39 Employees and applicants” ....**

*“(2) An employer (A) must not discriminate against an employee of A’s (B)-*

*(a) as to B’s terms of employment;*

*(b) in the way A affords B access, or by not affording access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*

*(c) by dismissing B;*

*(d) by subjecting B to any other detriment.”*

132. Section 136 of the EA, so far as it is relevant, provides:

**“136 Burden of proof**

*(1) This section applies to any proceedings relating to a contravention of this Act.*

*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

*(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”*

133. Section 123 of the EA, so far as it is relevant provides:

**“Time limits**

*Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of-*

*(a) the period of 3 months starting with the date of the act to which the complaint relates, or*

*(b) such other period as the employment tribunal thinks is just and equitable.” ....*

*“(3) For the purposes of this section-*

*(1) Conduct extending over a period is to be treated as done at the end of the period;”*

134. **Unfair Dismissal**

135. Section 94 of the ERA provides an employee with a right not to be unfairly dismissed by his or her employer.

136. Section 98 of the ERA, so far as it is relevant, provides:

**“98 General**

*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-*

*(a) the reason (or, if more than one, the principal reason) for the dismissal, and*

*(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

*(2) A reason falls within this subsection if it-*

*(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,” ....*

*“(3) In subsection (2)(a)-*



(a) “capability,” in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality,” ....

“(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.”

137. In the case of dismissal on grounds of ill-health, the decision in Paragon (referred to below) established that the basic question to be answered, as far as the fairness of the dismissal is concerned, is whether in all the circumstances the employer can be expected to wait any longer and, if so, how much longer?

138. The Tribunal was referred to K Spencer v Paragon Wallpapers Ltd [1976] IRLR 373, Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434, O’Brien v Bolton St Catherine’s Academy [2017] EWCA Civ 145, Birtenshaw v Oldfield [2019] IRLR 946 and Heskett v Secretary of State for Justice [2020] EWCA Civ 1487.

## **CONCLUSIONS**

139. **Did Mr Cowland make a protected disclosure?**

140. This is a question we must address in relation to Mr Cowland’s claim that he was unfairly dismissed because the reason, or principal reason, for his dismissal was that he made a protected disclosure. That is so, whether Mr Cowland’s claims that he was subjected to detriment on the ground that he had made a protected disclosure are in time or not.

141. As noted above, the Trust accepts that the email sent by Mr Cowland to Mr Stokes on 19 January 2020 (see paragraphs 38-40 above) “disclosed information and that the Claimant believed that this information showed that the health and safety of an individual had been endangered and/or that information tending to show this had been deliberately concealed” (137-138). Beyond that the Trust made no concession as to whether this was a protected disclosure.

142. The effect of the Trust’s concession is that the only issues for the Tribunal to decide are whether the disclosure satisfies the requirement that, in Mr Cowland’s reasonable belief, it showed that the health and

safety of an individual had been endangered and was made in the public interest and whether it was made to the employer.

143. Mr Cowland made the disclosure principally because he was concerned about his own health and safety. In doing so, however, as we noted in paragraph 40 above, Mr Cowland's concerns referred to "we" and "us", meaning his team of four. Mr Cowland also pointed out that "*at least one other wearer was also overcome by the heat on the exercise which the instructors expressed concerns about...*" There is no evidence Mr Cowland had some ulterior motive in making the disclosure. Our conclusion is that Mr Cowland reasonably believed the disclosure was made in the public interest. That being the case, the Trust concedes that it tended to show that the health and safety of any individual had been endangered (see Mr Sellwood's written argument at paragraph 14).

144. On the facts, Mr Cowland made the disclosure to his employer, the Trust.

145. Accordingly, we conclude that Mr Cowland's email to Mr Stokes on 19 January 2020 was a protected disclosure within the meaning of section 43A of the ERA.

146. We record, for the avoidance of doubt, that it is not necessary for us to make a finding about whether Mr Cowland had a reasonable belief that a criminal offence had been committed or that there had been a failure to comply with a legal obligation.

