



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107490/2020 (V)

Hearing Held by CVP on 17, 18, 19, 20, 21 January 2022

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Employment Judge McFatridge

Mr F Petrie

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**Claimant
Represented by:
Ms Neil,
Solicitor**

Scottish Fire and Rescue Service

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**Respondent
Represented by:
Ms MacDonald,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was not unfairly dismissed by the respondent. The claim is dismissed.

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REASONS

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1. The claimant submitted a claim to the Tribunal in which he claimed that he had been unfairly dismissed. The respondent submitted a response in which they denied the claim. It was their position that the claimant had been dismissed on grounds of capability and/or for some other substantial reason and that the dismissal was procedurally and substantively fair. At the Hearing evidence was led on behalf of the respondent from Alexander Hume, Group Commander Service Delivery with the respondent who had

dealt with the initial stages of the respondent's attendance management process which was applied to the claimant. David Lockhart, Deputy Assistant Chief Officer with the respondent who had dealt with a disciplinary hearing which involved the claimant in April 2018 and with a
5 subsequent stage 3 absence management meeting in 2019, Steven Gourlay, an Area Commander with the respondent who had dealt with a stage 3 absence management meeting in July 2020 at which the decision had been made to dismiss the claimant and Malcolm Peyton, a Board member of the respondent who had chaired the Appeal Panel which dealt
10 with the claimant's Appeal against dismissal. The claimant gave evidence on his own behalf. A joint bundle of documents was lodged by the parties. On the first day of the Hearing the claimant's representative in cross examination made reference to notes of a meeting which had taken place on 10th May 2018 between the claimant's then Line Manager and the
15 Occupational Health doctor who had recently examined the claimant. With the agreement of the parties these documents were lodged the following day. The documents lodged are referred to in the Judgment below by page number. The two additional documents were given numbers 220 and 221. On the basis of the evidence and the productions I found the
20 following factual matters relevant to the claim to be proved or agreed.

Findings in Fact

2. The respondent is Scottish Fire and Rescue Service. The claimant commenced employment with the respondent on or about 14th July 2003 and at the time of his dismissal on 24th July 2020 he was a firefighter.
- 25 3. In or about October 2017 the claimant was employed as a Crew Manager. He was based at Falkirk Fire Station. He and his crew were ordered to attend a fire which was taking place in an upper floor flat in a block of flats. There were people trapped in the flats. The claimant's appliance was the first on the scene and the claimant and his crew were ordered to put on
30 breathing apparatus and enter the building with a view to rescuing the people who were still in the building.
4. Wearing breathing apparatus is a key part of a firefighter's role. Firefighters are extensively trained in this during induction and have

subsequent refreshers on a regular basis. The claimant was well used to wearing breathing apparatus. On entering the building on this occasion the claimant passed the control point to be logged into the building and then proceeded up the close. During this process, before he entered the area where the fire was the claimant suffered a type of panic attack. He felt he could not breathe. He felt the mask was impeding his breathing. During his panic the claimant removed his breathing apparatus mask and then left the buildings. The claimant spoke to the Watch Officer but the Watch Officer was prioritising the rescue of the three people in the building and did not respond. The claimant managed to bring himself back under control and was able to put his mask back on and participate in the successful rescue of those trapped in the building.

5. The claimant was extremely concerned at what had happened. He felt the implications of this were potentially serious. He felt he had been fortunate in that he had suffered the panic attack in an area where it was relatively safe for him to take his mask off. If he had suffered a similar panic attack whilst he was in the building on fire he believed that he would still have removed his mask given the severity of what he was feeling at the time. The consequences of this would obviously be severe.

6. Following this incident the claimant was removed from operational duties and placed on temporary modified duties. He was given a Personal Development Plan. These modified duties were based at Falkirk Fire Station. Initially the claimant worked the same shift pattern as when he was on operational duties however after a short time his shift pattern was changed to a Monday to Friday daytime hours shifts. The claimant was referred to the respondent's Health and Welfare Department who provide Occupational Health services to the respondent. A referral report from the Occupational Health Service was lodged (page 47-48). It followed a consultation which took place with the claimant on 5th of December 2017. It noted that the claimant had three issues which had impacted on his ability to wear breathing apparatus that night. These were chronic sinusitis rhinitis, a tendency to asthma and anxiety issues. The Occupational Health physician believed that the claimant was temporarily unfit for operational duty but was fit for alternative duty. He stated that all of the problems should be amenable to treatment and that the claimant should

eventually be able to return to full operational duty and breathing apparatus use.

7. At this time the claimant's absence from operational duties was being dealt with under the respondent's Managing Attendance Policy by the claimant's Line Manager, Kevin Ketchen. The respondent's Attendance Management Policy was lodged (pages 139-180). The Policy is used by the respondent to deal both with short term and long term absences. It is also used by the respondent to deal with situations where an employee is unable to carry out their normal duties for whatever reason and have been placed on modified duties. It is relatively common for firefighters who are unfit for full operational duties and placed on modified duties for a time to have their absence from full operational duties to be managed under this Policy. The Policy makes it clear at various points that modified duties are not seen as a long term solution in a situation where an employee is unable to carry out their full normal operational duties for whatever reason.
8. During this period the claimant had a number of formal meetings with Mr Ketchen. The claimant got on well with Mr Ketchen at this point and felt supported by him.
9. At this time the claimant was doing various odd jobs around the fire station as part of his modified duties and had the opportunity to have a number of conversations with Mr Ketchen.
10. An incident took place on 23rd January 2018 which led to the claimant being placed on suspension pending a disciplinary investigation. Drug paraphernalia was discovered in and in the vicinity of the claimant's locker. A disciplinary fact finding investigation was initiated and the claimant was also referred again to the respondent's Health and Wellbeing Department about concerns that he might be dependent on drugs due to this and other recent behaviour.
11. The claimant met once again with the Occupational Health physician on 30th January where he denied being dependent on drugs. The claimant indicated he wanted to discuss the matter with the Investigating Officer and management before the medical report was submitted.

12. The report from Health and Wellbeing was lodged (pages 51-53). In addition to the points already mentioned the Occupational Health physician indicated that the claimant had been carrying out alternative duties but was currently medically unfit for all work because of his acute anxiety. In any event the claimant was suspended. It was noted that a GP report had been requested. The physician went on to state that the claimant should be reviewed in one month.

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13. The review meeting took place on 1st March. The report from this meeting was also lodged (page 54-56). By this time the claimant had had an investigatory meeting. The report notes:

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“He explained that at a disciplinary hearing he had divulged to management convened after needles were found in his belongings that he had used anabolic steroids on 2 occasions by intramuscular injection hence the needles found in his belongings. He denies the use of other injectable drugs. He also admitted that he had used cocaine intermittently in the past over a number of years but more so over the past 2 years. He described use about twice monthly but when he uses he can use repeatedly over 1 to 2 days. He denies ever using cocaine at work. He is willing to consider that his behaviour which had seemed to others as very anxious and irritable could be related to the effect of these 2 drugs. He however states that he has always been an anxious person.”

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14. There was reference to the “River Centre”, a health facility to which the respondent often referred employees, and their view that the breathing difficulties experienced by the claimant in the incident the previous October had a psychological component. The report goes on to note:

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“He has assured me when I last interviewed him that he was not using cocaine although he had admitted to the use of anabolic steroids on 2 occasions. He apologised for lying to me.

Today he sounded less anxious than usual and I feel he has a sense of relief about having informed management of his problems where he is distressed that he is suspended.”

The report then goes on to discuss typical symptoms of cocaine use and the use of anabolic steroids and how these can relate to the claimant's difficulties. The report goes on to state:

5 "He will not be able to return to operational duty until Health and Wellbeing and management can reach a stage where they can trust him to attend work in a normal mental state not under the influence of cocaine or anabolic steroids and not withdrawing from cocaine use. We will be able to do this by engaging in contact with his addiction counsellor and obtaining reports from them on his
10 progress and results of drug testing. We do not have a policy on drugs and alcohol which allows testing routinely or on suspicion. This process will likely cover some months.

- He will have to sign a contract of behaviour with management confirming that he will not abuse cocaine or illicit drugs or
15 anabolic steroids which might affect his behaviour and judgment in the workplace and the consequences of returning to drug use should be clearly spelled out. Currently he has significant problems with his sinuses causing pain and he is not fit for alternative work. He has minor respiratory problems. He will
20 be able to return to alternative office based duty and perhaps community safety work once his sinus problem is treated and his suspension is lifted. I asked Health and Wellbeing to authorise counselling for his anxiety.

25 During his period of alternative duty he will benefit from time off work to attend counselling or ENT appointments.

He will also benefit from training in BA work to gain more confidence in BA use.”.

15. At around this time the claimant had made a decision to cease using cocaine. He was suffering from withdrawal symptoms. He felt that he had
30 let himself and his colleagues down.

16. A disciplinary hearing took place on 23rd April 2018 which was conducted by David Lockhart who at that time was Area Manager. During the course of the Hearing the claimant confirmed his previous drug use and that this had now ceased. Mr Lockhart's view was that the claimant had been guilty

of gross misconduct and that there were ample grounds which would merit summary dismissal. That having been said Mr Lockhart's view was that because the claimant now accepted his guilt and was taking steps to address the issue he would give the claimant another chance. He decided
5 that the claimant would be demoted from Crew Manager to ordinary firefighter. In addition to being demoted the claimant was to be transferred to Larbert Fire Station on his return to full operational duties.