147. **Were Mr Cowland's claims, that he had been subjected to detriment by the Trust on the ground that he had made a protected disclosure, made within the appropriate time limit? Do or would they succeed?**

148. The detriments that Mr Cowland alleges are:

- On the second occasion that Mr Cowland applied for the Quality Lead role and was shortlisted for the post, Mr Dunt informed Mr Cowland that there was a conflict of interest in providing Mr Cowland with the information requested. This happened on 7 April 2021 (see paragraph 99 above).
- The Trust delayed Mr Cowland's appeal against his dismissal between 21 April 2021 and 14 May 2021. Applying section 48(4) of the ERA, whether it was an act or a failure to act, this was done on 14 May 2021.

- The Trust entered Mr Cowland's locker, emptied the contents and posted these to Mr Cowland's home address prior to dismissal. This happened on or around 11 March 2021 (see paragraph 97 above).
- The Trust expedited Mr Cowland's dismissal above that of other employees, namely Ms A and Ms Bauchop. Applying section 48(4) of the ERA, this happened on the date the dismissal took effect, 21 April 2021 (see paragraph 103).

149. These allegations were brought by way of an application to amend granted by Employment Judge Smail on 2 August 2022. They are to be treated as made on 2 August 2022. On any basis, they are, therefore, substantially out of time.

150. We cannot exercise our discretion to extend time as we have no evidence of why Mr Cowland did not bring these claims in time. (We note there is a mention of Mr Cowland's lack of legal qualification, knowledge of and experience in employment law in his application to amend at 84. However, Mr Cowland had his trade union available for advice.) Nor can the saving provisions in respect of acts extending over a period or failures to act assist Mr Cowland. These claims must, therefore, be dismissed because they are out of time and we have no jurisdiction to hear them.

151. However, if we were to be wrong for any reason about this, we have made relevant findings of fact and it is proportionate to deal briefly with each issue in the way we would have dealt with it had we had jurisdiction.

152. On the second occasion that Mr Cowland applied for the Quality Lead role and was shortlisted for the post, Mr Dunt informed Mr Cowland that there was a conflict of interest in providing Mr Cowland with the information requested

153. Our findings of fact in relation to this are at paragraph 99 above. We are not persuaded that Mr Cowland was subjected to any detriment. Mr Dunt appears to have wanted to remain neutral. Putting Mr Cowland's case at its highest, there are some pointers to Mr Dunt having favoured another applicant over Mr Cowland. That would amount to detriment. However, there is no evidence any detriment was done on the ground that Mr Cowland had made the protected disclosure.

154. The Trust delayed Mr Cowland's appeal against his dismissal between 21 April 2021 and 14 May 2021

155. In fact, Mr Cowland put in his appeal on or around 24 March 2021. We think Mr Cowland's point is that his appeal was heard some three weeks after he had left his employment, by which time it was too late. We do not know what timescales the Trust sets for such appeal processes. However, we can see there may be a detriment. Again, there is no evidence that any detriment was on the ground that Mr Cowland had made the protected disclosure.

156. The Trust entered Mr Cowland's locker, emptied the contents and posted these to Mr Cowland's home address prior to dismissal. This happened on or around 11 March 2021

157. The relevant findings of fact are at paragraph 97. Factually the allegation is wrong. At the time Mr Cowland's locker was emptied, he had been dismissed, although his appeal had not been heard. We see no detriment on the facts. Mr Cowland was asked if his locker could be emptied and he agreed.

158. The Trust expedited Mr Cowland's dismissal above that of other employees, namely Ms A and Ms Bauchop

159. Our findings of fact are at paragraphs 112-113. Mr Cowland was dismissed but there is no evidence that the Trust "expedited" his dismissal above that of Ms A and Ms Bauchop, far less that anything in that connection was done on the ground that Mr Cowland had made a protected disclosure.

160. It follows that, even if they had not been dismissed because they were out of time, the claims of detriment on the ground that Mr Cowland had made the protected disclosure would not have succeeded.

161. **Were Mr Cowland's claims, that he had been subjected to less favourable treatment because of his disability, made within the appropriate time limit? Do or would they succeed?**

162. The unfavourable treatment that Mr Cowland alleges is:

- Failing to appoint Mr Cowland to five roles during the capability process.
- At the Stage 3 meeting on 3 March 2021, Mr Stonehouse saying the things he said at the seventh, eighth and ninth bullets in paragraph 94 above. Although these are recorded in a shortened and slightly different form in paragraph 7.1.3 of the List of Issues (118), materially, the issues are the same. We will refer to them as the "we did it to you" remark (List of issues 7.1.3.1), the "off with sickness" remark (List of issues

7.1.3.2) and the “bad back” remark (List of Issues 7.1.3.3).

163. Mr Sellwood took no time point on the issue of the failure to appoint Mr Cowland to five roles, pointing out that it was part of the original claim and spanned a lengthy period.
164. Did that amount to the Trust treating Mr Cowland less favourably than it treats or would treat others? To answer this question a comparator is used. Mr Cowland puts forward no actual comparator and we must construct a hypothetical comparator. This would be someone in circumstances not materially different from those of Mr Cowland but without his disability. Noting that Mr Cowland was eventually put on the At Risk Register, which secured more favourable treatment for him in at least one of his job applications, our conclusion is that the comparator would have been treated in the same way as Mr Cowland. As far as we can see from the evidence, Mr Cowland was unsuccessful in his applications, not because of his protected characteristic of disability, but because he either did not meet the essential standards or was not the best candidate. Putting this into the context of the burden of proof set out in section 136 EA, there are no facts from which we could decide, in the absence of any other explanation, that Mr Cowland was not appointed because of his disability.
165. This claim of direct discrimination by reference to section 13 EA is, therefore, dismissed.
166. Mr Sellwood does take a time point on the other allegations of direct discrimination founded on Mr Stonehouse’s three remarks. These claims were brought by way of an application to amend granted by Employment Judge Smail on 2 August 2022. They are to be treated as made on 2 August 2022. On any basis, they are, therefore, substantially out of time. We cannot exercise our discretion to extend time as we have no evidence of why Mr Cowland did not bring these claims in time. Nor can the saving provisions in respect of conduct extending over a period assist Mr Cowland. These claims must, therefore, be dismissed because they were made out of time and we have no jurisdiction to hear them.
167. However, as with the protected disclosure detriment claims, if we were to be wrong for any reason about this it is proportionate to deal briefly with the issues in the way we would have dealt with them had we had jurisdiction.
168. The “we did it to you” remark

169. Our factual findings on this are at the eighth bullet in paragraph 94. Our understanding is that, reduced, Mr Stonehouse was saying that the Trust should probably not have sent Mr Cowland on the NARU course on 11 January 2020 because of Mr Cowland's previous diagnosis of PTSD. In that sense, Mr Stonehouse saw the Trust as responsible for the recurrence of Mr Cowland's PTSD.
170. Mr Cowland says this remark of Mr Stonehouse's has particular significance for him because he sees it as "victim blaming". What we understand Mr Cowland to mean by that is that Mr Stonehouse is blaming Mr Cowland's predisposition to PTSD (whether there was such a predisposition or not - we make no judgement on that) for what happened, rather than the circumstances themselves. Mr Cowland, of course, sees those circumstances as the result of Mr G's negligence, in particular.
171. To fit this into the framework of direct discrimination, we must ask the question: Did that amount to Mr Stonehouse treating Mr Cowland less favourably than he treated or would have treated others? The first step in the test is to identify something that could amount to less favourable treatment. We do not see that Mr Stonehouse's remark adversely affected Mr Cowland. To the contrary, Mr Stonehouse was responding to and agreeing with the statement that Mr Cowland had just made, that the Trust was responsible for what had happened. Mr Stonehouse was also addressing the welfare issue of whether Mr Cowland should have been sent on the course. (Mr Stonehouse was not, of course, aware that Mr Stokes had addressed that issue at the time.) We see nothing less favourable in any of this.
172. It follows that this complaint would have been dismissed on its merits, even if it had been in time.
173. The "off with sickness" remark
174. Our factual findings on this are at the ninth bullet in paragraph 94. Here, the starting point is to understand what was being said and how it was received. Mr Stonehouse's evidence (WS 3.9) is that his meaning was that many people had suffered (gone off sick) because of the suicide. Mr Cowland sees the reverse - that Mr Stonehouse was saying that no-one (or few) had gone off sick because of the suicide. In doing so, Mr Stonehouse compared Mr Cowland unfavourably to others who had not gone sick.
175. It seems to us that Mr Cowland's interpretation is likely to be right and this amounted to less favourable treatment. The comparison with others must be made. The hypothetical comparator would be someone in the same circumstances as Mr Cowland but without his disability.