17. He wrote to the claimant on 24th April 2018 setting out the outcome of the Hearing and detailing the expected improvements in the claimant's
10 conduct. This letter was lodged (pages 57-58). Paragraph 3 stated:

“In accordance with the Scottish Fire and Rescue Services (SFRS) Disciplinary Policy and Procedure I confirm the decision that your role has been reduced from Crew Manager to firefighter (competent) with effect from 2nd May 2018 and you will be
15 transferred to Larbert Fire Station on your return to full operational duties.”

18. The penultimate paragraph in the letter states:

“I would further advise that your suspension from duty has now been terminated with immediate effect. You will return to work on
20 restricted duties following a further consultation with Occupational Health. You will be informed in due course of your restricted duties post, the associated responsibilities, your reporting Line Manager and work pattern.

19. The claimant attended a further meeting with the respondent's
25 Occupational Health physician, Dr Tom Skade, on 8th May 2018. Dr Skade's report was lodged (pages 59-61).

20. Dr Skade noted that the report from the claimant's GP had now been received. It was noted that the claimant had significant breathing
30 problems due to nasal obstruction. It was noted that the GP report stated that the ENT Department felt that the claimant had typical signs of damage to the lining and septum of his nose due to cocaine use. An operation may be required to help this heal. He noted that the claimant had symptoms

of asthma and psychological problems of anxiety and depression. It was noted that the claimant had admitted to cocaine use over many years and some of his psychological symptoms could be related to that. It was noted the claimant had not used significant amounts of cocaine since his suspension in January but had used once in April 2018. It was noted that he had been referred to a drug rehabilitation charity in Falkirk who counselled clients but did not urine test for drugs. The report goes on to state (page 60) he is motivated to return to work.

“Therefore the anxiety and agitated behaviour between management and himself has almost certainly been due to cocaine use. He has lied to Health and Wellbeing and possibly the River Centre about this but is now admitting his problem.

The difficulty using BA may be multifactorial. He has had abnormal levels of anxiety due to cocaine use and possible underlying General Anxiety Disorder, he has difficulty breathing through his nose and he has a history of asthma. All of these could have left him panicky when donning a BA set.

He was apparently free of cocaine use by his admission. The SFRS does not have drug testing policy as part of its drug and alcohol policy therefore it is difficult to absolutely determine his freedom from cocaine use. He has given me permission to approach his drug counsellor but she also has not access to drug testing of urine.

As noted my last report if management decide to allow him back to work he will have to be monitored closely by his Line Manager. The points to look for have been outlined in my report of 1.3.2018. A contract needs to be created between him and management with the consequences of relapse being apparent.

I believe he can now be allowed back to alternative duty such as administrative duty or possibly community fire service duty with careful monitoring by his Manager on a daily basis of behaviour, appearance, demeanour and performance.

I believe he has a legal duty to inform the DVLA of his condition. They will carry out their own investigation. I suggest he does not drive until they have authorised him to do so. He had been

informed of this by his Manager on my advice. He should not drive for SFRS until the DVLA have confirmed he can and he has been assessed by me and Health and Wellbeing. ... It will probably be months before he can breathe freely through his nose and I feel he should not be fully operational until he can breathe freely and show he can easily use BA. I suggested if his fitness test, pulmonary function test and counsellor's report are satisfactory he can be allowed to resume drills in the yard including wearing BA set and mask but avoiding hot compartment behaviour training. This will allow him to increase his confidence wearing BA and help and reduce any anxiety related to this task.

I have asked him to try and obtain CBT counselling specifically for his underlying anxiety via his GP. He may wish to attend Jubilee House in the future."

15 21. On receipt of this report Mr Ketchen invited the claimant to an attendance support meeting which was to take place on 10th May. A letter of invitation was lodged (page 72). The claimant did not attend this meeting. He telephoned Mr Ketchen shortly before it stating he was unwell.

20 22. Mr Ketchen had arranged for Dr Skade to be present at the Hearing and rather than waste the opportunity he decided to use the time to have a brief discussion with Dr Skade so as to inform himself of Dr Skade's view on the claimant's medical position. Subsequently Mr Ketchen gave the claimant 2 sheets of paper which bore to be notes he had taken of his meeting with Dr Skade. These were the additional 2 pages lodged on the
25 second day of the Hearing by the claimant's representative (220-221).

30 23. A further meeting was then arranged for 18th May. This was described as a case review meeting. A letter of invitation was lodged (page 69). Unfortunately the night before this meeting the claimant required to attend hospital due to an adverse reaction to an antibiotic he was taking. He advised Mr Ketchen of this the following morning and the start time of the meeting was changed so that it took place in the afternoon. Following this meeting Mr Ketchen wrote to the claimant summarising what had taken place. The letter was lodged (pages 65-66). It is probably as well to set out the terms of this in full.

“Outcome of the Informal Review Meeting

I refer to the informal review meeting held on Friday 18th May with SM Kevin Ketchen at which you were accompanied by Craig Lauder and where the reasons for your recent period of modified duties were discussed.

Our records show that you have been on modified duty since 18th October 2017 resulting in a period of 7 months non-operational.

During this meeting we discussed the following;

You were asked what assistance you have had to date regarding drug counselling and what steps you have taken to come off drugs, you informed me you have now attended 4 sessions of ASC in Falkirk and thought that the total amount of sessions resulted in 6 in total, you have since confirmed there to be 6 sessions followed by a further 6 sessions if required.

You were asked what you would do if at the end of these sessions you felt that the issues were not fully dealt with. You said you would go elsewhere as now that you have started this you will see it through.

You were asked regarding the last time you took cocaine. You confirmed this to be mid January however around Easter you had what you called a slip and took a line of cocaine. You also said you identified you were in it with the wrong people and realised you were capable of withdrawing yourself from the situation.

You were asked if the current drug counselling service provided drug testing and if not have you considered changing to a drug counselling service that would provide such. I made it clear that I was not asking you to change counselling services during a block period however asked if this was something you would consider changing to at the end of the current sessions. You asked if a drugs test would be required to return to work. I informed you SFRS do not have a drug testing policy at this time and that any drug test you presented would be of benefit to you in moving forward.

You were asked if a drug counsellor would provide a report to a SFRS doctor. You said that this was currently under way. You mentioned that stress was a factor which resulted in the cocaine

abuse, I asked if you were currently receiving enough support regarding the stress and did you require any professional support at this time. You said no.

5 Dr Skade had advised in his most recent report that he has requested Health and Wellbeing authorise further counselling for anxiety.

10 You were asked if you had contacted DVLA to inform them of the drug use and could you provide proof of this. You said you had tried to do so but due to your dad's PC going faulty you were unable to complete. I offered the use of a SFRS PC while you were at the station and you declined saying you did not have enough information and would come to the station on Monday to do so.

15 Can you confirm the position regarding reporting to DVLA on receipt of this letter, I would also like to remind you of the advice of Dr Skade in that you should refrain from driving in entirety until you have reported the drug use to DVLA.

20 You were asked what progress you had made with regards to your sinus issue which is affecting your breathing. You informed me that this was still infected. You had a number of creams for internal and external application and had been prescribed antibiotics. You went on to say you are awaiting further appointments with ENT.

25 You were advised on receipt of Dr Skade's report this information would be assessed and the outcome would determine whether or not you return to modified duties at Falkirk. I can confirm I have now received the report and discussed with AM David Lockhart where we have agreed you will return to Falkirk on modified duties commencing Monday 28th May.

30 You will work Monday to Friday completing a 42 hour week with the Prevention and Protection Team at Falkirk, you should report to WM Scott Williamson who will be your immediate Line Manager. You are not authorised to drive SFRS vehicles at any time."

24. Following his meeting on 18th May the claimant did return to the station the following Monday in order to use their computer facilities to advise DVLA of the situation regarding his drug use. He was subsequently
35 advised by DVLA that they would require to investigate his circumstances.

The claimant decided to continue driving his own vehicle in the meantime on the basis that DVLA were still investigating matters. He remained unable to drive fire service vehicles.

25. The view of the respondent's management was that it was part of the role map of a firefighter that they hold a valid driving licence. A firefighter may be required to carry out driving duties in fire service vehicles. The respondent's management considered that given the claimant was an experienced firefighter who had previously been a Crew Manager then having him carry out the necessary training to drive fire appliances would have been a good way of using his skills. Management were therefore extremely keen that the claimant receive confirmation from DVLA that he was fit to drive as soon as possible.

26. The claimant returned to work on 28th May. On his return the claimant was given a performance development plan by Mr Ketchen which was lodged (page 67). It essentially set out the steps which were required for the claimant to return to full operational duties and it was stated that he was required to return to full operational duties within one month from Monday 28th May. In addition to this the claimant was required to complete absence documentation in relation to his absences on 10th May and 18th May.

27. The position on those dates was that the claimant was no longer on disciplinary suspension since that had been lifted by Mr Lockhart following the disciplinary in April with immediate effect. He was however unable to return to full duties until there was a further consultation with Occupational Health which had taken place on 8th May. The claimant had been unable to attend the meeting fixed for 10th May and had been unable to attend the meeting on 18th May at the time originally fixed and Mr Ketchen considered that the claimant was therefore to be regarded as absent on those dates. The claimant did not demur from this at the time. The claimant's position was that he felt he had let himself and his colleagues down by his previous drug use. He was very anxious to make a fresh start and do whatever needed to be done to get back to full operational duties and resume his career in the fire service. The claimant thereafter continued to attend

Falkirk Fire Station where he carried out modified duties working for the Community Prevention and Protection Team.