This would be an employee who had gone off sick in response to the suicide but without Mr Cowland's disability. Mr Stonehouse would have treated the comparator in the same way. In short, Mr Stonehouse's remark was about absence sick, not disability.

176. Therefore, this claim would have failed as a claim of direct disability discrimination, even had it been in time.

177. The "bad back" remark

178. Our factual findings are at the seventh bullet in paragraph 94. Mr Stonehouse, although inelegantly, is saying no more than he would have treated someone with a bad back in the same way as he was treating Mr Cowland. We do not see how that can amount to unfavourable treatment. This claim would also have been dismissed, had it been in time.

179. As a general observation, the remarks Mr Stonehouse made were injudicious. We detect that Mrs Matthews thought so when she dealt with them on appeal. No doubt Mr Stonehouse has since reflected on them.

**180. The claim that the dismissal was an act of discrimination arising from disability**

181. We now come to the bones of the case. It is about the dismissal and (borrowing the words of HHJ Richardson in General Dynamics Information Technology Ltd v Carranza [2015] ICR 169) "*the extent to which an employer was required to make allowances for a person's disability*".

182. Dismissing Mr Cowland, potentially falls within subsection 39(2)(c) of the EA.

183. The Trust accepts that it knew of Mr Cowland's disability at the relevant times. It also accepts that the dismissal was unfavourable treatment because of Mr Cowland's inability to return to his substantive post in consequence of his disability.

184. Therefore, the claim for discrimination arising from disability by reference to section 15 of the EA is made out, if the Trust cannot show that the treatment is a proportionate means of achieving a legitimate aim.

185. The test is a two step test. Is there a legitimate aim? If so, was the treatment a proportionate means of achieving it? It is for the Trust to show evidentially both the legitimate aim and the proportionate means.

186. Legitimate aim

187. The legitimate aim relied upon by the Trust is “ensuring the efficient and proportionate use of public funds.” On this subject we have in mind both the guidance in the EHRC Code and Underhill LJ’s guidance in *Heskett* (see the fifth and sixth bullets in paragraph 130 above). The EHRC Code sets out the general proposition that cost alone is not enough and Underhill LJ points out that, in deciding whether the aim is only cost saving, the focus is on “*a fair characterisation of the employer’s aim taken as a whole*”.

188. The evidence we have from the Trust on the subject is concise, almost to the point of inadequacy. Mr Stonehouse’s statement deals with it (WS 3.3, see paragraph 92 above). As we noted, this is not reflected in the contemporaneous dismissal paperwork. That is not, however, fatal to the Trust’s argument, although it may make it evidentially harder to establish. Mrs Matthews’ letter of 1 June 2021 touches on the subject (see the fifth bullet in paragraph 109). Mrs Matthews wrote: “... *as a publicly funded organisation, we cannot sustain individuals carrying out roles which are not funded when they are not able to fulfil their contracted role.*” That evidence is, of course, more contemporaneous than that of Mr Stonehouse.

189. In our view this is a borderline case as far as a legitimate aim is concerned. On the one hand the proposition “If this was not all about money, what was it about?” has some traction. On the other hand, Mrs Matthews is focussing more towards the allocation of resources within funding constraints. Certainly, that is the direction of the legitimate aim now relied on. Our conclusion is that “*a fair characterisation of the*” Trust’s “*aim taken as a whole*” is that now relied on, of “ensuring the efficient and proportionate use of public funds”. We think that goes beyond cost and is a legitimate aim.

190. Was dismissing Mr Cowland a proportionate means of achieving the legitimate aim of ensuring the efficient and proportionate use of public funds?

191. At the start of an article on the subject of “*Managing disability-related absence*” in the IDS Employment Law Brief 2017, 1080, 12-19, the author commented: “*The management of disability-related sickness absence is a perennial source of anxiety for employees, employers and representatives alike. There is often confusion as to whether the law permits disabled employees to be warned or dismissed in respect of the level of absence they incur. And closely related to this is how (if at all) absence management policies need to be modified ....*”. This case illustrates that the uncertainty continues, even in the case of a large public sector employer such as the Trust.



192. The test is objective and it is for the Tribunal to apply. We must engage in critical scrutiny by weighing the Trust's justification against the discriminatory impact, considering whether the means correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question and are necessary to that end.

193. We have divided our consideration of what happened in this case under two general headings. The first is what happened at a general level, which mostly revolves around policies. The second is what happened to Mr Cowland specifically. The general level, of course, feeds into the specific level.

194. The general level

195. It is noticeably the case from the contemporaneous paperwork, confirmed by Mrs Matthews in her frank answers to questions on the subject, that Mr Cowland's absence from his substantive post was dealt with in the same way any sickness absence would have been dealt with. That is unsurprising as, although the phrase "reasonable adjustments" was used on occasion, there is no encouragement in the Trust's policies to focus on addressing any disability. That is by no means fatal to the Trust's argument that it used proportionate means to achieve its legitimate aim. However, it made it more difficult for the Trust's personnel managing the sickness absence to take account of Mr Cowland's disability in the sense referred to by HHJ Richardson in *Buchanan*. The purpose underlying discrimination law "*is to secure more favourable treatment for disabled people and it requires employers to assess on an individual basis whether allowances or adjustments should be made for them.*" Whether sufficient allowances or adjustments to meet the "proportionate means" test were made is the fact specific issue we come to below.

196. This lack of direction in the policies about disability meant that, when Mr Stonehouse came to make his decision to dismiss Mr Cowland, with advisory support from Mrs Mcshane, he seems to have done so without any real appreciation of the balancing exercise his decision might later be subjected to by discrimination law. Again, that is not fatal to the Trust's case. Mr Stonehouse might have achieved the balance by accident rather than design. But it did make Mr Stonehouse's task, advised by Mrs Mcshane, more difficult.

197. The specific level

198. More important than any defect in the policies is what happened in Mr Cowland's case.

199. As Mr Sellwood put it on behalf of the Trust in paragraph 38 of his written argument (albeit in the context of argument on the claim of unfair dismissal): “*This is a case in which the Claimant had been absent from his substantive role for over 13 months at the date of the decision to dismiss. He was not fit to perform his substantive role at that date, nor was there any prognosis for his return to that role. The Respondent had provided him with a role in a non-patient facing team for over eight months since his return to work ....*”. Mr Sellwood continued in paragraph 49: “*It put him on the at-risk register. It adjourned its Stage 3 process to give him an additional three months to seek redeployment. It provided him with counselling. It sent him to Occupational Health experts.*” That is a fair summary of what the Trust did do for Mr Cowland.

200. Notwithstanding, applying the test, it is our conclusion the Trust cannot show that dismissing Mr Cowland was a proportionate means of achieving its legitimate aim of ensuring the efficient and proportionate use of public funds, on the facts. This is so for the following reasons.

201. The lack of a proactive approach to finding alternative employment

202. During the Stage 2 meeting on 28 May 2020 Ms Hill had identified an obvious course of action in pursuing an alternative role for Mr Cowland (see paragraph 60 above). Ms Hill is recorded as saying: “*we’d also actively get in touch with any kind of heads of or managers for areas that you’re particularly interested in and have conversations with them about what’s coming up.*” In the eleven months that followed, no-one seems to have picked this up. During those eleven months it became more and more clear that there was no medical prognosis on the timing of Mr Cowland’s return to his substantive post and that Mr Cowland was reluctant to risk going down that route in any event. The case for doing something proactive to find Mr Cowland alternative employment grew stronger as time went on. Rather, what happened was Mr Cowland returned to work in the FCT and was then left pretty much to his own devices. It is true that, at various stages, Mr Hammond-Williams, Mr Stonehouse and Mrs Mcshane encouraged Mr Cowland to apply for jobs. That, however, was a long way short of the approach Ms Hill had identified. Even after Mr Cowland had been given notice, nothing changed in this respect in the following seven weeks. In her evidence, Mrs Matthews confirmed that there was job “churn” in the Trust and, in an employer of this size, looking at it objectively, we are far from convinced that a structured approach to finding alternative employment would not have succeeded within a relatively short time scale.