28. At some point either during this period or prior the claimant advised the respondent's Managers that he did not feel he would be confident about using breathing apparatus unless he attended a full breathing apparatus induction course. As noted above the use of breathing apparatus is a core part of a firefighter's duty. The claimant could not be regarded as fit for operational duties until he was able to use breathing apparatus. The respondent's Managers had hoped that the claimant would be in a position to recommence using breathing apparatus if he carried out a one day refresher course. Such courses are held fairly often and can be held in a firefighter's own station. The course the claimant was seeking is one which is normally used to train new starts. The course takes two weeks. There are usually only two or three each year.
29. During this period the claimant was suffering from the effects of cocaine withdrawal. He discussed this with Mr Ketchen. On occasions Mr Ketchen allowed the claimant to go home and take short notice holiday leave to cover odd absences.
30. The respondent's Health and Wellbeing Department forwarded a further report to Mr Ketchen on 26th June. This referred to a previous report dated 19th June (which was not lodged) and gave information which had been provided in a report from the claimant's drug counsellor. It noted that the drug counsellor's impression was that the claimant was currently abstaining from use of cocaine.
31. Subsequent to this the claimant was invited to a first stage capability meeting which was to be held on 12th July 2018. The letter advising him of this appointment was lodged (page 70). Unfortunately this letter is undated. It notes that the claimant had failed to achieve the improvements to performance set out in the Personal Development Plan issued on 28th May. That had been to return to full operational duties within one month of 28th May. The claimant was not fit to return to full operational duties by 28th June.

32. The respondent's Attendance Management Policy sets out provisions in relation to "termination of employment due to capability" in section 21. Section 21.2 (page 170) states:

5 "There is no single formula for determining the point at which an individual's attendance should be progressed through the capability process. Each case must be based on its own merits but will always be based on the following principles:

- 10 • The intention of managing attendance including formal action in the relevant capability procedure is to improve attendance
- Where individuals are injured or ill they should be treated fairly and compassionately at all times
- 15 • Managers should be able to demonstrate that they have acted reasonably in all actions taken at all stages of the managing attendance process including any decision to progress to the relevant capability procedure
- 20 • In certain circumstances it may be appropriate to consider redeployment or ill health retirement in discussion with the employee. In these circumstances advice must be sought from HR. Although each case must be reviewed on its own merits as a guide consideration should be given to initiating capability process at the following points short term absence

25 If an employee fails to achieve the targets for improvement given to them as part of their attendance support meetings and short term persistent absence remains a management concern due to the continuing nature within the employee's attendance record the first stage of the capability process may be considered. Managers should contact their HR advisor for further advice.

30 An individual should not normally be progressed to the relevant capability process unless

- 35 • Notwithstanding supportive management action being taken the individual continues to have unacceptable levels of persistent short term absence and there is no sufficient improvement in their attendance and/or

- 5 • The individual is absent due to long term sickness and despite notwithstanding supportive management action having been taken there is no realistic prospect of return to work or return to substantive duties in a reasonable timeframe
- The employee is unable to return to their substantive role and it is not anticipated they will be able to do so within a reasonable time frame
- 10 • The employee has been previously advised that their continued absence may result in progression through the capability process
- Earlier supportive action was offered but the individual either declined it or failed to cooperate and as a result there has not been the necessary improvement in the employee's attendance."
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33. I have set out these provisions of the Policy in full. At no time during the formal capability process which ensued over the two years subsequent to this did either the claimant or his Union representative make any issue over whether or not Mr Ketchen had been acting in accordance with policy when he decided to invite the claimant to attend a first stage capability meeting. It was however the claimant's position during the Tribunal Hearing that Mr Ketchen's decision had not been in accordance with this policy.

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34. The meeting which was originally fixed to take place on 12th July did not take place but was postponed to 24th July. The claimant was represented at this meeting by John MacKenzie of the Fire Brigades Union who in fact continued to represent the claimant at all further meetings which took place. Following the meeting Mr Ketchen wrote to the claimant setting out what had taken place (pages 71-73). The outcome is set out at the bottom of page 72 and states:

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“At a meeting with the Training Officer and SM Ketchen to establish expectations and development plan

- Development plan put in place for a period of one month

- Allocation of a Training Officer for consistency to assist and oversee development plan
- Set a review period midway through development plan
- Provide a report to SFRS GP detailing progress regarding working towards full operational training plan
- SM Ketchen to liaise with SFRS GP for clarity on nasal operation”.

The letter then goes on to state:

“I therefore hope to see a return to operational duties within 12 weeks from Monday 6th August 2018. If this does not occur you will be seen under the second stage of the capability process to further discuss your position. You should be aware that this may ultimately lead to your employment being terminated on the grounds of capability.

The Scottish Fire and Rescue Service will continue to support you to achieve the targets detailed above and if you feel that further support mechanisms may be of assistance to you please do not hesitate to contact me.”

35. The claimant attended a further consultation with the respondent’s Occupational Health physician on 31st July. The note following this was lodged (page 74-75). It stated that the claimant was abstinent from the use of cocaine. The report also states:

“His nose is slowly beginning to heal but there is inflammation still present at the outside of the right nostril and on the septum. I could not see a septal perforation today. His nose seemed less congested.

He is still engaged in counselling and has requested more specific anxiety reduction treatment from his counsellor.

He has not yet started training. He explained he has asked if he can do full BA course to try and improve his confidence.

He is fit for alternative duties.

I feel he is fit to be assessed carrying out all drills. He can do BA training and hot fire training if he can tolerate wearing a mask. The

decision would then have to be made on whether management feel he is safe to return to operational duty.”

36. The claimant had a development plan review meeting on Monday 27th August 2018 with Mr Ketchen. By that time he had not achieved a return to full operational duties. Mr Ketchen decided that matters should be referred to stage 2 of the capability policy. In accordance with the respondent’s policies a different Manager would deal with stage 2. Mr Hume took on this role. Mr Hume wrote to the claimant at some point around the end of October 2018 inviting the claimant to a second stage capability meeting which was to be held on 31st October. The undated letter of invitation was lodged (page 55). It noted that: “The improvements discussed at that meeting had not taken place and you have been unable to meet the target set for a return to full operational duties.” By this point 12 months had elapsed since the claimant had been on modified duties. Prior to the meeting on 31st October Mr Hume reviewed all of the prior documentation in the case. This included a report from the respondent’s Health and Wellbeing Department issued following a further consultation with the claimant which had taken place on 2nd October 2018. This document was lodged (page 56, 57). This report was issued by Liz Muir, a lead Health and Wellbeing Practitioner who had taken over from Dr Skade. It was noted that the claimant was suffering from anxiety which she attributed to the development plan he was on. It was noted:

“He had not yet commenced on his propranol which allayed his anxiety symptoms as he was concerned about its use while it worked. I would suggest that should his Managers wish to progress him to hot fire training that this is carried out after several weeks of taking this beta blocker.”.

“In terms of his nasal symptoms he tells me that this is improving although today it is clear that this is still troublesome with redness and skin fragility which is causing excess nasal mucus which affects his ability to breathe through his nose. He attends ENT regularly and is due another appointment next month. It may be prudent for me to write to ENT after he has been seen with regards to treatment plans and healing time etc.

He also tells me that he is more than happy to undergo drug testing to prove his abstinence for safety purposes for a return to work and to ongoing testing as required.

5 I have informed him that I would speak with his Managers following his appointment.

He should remain on modified duties until he has completed all his training and development needs and I plan to review him again once the hot fire training has been completed.

10 I trust that the above information is helpful to you. However should you require clarification of any point or any further information please do not hesitate to contact me.”.

The reference to hot fire training is a reference to training in a stimulated fire environment with smoke and flames present. As noted above the claimant had indicated that he wished to go on the full two week breathing apparatus course which would involve hot fire training.

15 The claimant’s meeting with Mr Hume went ahead on 31st October 2018. Following the meeting Mr Hume wrote to the claimant summarising the outcome and this letter was lodged (page 79-80). Within the letter Mr Hume notes the reasons for the move to stage 2 stating:

20 “I understand the reasons why you are unable to fulfil the duties and responsibilities of your substantive post and while I am sympathetic to the issues you are experiencing you will appreciate that your inability to return to these duties is adversely affecting service delivery and is unable to be sustained in the longer term.”

25 The claimant updated Mr Hume on his current health issue. The letter goes on to state:

30 “You have stated that you are no longer using drugs and it is your intention to never use these again. Although the counselling is difficult it is making you feel better within yourself and a lot of your personal stresses that were causing anxiety have now gone away. You have stated that you are now going back to the gym although you have not been for a while. You thanked me for all the support the Service had given you over this difficult period. I confirm the

outcome of our discussions included clarification that you are currently progressing through the capability process under the SFRS Managing Attendance Policy due to your being unable to return to full operational duties within the specified time frame.