203. Objectively viewed, the Trust should have been more proactive. Having concluded that Mr Cowland was not going to return to his substantive post in the foreseeable future, it could have looked across its operations to identify what non patient facing roles Mr Cowland might be suitable for, with or without training. These could have been at Band 6 or above or possibly even below Band 6, with Mr Cowland's agreement. The Trust could then have taken a view on when vacancies might arise and what the budgetary implications, of keeping Mr Cowland in the FCT (or any other available temporary post) until they did come up, were. That could have been in the context of a timetable either agreed with or, if Mr Cowland was being unreasonable, imposed on Mr Cowland. Perhaps the twelve month period Mr Moakes had in mind (see paragraph 59 above) would have been appropriate,

204. There was one other obvious possible long term alternative to dismissing Mr Cowland, that was open to the Trust and could have achieved its legitimate aim. This arises from Mr Cowland's suggestion that he should remain in the FCT.

205. Mr Hammond-Williams placed a high value on Mr Cowland's contribution to the FCT. This can be seen in various places in the bundle but none better than 153-154. Although this letter, dated 16 April 2021, was sent in Mr Cowland's notice period, it presumably reflects what Mr Hammond-Williams had been thinking for some time. We recognise that Mr Hammond-Williams may have had his own agenda of promoting the FCT but, given the content of the letter, a cost/benefit analysis on simply maintaining Mr Cowland in the FCT, in other words, converting the unfunded post to a funded post, would have been an obvious avenue to explore. The possibility of Mr Cowland continuing in the FCT was considered but rejected by Mr Stonehouse. Beyond the rationale that this was an unfunded post, we have seen no evidence why that was considered to close the door on that alternative. We know from the exchanges between Mr Stonehouse, Mr Hammond-Williams and Mrs Mcshane on 11 and 12 January 2021 (see paragraph 78 above), that both Mr Stonehouse and Mrs Mcshane were aware of the level of Mr Hammond-Williams' support for Mr Cowland. Mr Stonehouse, himself, was supportive of something in that direction.

206. The reasons why Mr Stonehouse dismissed Mr Cowland

207. From our findings of fact, we think it plain that, up until the third meeting at Stage 3 on 3 March 2021, there had been a lot of focus on what alternatives there were to dismissal. In fact, we think Mr Cowland had been encouraged to expect that dismissal was unlikely, although we know he was worried about the possibility. Something changed between the second Stage 3 meeting and the third Stage 3 meeting. We have looked at this in paragraph 95 above. The evidence generally

on the reasons for dismissal is explored at 92-95. In paragraph 92 we record Mr Stonehouse's evidence that he discussed alternative solutions with Mrs Mcshane. However, "*Magda reminded me that, ultimately, the Claimant was unable to return to his substantive role and had been unsuccessful in finding any alternatives. The main question for me to consider was whether the Claimant could fulfil his substantive role as a paramedic.*" The difficulty with that is there were alternatives on the table. Mr Stonehouse seems to have changed his focus away from alternatives to dismissal and towards the need to bring the process to an end. Mr Stonehouse, advised by Mrs Mcshane, took the view that the process was better ended for the sake of both the Trust and Mr Cowland because this would bring "closure". If Mr Stonehouse had wanted to rely on that, he would have been best advised to seek an opinion from occupational health on the subject. We also think that Mr Cowland's increasing disaffection played a part.