5 I additionally advise that in order to enable and support your return to full duties you would now be transferred to Larbert Community Fire Station (in accordance with the outcomes of your previous disciplinary hearing) reporting directly to Station Manager Steven McCurrie who will have responsibility for progressing your Personal Development Plan and monitoring performance. Further details and confirmation of your transfer will follow in due course. SM McCurrie will meet directly with you to advise and confirm working patterns, annual leave entitlement and ongoing development arrangements.”

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15 37. Mr McCurrie was in attendance at the meeting on 31st October. Mr Hume’s letter goes on to state:

“I confirm that your formal development plan would be over a period of 3½ months with a date of returning to full operational duties of 18th February 2019, your progress will be monitored throughout the period by SM McCurrie. I also confirm that we will have a target of 6 months with zero absence.

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I therefore hope to see a sustained improvement in your attendance levels. If this does not occur you will be seen under the third stage of the capability process to further discuss your position. You should be aware that this may ultimately lead to your employment being terminated on the grounds of capability and that a decision regarding your employment will be made at a third stage capability meeting taking all relevant factors into account.”

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38. The claimant felt that this meeting was extremely supportive and he was optimistic that he would soon be able to achieve a return to full operational duties. By this time the only issues outstanding were in relation to his completion of the two week breathing apparatus course. The respondent’s position was that they would be happy for the claimant to

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take a shorter refresher course. However the claimant was clear that he wished to have the full two week course so as to give him enough confidence to go back to wearing breathing apparatus routinely. In addition to this the claimant had been in touch with DVLA. They had indicated that they required him to provide a drugs test so that they could make a decision as to whether or not they would be taking action in respect of his licence.

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39. The claimant attended a further meeting with the respondent's Health and Wellbeing Department on 1st November. The report on this was lodged (pages 81-82). Ms Muir, lead Health and Wellbeing Practitioner who compiled the report noted that the claimant had attended a capability meeting and that following this he feels that he has been supported by his Managers in order to return to his duties following further outstanding training. It was noted the claimant had been on beta blockers for a week but had preferred to come off these due to side effects. It was noted that the claimant's nasal symptoms were improving. The report goes on to state:
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"He is naturally anxious about completing his training but appears to be ready to undertake this and seems to have a positive attitude. His own BA mask would be beneficial as he still uses medication on his nose at present but there is no evidence of blood. Hygienically this would be beneficial.

He tells me that he is due to undergo a drug test for DVLA purposes on 19th November and it would be useful to have the results of these. Management should consider ongoing random testing to ensure ongoing absence from a safety viewpoint.

In my opinion he is both physically and mentally fit to undertake his BA and hot fire training. I will review him on completion."

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40. Following the confirmation that the claimant was now in a position to attend the BA and hot fire training course Mr Hume took steps to obtain a place for the claimant on the next course for which there were places available. This was a course which was to be carried out at the respondent's training location in Thornton, Fife in January 2020. There was some difficulty in obtaining places on such a course since the
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respondents required most of the places for those who were new starts undergoing induction training. The courses were held at three locations and it was not possible to obtain a place for the claimant at either of the other two locations. One of Mr Hume's concerns was that in the normal course they would give the claimant the use of a SFRS car to drive to the training location. Mr Hume was therefore concerned to ensure that the claimant was cleared to drive SFRS vehicles by the time the training course took place.

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41. The claimant did not attend the drug test appointment which had been arranged with DVLA for 19th November. The claimant's position is that he received a telephone call from the drug testing centre cancelling his appointment a few days prior to the date it was to take place. However on contacting the test centre a few days later to rearrange he was told that the testing centre had no record of making such a call and that he was being registered as a "no show" for this drugs testing.

42. The claimant was invited to a further meeting which was to take place on 19th December. The letter of invitation to this meeting was lodged (page 83). It is undated. The reason for the Hearing is set out in the first paragraph which states:

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"Further to your previous second stage capability meeting on Wednesday 31st October 2019 I write to advise you that unfortunately there were a couple of areas that should have been covered but were inadvertently omitted namely the processes surrounding redeployment and ill health retirement in the event that matters progressed to stage 3."

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43. The claimant attended the meeting on 19th December accompanied by his Trade Union representative Mr MacKenzie. Mr Hume was accompanied by Mr McCurrie and Alison Bryson of the respondent's Human Resources Department. At the meeting it was confirmed that Mr Hume had omitted to go over the respondent's redeployment and ill health retirement processes with the claimant. He confirmed that he had offered to provide hard copies of the policies but the claimant was content to access them from the intranet. He went on to state that:

“I understand the reasons why you are unable to fulfil the duties and responsibilities of your substantive post and whilst I am sympathetic to the issues you are experiencing you will appreciate that your inability to return to those duties is adversely affecting service delivery and is unable to be sustained in the longer term.”

5 It was noted that the claimant’s development plan covered a period of 3½ months with a date to returning of full operational duties by 18th February 2019 and confirmed that his progress would be monitored.

10 44. During the discussion the position regarding the claimant’s DVLA drug test was raised. It was noted that the claimant had not attended the test arranged for 19th November. Mr Hume indicated to the claimant that he was prepared to offer to provide a drugs test from a recognised local provider at the expense of SFRS. He advised that this would require to

15 be taken on a voluntary basis and the claimant agreed to this. Mr Hume hoped this would facilitate a review of the current restriction on the claimant driving SFRS vehicles. Following the claimant’s agreement Mr Hume contacted ETHOS Health Care (Grangemouth) and arranged for the test to take place immediately after the meeting. It was agreed that

20 Mr Hume would give the claimant a lift to the testing centre. Mr Hume duly did this along with Mr McCurrie. One of the reasons that Mr Hume was keen to get the test done was so that the claimant could be authorised to drive SFRS vehicles so he could attend the training in Thornton, Fife which was due to take place in January. He was aware that the claimant had on

25 numerous occasions indicated that he was happy to submit to random drug testing. Mr Hume had advised the claimant’s Union representative in advance that he intended to make this offer to the claimant.

45. When they arrived at the drug testing centre Mr Hume was present while the claimant went through the various procedural steps prior to having a

30 sample taken. The claimant required to complete a number of documents. He required to answer a number of questions verbally and then given a copy of the form which reiterated the points which had been verbally explained to him. One of the things he was told was that he had to complete a form confirming all the drugs taken by him in the previous

35 seven days. The claimant completed this. In his form the claimant did not

indicate that he had taken the drug co-codamol at any point within the previous seven days. He did not mention this on his form or orally. Immediately after the sample was taken for processing the testing centre advised the claimant and Mr Hume that the initial screening test had shown positive for opiates.

46. On being told that the screening test was positive the claimant then asked if co-codamol would show up on the test. The representative of the testing centre indicated that it would and the claimant then said that he had taken some co-codamol the night before.

47. The drug testing centre advised Mr Hume that because the claimant had not disclosed co-codamol in the form which he had filled in on arrival at the centre the test was to be regarded as a fail. The blood sample would then be sent away for analysis. The analysis could possibly confirm whether the reading was due to illegal substances or whether it was due to a prescription drug such as co-codamol. It is probably as well to report at this stage that in due course the result of the analysis came back to disclose that there was no sign of any illegal substances but that the reading was consistent with having taken co-codamol.

48. The claimant attended a further meeting with the respondent's Health and Wellbeing Department the following day (20th December). The report issued following this meeting was lodged (pages 86-87). With regard to the drugs test it stated:

"He informed me that he had undergone a random drugs test the day previous to the consultation. This had been arranged by his Managers with an external provider. He states he was taken aback by this as he states he hadn't been expecting this. We discussed this as I had had a previous discussion with him about the possibility of testing.

He also tells me that he had failed this test as he admitted at the time of the test he had taken co-codamol for tooth pain for 2 days over the weekend then stopping for 3 days prior to the test (although he states he is not sure what he took and had apparently initially informed the test that he had taken paracetamol then

changed his mind stating it was co-codamol after the initial test showed positive). He tells me he took more co-codamol over the last 24 hours as he had been involved in an RTC the night prior to his consultation. He was asked if he took this medication regularly and he denied this. Co-codamol contains codeine and can be addictive for some.

In relation to work he is to undergo his BA training in January and is apprehensive about this. He has asked for a further review with me if possible before this starts on 21st January.”

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- 10 49. The claimant was invited to a further meeting on 17th January 2019 to discuss the outcome of the drugs test. It was attended by Group Manager Hume, Steven McCurrie and Alison Bryson. The claimant was again accompanied by John MacKenzie of the Fire Brigades Union. Mr Hume confirmed to the claimant that after analysis the results confirmed the specimen was identified as containing opiates (codeine) and had concentrations at or above the thresholds recommended by the European Workplace Drug Testing Society. Mr Hume understood the level was five times over that limit. The findings were not consistent with the disclosed medication at the time of testing (i.e. the claimant had not disclosed co-codamol use prior to the test). It confirmed that no illegal opiates had been found in the sample provided but the test was deemed to be a fail. The claimant indicated that his failure was due to naivety or ignorance on his part. Mr Hume said he did not accept this as the declaration was verbally communicated and the claimant was then afforded ample opportunity to review the written guidance which further detailed the procedure and these instructions specifically highlighted the requirement to identify all medications (prescription or non-prescription). Mr Hume pointed out the claimant had then been required to physically write down all medications and that the process had not been rushed or glossed over in any way.
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- 30 50. Mr Hume then went on to advise the claimant that due to the drugs test being deemed a fail the Service had taken the decision to suspend his Personal Development Plan until such time as they received further analysis of the toxicology report and whether the levels of codeine in his urine would be consistent with the information he had provided at the Occupational Health consultation on 20th December 2018 in relation to the
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amount of co-codamol which had been taken. Mr Hume emphasised the duty of care which he had to the claimant and that of colleagues and that was the reason for suspending the PDP. The effect of suspending the claimant's PDP was that the claimant would not be able to carry out the breathing apparatus training fixed for January. Mr Hume went on to advise that the training involved wearing breathing apparatus in a realistic training environment and Occupational Health would be in touch in order to request the necessary permissions to obtain access to the claimant's GP records and obtain copies of the drugs test and toxicology report for analysis. The letter to the claimant goes on to remind the claimant that as per the Managing Attendance Policy he was due to progress to stage 3 of the capability process on 18th February 2019 if he was not back to full operational duties by then.

51. The claimant was asked to complete the skills match form under the respondent's redeployment policy by 25th January. The claimant did not do this but advised Mr Hume that he had some difficulty as he did not have appropriate software on his home computer and he did not have permission to use Microsoft products on SFRS computers following his demotion to firefighter. Mr Hume arranged for the claimant to be given the necessary PC access and the claimant completed the form on or around 31st January. The form was lodged (page 37-41). The form is used within the fire service where an individual is facing the final stage of the capability process and is designed so as to enable other Managers who may be seeking staff to identify members of existing staff who are looking to be redeployed. It is often used by the respondent where a member of staff is unable to carry out their usual operational duties but would be capable of performing other duties. In addition to this the claimant had access to all vacancies on the respondent's intranet system.

52. On or about April of 2019 the claimant was referred to stage 3 of the capability process which was to be managed by David Lockhart. As part of this process Mr Hume required to complete a checklist setting out what had happened in the case to date. A copy of this checklist was lodged (pages 101-103). It notes that the claimant had been on the capability procedure since July 2018. It notes the absences in the past 24 months. Notably the claimant had not in fact been absent since February 2018 i.e.

for more than a year prior to the referral. The reason for the claimant being referred to stage 3 was that he was still on modified duties and as noted above this is dealt with under this section of the capability procedure. On 18th April Mr Lockhart wrote to the claimant inviting him to a third stage capability meeting which was to take place on 29th April 2019. This letter was lodged (page 97). The claimant was advised:

“You should be aware that this meeting may lead to your employment being terminated on the grounds of capability. A decision regarding your continued employment will be made at a third stage capability meeting taking all the relevant factors into account inputting any current health issues the likelihood of a return to substantive duties within a reasonable timescale and any improvements you have been able to make in relation to your attendance at work.”

53. In the meantime the claimant had received another appointment from DVLA for a drugs test which he had not attended. The reason he did not attend was because he no longer had access to a vehicle following the road traffic accident he had been in on 19th December. He had arranged a lift with a friend however the friend let him down at the last moment. As a result of the claimant's failure to attend 2 drug test appointments arranged by DVLA DVLA suspended his driving licence for a year from February 2019.

54. The claimant duly attended the third stage capability meeting on 29th April. Mr Lockhart decided on that date that he was not in a position to reach an outcome. The respondent's health and wellbeing department had not yet received the toxicological analysis of the drug test sample the claimant had given on 19th December 2019. He advised the claimant that he could not make a final decision until he received this further information from the respondent's Health and Wellbeing Departments.

55. On 6th May 2019 the Health and Wellbeing Section sent in a fresh report having received the results of the toxicological analysis. This was lodged (pages 99-100). It noted that it was not possible to make comment on the

concentration of drug metabolite in the urine specimen and compare it to a declared pattern of medicinal drug use. It went on to state:

5 “It is possible however to state that the amended profile of declared medication – now to contain co-codamol, may be considered consistent with the findings reported for donor xxxx. It is noteworthy that the use of co-codamol was not disclosed at the time of specimen provisions.”

10 56. Having received this information Mr Lockhart wrote to the claimant on 27th June 2019 inviting him to a further meeting which was to take place on 11th July. This letter was lodged (page 104).

15 57. The claimant duly attended the meeting with Mr Lockhart on 11th July. Following that meeting Mr Lockhart wrote to the claimant confirming the outcome which was that the claimant would not be dismissed but that the stage 3 of the capability process would remain live for the next 12 months. The letter was lodged (page 105-106). The letter notes:

 “The meetings were in connection with your inability to return to full operational duties about which you have attended previous meetings under the process for dealing with capability.”

20 58. Mr Lockhart set out the history of the matter and the fact that he had wished to delay making a decision until he had the report of the toxicological analysis. Mr Lockhart made the point that he considered that the respondent ought to have been in a position to obtain the toxicological analysis sooner. He noted that the claimant had now had his driving licence revoked. He noted that the claimant had made progress with
25 everything required to return to operational duties apart from the breathing apparatus induction course. He noted the claimant was now fit to attend this. He advised the claimant that as of Monday 15th July the claimant would be deemed as operationally fit and would recommence his Personal Development Plan. On his return from annual leave on 22nd July he was
30 to commence a reintegration programme to refresh the development that he undertook in 2018 prior to being deemed unfit for operational duties. The claimant agreed to take random drug tests within the next 12 months. The letter finally noted as stated above that

“lastly I advised that the stage 3 of the capability process (managing attendance) will remain live for the next 12 months and should you become unfit for operational duties or hit absence triggers a stage 3 meeting would be convened.”

5 The absence triggers are contained in the respondent’s Managing
Absence Policy and Managing Attendance Policy at section 8. There are
two triggers, one is either three separate instances of absence or a total
absence of six working days or over in any rolling six month period. The
second is over a 12 month rolling period and is where an employee has
10 five separate instances of absence or a total absence of eight working
days or over in any 12 month rolling period (page 156).

59. The claimant returned to work. The claimant completed the breathing
apparatus course and was able to return to operational duties.

60. The claimant was absent from 11th to 20th December 2019. He obtained
15 a fit note. The GP indicated that the reason for absence was upper
respiratory tract infection.

61. On 13th February 2020 the claimant was also absent. The circumstances
were that the claimant was due to be on duty that day. He contacted the
respondent shortly before he was due to start saying that he had a family
20 emergency involving his aging parents and asking that he be on
authorised absence. This application was refused. The claimant did not
attend work that day.

62. The circumstances around this absence and another related matter
became the subject of disciplinary proceedings which had not been
25 resolved by the date of the claimant’s dismissal. The other matter involved
an allegation that the claimant had improperly completed a form in
connection with an application to the respondent by his parents.

63. The claimant was then absent again from 28th February to 17th March
2020. Again he submitted a fit note and his GP indicated that the cause
30 of his absence was tonsillitis.

64. The claimant was then absent again on 30th-31st May with toothache.

65. An attendance support meeting/return to work meeting was held following the claimant's December absence on 3rd January 2020. The note following this was lodged (pages 108-110).
66. An attendance support meeting was held following the claimant's absence in March on 20th March 2020. The note and return to work form completed following this were lodged (pages 110-113).
67. An attendance support meeting and return to work meeting was held on 1st June 2020 and an outcome attendance support meeting was held following the claimant's return to work from his absence through toothache. The form for this was lodged (page 114).
68. In addition to these absences the claimant had overslept on 8th August 2019 and a note to file had been put on his personnel record in respect of this. This was lodged (page 107). This note to file did not count as a formal absence under the Absence Management Policy.
69. As a result of his absences in December, March and May the claimant had met both of the respondent's absence triggers. In terms of the Policy only one trigger has to be met. The claimant would have met both triggers even if the absence on 13 February and 31 May were discounted.
70. The claimant had met the absence triggers whilst still within the 12 month period from the date Mr Lockhart had written to him in July 2019. Mr Lockhart had decided that, given that during the previous 2 years he had dealt with a disciplinary meeting in respect of the claimant together with the stage 3 absence management meetings which had taken place in April and July 2019 that it would be more appropriate for another Manager to deal with the stage 3 absence management meeting which was now required in terms of the respondent's policy.
71. Prior to the stage 3 meeting Mr Hume who had dealt with the previous stage 2 was required to produce a further checklist. This was produced (pages 123-125).
72. The third stage capability hearing was dealt with Steve Gourlay, an Area Commander with the respondent. He was assisted by Alison Bryson of the respondent's HR Department. The claimant was represented by

Mr MacKenzie, his Fire Brigade Union representative. Prior to the meeting the claimant attended a further assessment with the respondent's Health and Wellbeing Department which took place on 23rd June 2020. The report from this was lodged (pages 117-119). It was noted that the claimant had triggered the Absence Management Policy and was currently attending work. He went on to state:

"At assessment today he confirmed that his 3 most recent absences appear unrelated to his underlying medical conditions – which he advises are well managed medically. He also confirms no substance misuse currently and that he has remained abstinent from around the past 2 years.

He advises that his overall wellbeing is good currently."

73. Prior to the meeting Mr Hume forwarded a pack to Mr Gourlay which contained all of the information which the respondents had. It included all of the notes of absence management meetings and the reports from Health and Wellbeing together with the outcomes of the previous meetings which had taken place. Mr Gourlay considered that the claimant had been deemed operationally fit and this was confirmed by the Health and Wellbeing Department. He noted however that the stage 3 process was to remain live for a period of one year and the claimant had not been able to meet the attendance target during this period. He noted that the previous letter had stated that if the absence trigger was hit then a further meeting at stage 3 would take place. Mr Gourlay noted the information on the management checklist. He noted the new absences which had taken place since the stage 3 meeting in 2019.