208. That change of focus and hardening of attitudes led to the three possibilities for alternative employment being left open only for the seven week notice period. Objectively, the proportionate response by Mr Stonehouse would have been to extend the Stage 3 process until the possibilities on the table for redeploying Mr Cowland had been pursued to a conclusion. If other possibilities had come into play a decision could then have been taken on whether they, in turn, should also have been evaluated before dismissal. Coupled with the proactive approach explored above, it seems highly likely that the result would have been finding alternative employment for Mr Cowland. This was within the options available to Mr Stonehouse under the Trust's policies (see paragraph 24 above). This was especially so given that Mr Cowland had returned to work on or shortly after 19 June 2020, had not had any sick leave for the eight or so months since his return and was highly valued by his manager, Mr Hammond-Williams. Although Mr Cowland was absent from his role as a HART Paramedic, he was clearly able to make a significant contribution to the Trust in a non patient facing role. This would have lessened the discriminatory impact. In that way, the needs of the Trust would have been appropriately balanced against the discriminatory impact of dismissal on Mr Cowland. Dismissal would have remained an option but only after a proper and full consideration of the alternatives on the table and a consideration of Mr Cowland's value to the Trust in non patient facing roles.

209. The lack of an updated occupational health report

210. Although we place no great weight on it in the circumstances, it is our view that the Trust should have obtained updated occupational health advice. As we have observed, this was certainly the case if Mr Stonehouse wanted to rely on what was best for Mr Cowland to achieve

“closure”. Although Mr Cowland had not thought an updated occupational health report would have helped, he was willing to co-operate with one and the Trust should have taken that up. The onus was on the Trust to establish the up to date medical position.

211. Mr Cowland’s claim of disability related discrimination therefore succeeds.

**212. The claim that the dismissal was automatically unfair because the making of the protected disclosure was the reason or the principal reason for the dismissal**

213. Mr Cowland has not shown us sufficient evidence to raise the question whether the reason or the principal reason for the dismissal was his making the protected disclosure. The evidence points in the opposite direction. The incident on 16 January 2020 and Mr Cowland’s subsequent protected disclosure understandably assumed considerable importance in Mr Cowland’s mind. In contrast, the Trust read the protected disclosure and ensuing correspondence addressed to them, established that NARU was looking into the incident and noted the resultant report. Thereafter the incident itself and the protected disclosure seems to have been of little interest to the Trust. Certainly, Mr Stonehouse had to go looking for the report, which was already in Mr Cowland’s hands. Indeed, Mr Cowland criticises the Trust’s lack of action on the subject. There is no evidence to project from that a conspiracy amongst those of the Trust’s employees involved in managing Mr Cowland’s sickness absence. In answer to questions from Mr Sellwood, Mr Cowland, himself, excluded Mrs Matthews from any conspiracy. One might have thought Mrs Matthews would have been the driving force behind anything that was going on.

214. We are satisfied that the protected disclosure Mr Cowland made was not the reason or the principal reason for his dismissal and this claim is dismissed.

**215. The unfair dismissal claim**

216. Mr Sellwood did not accept the proposition that a finding of a discriminatory dismissal can simply be read across to unfair dismissal. The Tribunal agrees. Authority is mixed on the subject but to the effect that it is counterintuitive to think that a discriminatory dismissal will not always be unfair. The issue is not entirely academic. Although the provisions of section 126 of the ERA prevent double recovery, there are some potential heads of loss recoverable for unfair dismissal that are not recoverable for discrimination. The obvious example is the basic award.

217. It is for the Company to show a permissible reason for the dismissal and it puts forward capability. Although we have recorded some reservations about what was acting on Mr Stonehouse's mind when he decided to dismiss Mr Cowland, we accept that, in the round, the principal reason was capability.
218. We also accept that the Trust genuinely believed that Mr Cowland was no longer capable of performing his duties as a HART Paramedic and would remain so for an indeterminate time.
219. There was consultation and a reasonable investigation into Mr Cowland's medical prognosis (or lack of it), although we find the Trust should have obtained an up to date medical report.
220. However, for the reasons we have given in respect of our finding of disability related discrimination, dismissal was not only an act of discrimination but it was also outside the band of reasonable responses in the circumstances. An employer acting within the band of reasonable responses would have focussed on the alternatives to dismissal and not dismissed in the circumstances. The dismissal was, therefore, unfair.

Employment Judge A Matthews  
Date: 5 January 2023

Judgment & Reasons sent to the Parties:  
12 January 2023

FOR THE TRIBUNAL OFFICE