74. The claimant had produced a pack in advance of the meeting with a presentation which he asked if he could submit. This was permitted. The claimant made his presentation orally. The claimant set out his reasons for the absence as he saw them. Mr Gourlay noted that there was a dispute regarding the absence in February and this was the subject of disciplinary proceedings. He noted the explanations provided by the claimant in his presentation but felt at the end of the day these reasons did not have much impact on the decision which required to be made. The fact of the matter was that the claimant was on stage 3 of the capability

procedure and had met the absence trigger. He had met both the six month trigger and the 12 month trigger. It was no part of the respondent's position at that point that the absences were not genuine. He noted from the report from Health and Wellbeing that this was not a case where there was a recurrent or chronic condition. The situation as he saw it was of a series of persistent unlinked short term absences. The claimant did have underlying conditions but according to the Occupational Health report these were being well managed.

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75. Mr Gourlay considered whether it would be appropriate to redeploy the claimant however he noted from the Occupational Health report that the claimant was said to be fit for his current duties. He did not consider that redeployment would make any difference. The claimant was also ineligible for ill health retirement given that he was currently fit to do his duties.

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76. It was duly noted that there were no Equality Act considerations highlighted by Occupational Health. During the Hearing the claimant agreed that absences were an issue for the Service. Mr Gourlay was aware that the respondent are an emergency service and need fit firefighters for duty all year round. Mr Gourlay's issue was not with the reasons why the absences had taken place but in his view the persistent nature of the absences could not be sustained.

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77. Mr Gourlay was aware of the Absence Management Policy. He was using the Manager's Handbook for managing absence which contains a precis of the Policy. It contains the same checklist as is contained within the Policy at page 180. It is as well to set out the terms of this checklist. It states:

“Any decision to dismiss an employee will only be taken when

- The employee has been formally advised that failure to attend work on a regular basis could lead to dismissal. This applies equally to cases of both short term persistent and long term absence.
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- The employee and Trade Union representative have had an opportunity to explain the absence record and the reasons for it.
- 5 • Management has explained the requirement for the employee to attend work on a regular basis and has given him/her the opportunity to prove that he/she can attend work on a regular basis.
- 10 • Reasonable adjustments to the post have been considered as required under the Equality Act and it has been determined that no adjustments can be made.
- Where applicable the option of a suitable alternative position has been fully considered.
- 15 • Medical advice has been obtained to ascertain the nature of the illness/ailment, its likely duration, whether the employee is likely to make a full recovery and if not what work he/she is able to perform.
- Ill health retirement has been considered where appropriate.”

78. Mr Gourlay’s view was that all of the points in this list were relevant and
20 had been met. The issue with the claimant was that it would appear that over a substantial period the claimant had been unable to carry out his role as a firefighter on a regular basis.

79. Mr Gourlay was aware that although the claimant’s driving licence had
25 been taken away for a year in February 2019 it had been restored to him in or about February 2020. At the end of the day however Mr Gourlay considered that in terms of the Attendance Management Policy the appropriate course of action was to dismiss the claimant. He conveyed this decision to the claimant at the end of the meeting and wrote to the claimant confirming his decision and his reasoning by letter dated 28th July
30 2020 which was lodged (pages 126-127).

80. The claimant was given a right of appeal. The claimant sent in a formal appeal by letter dated 4th August 2020 which was lodged (page 128). The grounds of appeal were said to be as follows:-

“Decision to dismiss was too severe:

My grounds for appeal on the above are that I would like to question some of the absences in which I am being accounted for and will provide evidence of at least one in which I was at work on the date in question.

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Medical information has not been considered or new information has come to light:

I believe that there are reasonable grounds to suggest that one if not two of the recorded absences within the last 12-month period are as a result of me contracting Covid-19 and a third was a direct impact of the Covid-19 virus. I am at present trying to source a Covid-19 antibody test to support this and I aim to have the results for this prior to any appeal hearing.

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Absences caused by bullying and harassment from line manager:

I would also like to disclose that I was the victim of bullying and harassment within the workplace between the period of May 2018 to October 2018 which had a detrimental effect on my wellbeing and mindset at attending and maintaining attendance at work during this period and beyond. I can provide evidence for this by way of witnesses to some of these events and also emails between myself and the person I was the victim of.”

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81. The appeal hearing took place on 22nd October 2020. The claimant was accompanied by Mr MacKenzie his Fire Brigade Union rep. The appeal panel consisted of members of the respondent board. These were Malcolm Payton, Anne Buchanan and Primrose Stark. The respondent’s HR department was represented by Gillian Clark. Mr Gourlay as Dismissing Officer also attended the hearing. A note of the hearing was produced and was lodged (pages 130-136). I considered this to be an accurate albeit not verbatim record of what took place at the hearing.

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82. At the outset of the hearing Mr Gourlay set out the management position. He referred to the management pack which included a timeline. All of the relevant documents were included in the management pack. The claimant had also produced a pack for the hearing.

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83. Mr Gourlay referred to the timeline of events and noted that stage 1 of the formal capability process had commenced in July 2018 some two years before the hearing which Mr Gourlay chaired which had led to the claimant's dismissal. He referred to the stage 2 capability meeting on 31st October and that matters had then moved to a final stage 3 hearing in April. This had not concluded and had been adjourned for a further report. Following this the meeting had reconvened in July and Mr Lockhart had decided to give the claimant a final opportunity. The outcome letter stated that the stage 3 process would remain live for the next 12 months and should the claimant become unfit for operational duties or hit absence triggers a stage 3 meeting would be convened. Mr Gourlay noted that the claimant had returned to work and had hit a trigger in December 2019 however the area supported him with his absence and a further three more before progressing to the final stage 3 meeting which took place in July 2020. Mr Gourlay made the point that the criteria for dismissal existed in April 2019 but the claimant had been provided with further support and a return to operational duties had been provided. There were then a further four short term absences and three attendance support meetings. The appeal hearing decided not to discuss the absence in February since this was still the subject of ongoing disciplinary proceedings. Mr Gourlay then went through the bullet points mentioned on page 180 of the productions. He set out his position in respect of each point. He noted that with regard to bullet point 3 there had been an extended absence management process and the timeframe for capability would normally have been concluded within 12 months.

84. He then went on to consider the various points made by the claimant in his appeal letter. It was his view that the criteria for dismissal on grounds of capability for poor attendance were fully met. He stated that the respondent were looking at 11 short term absences over the period in question and that it was absolutely the correct decision for SFRS to dismiss. With regard to the second point made by the claimant he considered there was no substance to this. He stated that it saddened him that the claimant was using the world pandemic to divert attention away from the facts as they were presented. He made the point that the claimant's absences in December and March preceded the recognised

onset of the pandemic. In any event Covid-19 could not explain his persistent short-term absences over the previous 24-month period.

5 85. With regard to the allegation that absence was caused by bullying and harassment he noted that the claimant now said this had happened between May and October 2018 however at no point during the process to date had the claimant referred to this. It had never been raised by him with any of the officers involved in the case nor at any of the three final stage 3 capability meetings. He made the point that there was no evidence to support the claims.

10 86. The panel then allowed Mr Gourlay to be questioned by the claimant and his representatives. The only question asked by the claimant's representative related to the number of stage 3 meetings. Mr Gourlay confirmed that three meetings had been scheduled but in fact only two had reached a conclusion namely the one in July 2019 where Mr Lockhart had agreed to give the claimant another chance and the one in July 2020 where Mr Gourlay had decided to dismiss. He accepted that the first meeting in April 2019 had been adjourned. Mr Petrie asked Mr Gourlay why he had been brought into the process late. Mr Gourlay confirmed his understanding was that the prior involvement by Mr Lockhart meant that it was decided there should be a fresh pair of eyes on the case.

20 87. Mr Petrie then made his presentation. Mr Petrie spoke rather than his representative. He noted that his issues started when he was suspended on 23 January 2018 due to his drug use. He stated that he had taken ownership of this and had regretted what had happened and recognised the support received from the service since then. He stated that his recovery was complicated and referred to withdrawal symptoms he had suffered from. He stated

30 "During this time he had issues with the station commander (Mr Ketchen) which had been raised with the group commander and the union and he believed this to be the reason for him to be absent during this time. He also believed that his station commander was changed due to these issues."

88. The claimant indicated that he considered that his absences on 10th and 18th May and 28th August 2018 were all related to his recovery from drug dependency as was the absence on 14th February 2019. The claimant noted that the absence on 18th May 2018 was due to an allergic reaction however he had attended a meeting with his station commander later that day but was nevertheless instructed that he would be booked sick. He noted that no return to work or attendance support meetings had taken place in respect of these earlier absences. With regard to his absence in December he indicated that there were five members of the team at his station who were off at the same time and with hindsight he believed they may have had Covid-19 however there was no medical evidence for this. He stated that his absence between 28th February 2020 and 17th March 2020 was very similar although his GP note considered tonsillitis. He referred to the absence on 30th May as being through toothache. He stated he was unfit for work the following day 31st May 2020 due to the pain. With regard to the incident in February he stated that he failed to report for duty on 19th February due to an issue with his parents who have dementia and he is the sole carer for them. He stated he had phoned at 1900hrs to request special leave however this was rejected.
89. The claimant was asked to confirm which station commander he alleged had been responsible for bullying him and he confirmed that this was Mr Ketchen. He advised that Mr Hume was the group commander he was referring to who he said had agreed to transfer him because of these allegations. Mr Gourlay pointed out that there was absolutely no record of this and that according to the record he had been transferred for disciplinary reasons. He also noted that the claimant had not raised these issues previously and had had plenty of opportunity to do so not least of which had been at the stage 3 meeting with Mr Gourlay. Mr MacKenzie stated the discussion with the group commander had been informal. The parties were then asked to sum up. Mr Gourlay confirmed that he stood by his decision. Mr MacKenzie stated that he believed only the three absences since July 2019 should be considered. He noted the claimant had made every effort to return to full operational duties whilst he was under the microscope he made every effort where he possibly could to attend work. The claimant confirmed he was committed to attending work.

He was not trying to use the pandemic as an excuse however he believed it had impacted. He stated he had tried hard to meet the target set by David Lockhart at the stage 3 meeting but if he had attended work he would have been putting his work colleagues at risk. He said he was currently fit and healthy.

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90. The panel adjourned to consider matters and then advised the claimant that they had decided to uphold the decision to dismiss.

91. Following his dismissal the claimant registered as unemployed. He applied for various jobs. A list of the jobs he applied for required to be submitted to the DWP as part of the conditions under which he received Universal Credit. The list of his job search was lodged (pages 190-203). The claimant was successful in obtaining a job with William Grant which was a fixed term contract due to start on 5th January 2021 and end on 2nd April 2021. The claimant in fact left this employment early on or about 26th February when he found other employment with a company called Lumirdax. The claimant's net pay with William Grant was £368.31 per week and his net pay with Lumirdax was £484.62 per week. His net pay with Lumirdax is higher than the pay he received from the respondent. The claimant was also in receipt of Universal Credit for the period up until he started employment with William Grant.

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Matters arising from the evidence

92. I generally found the respondent's witnesses to be credible and reliable. There was a difficulty in this case in that it became clear from the outset that the claimant's representative sought to challenge a number of decisions which had been made in or around 2018 by his then Station Commander Mr Ketchen. These events had happened over two years before the claimant's dismissal and essentially related to the decision to place the claimant in the capability process and to progress him from stage 1 to stage 2. The respondent had not called Mr Ketchen to give evidence and nor had the claimant sought to do so. The claimant sought to challenge whether or not he should have been counted as absent on 10th and 18th May 2018. Mr Hume who was the first of the respondent's witnesses had not had anything to do with the claimant's management at

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that stage and in fact had been working in a different area at that time. The respondent's representative could not have anticipated that the claimant was going to raise this issue since it was not clearly foreshadowed in the pleadings and apart from an oblique reference in the appeal hearing it was clear that nothing had been said either at the time or since. The position was therefore that Mr Hume was often being cross examined about matters which he could have absolutely no personal knowledge of. Despite this he answered as best he could and made appropriate concessions when he was simply not in a position to know what the answer was.

93. I would make the same comment in respect of the other three of the respondent's witnesses. It was clear that these witnesses had carefully considered matters at the time and were in some cases somewhat taken aback to be questioned at a Tribunal about matters which had never hitherto fore been raised. I considered that their evidence in respect of their own personal involvement could be relied upon.

94. The respondent's representative made a number of criticisms of the claimant's evidence during submission which I considered to be well founded. The claimant gave evidence in fairly emotive and extreme language at times. He also made a number of assertions which had not been heard before and which were not in any way evidenced by contemporary documents and indeed had no support at all. A number of those assertions were never made at the relevant time during the respondent's process. He also made a number of assertions in his own evidence which were never put to the respondent's witnesses. We would agree with the respondent's representative that in view of this it is simply not possible for the Tribunal to rely upon them.

95. In particular the claimant suggested for the first time at the Appeal Hearing that there had been a conversation between GC Hume and his Union rep about Mr Petrie's allegation that Mr Ketchen was bullying him. This was never put to Mr Hume at any point when he was giving evidence to the Tribunal. In cross examination the claimant also suggested that it had been discussed with him that he was being moved to Larbert to get away from Mr Ketchen and that his Union rep had discussed concerns about the

capability process with Mr Hume. None of this was put to Mr Hume and indeed it would appear to not be in line with the evidence that was given by Mr Hume.

96. In addition Mr Petrie suggested in cross examination that his dedicated
5 Training Officer was Mr Ketchen and indeed that Mr Ketchen had not fulfilled this role well. He never mentioned this in his evidence in chief. Mr Hume in his evidence had said that a dedicated Officer from the respondent's Training Department was allocated and this was not in any way challenged on cross examination. Mr Petrie suggested in cross
10 examination he had offered to come in on annual leave days to do training and that Mr Ketchen had refused this. This was not put to any of the respondent's witnesses. Mr Petrie also suggested in cross examination that many other firefighters did not have a driving licence. Despite the matter of whether or not a driving licence was necessary for the role being canvassed before various of the respondent's witnesses the claimant's
15 suggestion was not put to these witnesses. Mr Petrie asserted that he was not moved to Larbert right away and that this had some impact on his mental health but again this was not put to the respondent's witnesses. The claimant also asserted in evidence that the decision to dismiss him had been made long before Mr Gourlay decided on it. This was not put to
20 any witnesses nor in fact did the claimant assert who he believed made the decision at what stage or why. Mr Petrie also asserted that Mr Gourlay was not interested in his absences and that Mr Gourlay had not examined the Occupational Health report. The latter point was not put to Mr Gourlay. Mr Petrie asserted he did not get an opportunity to present his side at the
25 stage 3 meeting in July 2020 which was not put to Mr Gourlay. Mr Petrie criticised Mr Hume for not extending the claimant's redeployment process after the claimant put his form in six days later than he was supposed to have. It was not put to Mr Hume and nor did the claimant give any
30 evidence as to what the potential impact was. The claimant's representative did cross examine Mr Gourlay about whether the decision to move the claimant to stage 2 had been properly made but did not in fact cross examine Mr Hume who was the person who carried out stage 2 of the process. The claimant's representative did make some general
35 comments and did not put that specific point.

97. With regard to the absences on 10th and 18th May the claimant's position on this appeared to develop during the Tribunal Hearing. By the time he gave his own evidence in cross examination he said that he had been specifically instructed to book these days as sick when he returned to work on 28th May. He stated that these dates should not have been counted. This had not previously been put to any of the respondent's witnesses nor had it featured to date.
98. During his evidence the claimant also made a point relating to the breathing apparatus training only being two days. At other times he accepted the respondent's position that what he was meant to be booked on was a two week course. His own evidence was that he agreed that he had been the one who had insisted on this. His evidence at a later stage saying that a two day course would have been enough seemed to be an attempt to simply rewrite history.
99. I also had a number of concerns in relation to the claimant's Schedule of Loss. There were clear errors in this in that he had failed to mention his benefits and also underestimated the pay he had received. At the end of the day it appeared to me that the claimant was keen to seize on anything which he felt might assist his case even if the facts would not support it. I was prepared to accept his evidence in relation to certain matters particularly in relation to the earlier incidents in 2017 and 18 where I frankly had no other evidence to go on. I was not prepared to accept his evidence where it was either in conflict with the contemporary documents or where the contemporary documents or the evidence of the respondent's witnesses relating to what he had said at a later stage made the version he gave at the Tribunal seem unlikely.

Issue

100. The sole issue to be determined by the Tribunal was whether or not the claimant was unfairly dismissed by the respondent. The claimant indicated that if he had been successful his preferred remedy was reinstatement which failing re-engagement which failing compensation. The claimant lodged an amended Schedule of Loss shortly before the Hearing.

Discussion and Decision

101. Both parties submitted written submissions which are referred to for their terms. These were expanded upon orally. Since both parties correctly identified the statutory provisions I shall not restate these here. In the ET3
5 the respondent had indicated that their primary position was that the claimant had been dismissed on grounds of capability however if this were not the case then the reason for dismissal was some other substantial reason in terms of section 96 of the Employment Rights Act. During her submission the respondent's representative made it clear that, having now
10 heard the evidence and in particular the evidence of Mr Gourlay who had made the decision to dismiss, the respondent's primary submission was that the claimant had been dismissed through operation of the respondent's Attendance Management Policy and that as such it was to be regarded as a dismissal for some other substantial reason. It was the
15 respondent's secondary position that the claimant could have been dismissed by reason of capability. It was their position that even if the dismissal was unfair (which they denied) the claimant had contributed to his dismissal and that if the dismissal were found to be procedurally unfair then any compensatory award should be reduced to take account of the
20 Polkey principle. Rather than to seek to summarise the written submissions of each party I shall refer to them where appropriate in the discussion below.

102. In assessing whether a dismissal is fair or unfair in terms of section 98 the usual first step is for the Tribunal to identify the reason for dismissal and
25 identify whether or not this is a potentially fair reason. Matters are somewhat complicated in a case where a dismissal was said to be for some other substantial reason since inevitably the decision as to whether or not the reason is a "substantial" one involves some consideration of those matters which are more usually dealt with at the stage of assessing
30 whether the dismissal is fair or unfair in terms of section 98(4).

103. In this case I was directed by the respondent to the case of ***Wilson v Post Office*** [2000] EWCA Civ 3036 where it was suggested that dismissal for short term absence under an Absence Management Policy may well properly fall under some other substantial reason as a potentially fair

reason for the dismissal rather than capability. I was also referred to a paragraph in the case of **Ridge v HM Land Registry** UKEAT/0485/12/DM which states:

5 “It can be a difficult question whether to classify a dismissal following repeated periods of absence as a capability dismissal or a some other substantial reason dismissal. The Employment Rights Act 1996 contains a definition of capability. It means capability assessed by reference to skill, aptitude, health or any other physical or mental quality. If these considerations are to the
10 forefront of the employer’s mind when dismissing an employee then the reason for dismissal will relate to the capability of the employee performing work of the kind which he is employed by the employer to do. But it is not unusual particularly in cases of repeated short term absence for a variety of reasons for the recurring absences themselves to be the reason for dismissal. The operation of an
15 Attendance Policy might have been triggered (see **Coutts**: see **Wilson v Post Office**). In that case a better label may be some other substantial reason.”

104. Having heard the evidence in this case and in particular the evidence of
20 Mr Gourlay I would agree with the respondent that although the dismissal was initially characterised as capability a more correct view would be that the reason for dismissal in the mind of the decisionmaker at the time should be characterised as for some other substantial reason.

105. Very often those who design an Absence Management Policy for an
25 employer do so with a view to providing a process which will enable Managers to assess whether or not an employee is capable of carrying out their job or not using the definition of capability contained in the Employment Rights Act. A typical justification for this for including short term absence is that where an employee has demonstrated in the past
30 that they are unable to maintain a satisfactory level of attendance because of their tendency to have a number of unpredictable unrelated short term absences then this can be a useful predictor of the future. If the employer is an organisation which has decided that it cannot sustain more than a certain amount of unpredictable unrelated short term absence from its

employees then the fact that an employee has been unable to maintain the appropriate level of attendance in the past will often justify an employer coming to a decision to dismiss on the basis that they have no reason to believe things will be any different going forward and thus that the employee is not capable of doing their job.

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106. What struck me in this case was that Mr Gourlay did not make his decision based on any such assessment. At the time of the claimant's dismissal the claimant had been fit for operational duties for almost a year. He had short term absences which meant he met both of the absence triggers. Prior to that however he had gone for a period of around a year without any short term absences. The problem was that during that period the claimant had been unfit for his full operational duties for a very lengthy period and it was only with the benefit of considerable support from his employer that he had reached a position where he could be restored to being fully operational. It appeared to me that Mr Gourlay's decision was quite clearly based entirely on the Absence Management Policy as he understood it. Mr Gourlay gave evidence to the effect that he had been advised as to how the Policy should be interpreted by the respondent's HR Department.

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107. I was referred by the respondent to the case of ***Kelly v Royal Mail Group Limited*** UKEAT0262/18 which found that a loss of confidence that an employee will maintain acceptable attendance in future amounted to some other substantial reason for the purpose of dismissal. It appeared to me that this was more in line with Mr Gourlay's thought processes rather than a finding that he had decided the issue of capability *per se*.

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108. Having heard Mr Gourlay's evidence there is no doubt the fact that the claimant had been in a formal capability process for a period of around two years prior to the July 2020 meeting was something which weighed heavily with Mr Gourlay and indeed led him to dismiss.

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109. It appeared to me that the purpose of the respondent's Managing Attendance Policy was to ensure that employees will be fit to carry out their normal operational duties. One aspect which may render them unfit is if they become medically unfit to carry them out for whatever reason. In

the claimant's case he became medically unfit in October 2017 when the incident took place regarding the wearing of breathing apparatus. He did not become fit for his full operational duties again until around August 2019 following his return to duty after the stage 3 Hearing conducted by Mr Lockhart. In addition the Attendance Management Policy was used to manage his short term absences. It was clear to me that the initial trigger for putting the claimant on stage 3 in 2019 was the fact that he was unfit for operational duties for an extended period whereas the trigger in 2020 was his short term absences. It appeared to me on the basis of the evidence that both of these decisions were quite properly made.

110. I did not accept the claimant's criticisms of the operation of the Policy by the respondent. It appeared to me having heard the evidence of Mr Hume, Mr Lockhart and Mr Gourlay that the claimant had been given every opportunity to return to full operational duties. Considerable support had been provided to him by the respondent.

111. The claimant now complains that he perhaps should not have been on the Policy at all because certain absences should not have been counted but at the end of the day it appeared to me the principal reason the claimant was moved on to the Capability Policy was because of his inability to carry out his normal operational duties. This is very clear from the contemporary documents. Even if the claimant is now critical of the fact that the absences on 10th and 18th May were taken into account (criticisms which I do not accept) I do not see these as making any difference to the fact that the claimant was quite properly moved on to stage 2 of the process in 2018 and to stage 3 of the process in April 2019. The fact is that the claimant met both criteria for being under the capability process. He was unable to perform his normal operational duties and he had also hit the absence triggers.

112. It appears to me that Mr Lockhart extended considerable leniency to the claimant by then deciding that he was not going to make a decision until he had the full results of the toxicological analysis. Mr Lockhart was in my view even more lenient when he decided in July 2019 to give the claimant a final chance.

113. It was clear that one of the options open to Mr Lockhart if he did decide to give the claimant a further chance was to leave the claimant at stage 3 of the process so that he would know that any breach of the attendance triggers was likely to lead to dismissal. This is quite clearly what Mr Lockhart did.
114. The claimant's position appears to be that his absences in December 2019 and February/March and May 2020 were genuine absences and that it would be inappropriate for his employer to take these into account. Mr Gourlay's position was that he was not particularly looking at the reason for these absences but simply at the fact that these absences had taken place.
115. It is a fact that the claimant did breach the absence triggers. The claimant had in fact breached the absence trigger in December 2019 but was allowed a further opportunity to improve. He then breached the trigger again. There is no doubt that Mr Gourlay believed that he had effectively reached the end of the road as far as the Absence Management Policy was concerned. That was the reason for dismissal. I believe Mr Gourlay was entitled to take that view.
116. I am prepared to accept therefore that the breach of the Policy was a substantial reason justifying dismissal.
117. Looking at the question posed by 98(4) does involve going over the same ground again to some extent. I entirely accept the respondent's position that the claimant could have been fairly dismissed in July 2019. He was not dismissed. He was given a further final chance. The terms of his further final chance were that he not breach any absence triggers. The claimant breached these absence triggers.
118. I can quite understand the claimant's frustration that having, to some extent, turned his life around, overcome his drug addiction and returned to full operational duties it is frustrating that at the end of the day he has lost his job due to further unconnected short term absences. Unfortunately for the claimant a final chance is just that. Mr Lockhart decided that with appropriate support there was some realistic hope of the claimant being able to return to operational duties and indeed with the help of the

respondent the claimant was able to do this. Mr Lockhart was entirely entitled to put a caveat on that to the effect that the claimant having reached stage 3 of the process would stay at stage 3 of the process until it had been established that he was able to maintain sufficiently good attendance to not trigger any absence triggers. Unfortunately the claimant did trigger the absence triggers and in my view Mr Gourlay was entitled to find that dismissal was justified in terms of the absence management process. I have no doubt that some employers may have decided to give the claimant another chance but as I was reminded by the respondent's representative it is not for me to substitute my view for that of the employer. I have no doubt that it was within the range of reasonable responses for the employer in this case to come to the decision they did.

119. With regard to the claimant's assertion that his absences in December and March were due to COVID and should therefore be disregarded I should specifically state I do not accept that these absences were. In each case the claimant's GP examined him at the time and reached an alternative diagnosis. In my view there was no evidence before the respondent which would have allowed them to discount his absences on the basis that they were COVID related. There was also an argument from the claimant that his absence on 30th-31st May should be counted as one day rather than two days as stated by the respondent. Even if it was the claimant would still have hit the trigger. Again I do not consider this makes any difference. The fact of the matter is that the respondent applied their Absence Management Policy fairly and properly. The claimant reached stage 3 of that Policy in July 2019. He was not dismissed but allowed to continue in employment subject to remaining at stage 3 and on the basis that he did not hit any absence triggers. The claimant hit two absence triggers.

120. If I am wrong in this I should say that it is my view that had the claimant not been dismissed for some other substantial reason then he would have fairly been dismissed on grounds of capability in any event. It appeared to me that any reasonable employer looking at the claimant's record over the previous 2½ years would have been entitled to conclude that the claimant was not reaching the standard of capability required. He had been unfit for operational duties for the period between October 2017 and July 2019. During part of this period he had been on disciplinary

suspension as well. He had then, with considerable support, been able to return to full operational duties in or about August 2019. Having returned to his full operational duties we are entitled to assume from the fact that he had four absences, two of which were for comparatively lengthy periods that they could no longer rely on him providing sufficient service going forward to meet their reasonable attendance standards.

121. My primary finding however is that the dismissal was fair based on some other substantial reason. The claim is therefore dismissed.

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Employment Judge: Ian McFatridge
Date of Judgment: 17 February 2022
Entered in register: 18 February 2022
and copied to parties

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