EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs R Tiffin	and	Chief Constable of Surrey

Hearing held at Reading on 25, 26, 27, 28 April 2017
2, 3, 4, 5, 8 May 2017 (Hearing)
9 May 2017 (In chambers)

Representation **Claimant:** Mr D Stephenson, counsel
Respondent: Mr B Uduje, counsel

Employment Judge Mr SG Vowles **Members** Ms A Brown
Mr P Miller

RESERVED UNANIMOUS JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties. From the evidence heard and read the Tribunal determined as follows.

Discrimination Arising from Disability – section 15 Equality Act 2010

2. The Tribunal found that the Claimant was not subjected to discrimination arising from disability. This complaint fails.

Indirect Disability Discrimination – section 19 Equality Act 2010

3. This complaint was withdrawn at the start of the hearing and was dismissed.

Indirect Sex Discrimination – section 19 Equality Act 2010

4. The Tribunal found that the Claimant was not subjected to indirect sex discrimination. This complaint fails.

Failure to Make Reasonable Adjustments – section 20 Equality Act 2010

5. The Tribunal found that the Respondent was not in breach of the duty to make reasonable adjustments. This complaint fails.

Disability Harassment – section 26 Equality Act 2010

6. The Tribunal found that the Claimant was not subjected to disability harassment. This complaint fails.

Victimisation - section 27 Equality Act 2010

7. The Tribunal found that the Claimant was not subjected to victimisation. This complaint fails.

Reasons

8. This judgment was reserved and written reasons are attached.

REASONS

SUBMISSIONS

Claimant

1. On 17 May 2016 the Claimant presented complaints of disability discrimination and sex discrimination to the Employment Tribunal.

2. The claims were clarified in a case management order which was made following a preliminary hearing held on 15 August 2016.

3. Additionally, during the course of this 10 day hearing held from 25 April to 9 May 2017 the claims and issues were further clarified.

Respondent

4. On 1 July 2016 the Respondent presented a response and resisted all claims.

5. During the course of the proceedings, and before the start of the hearing, the Respondent conceded that the Claimant was a disabled person by reason of depression and hypothyroidism. There was a dispute between the parties, however, as to the material dates of the disabilities and as to the Respondent's knowledge of the disabilities.

EVIDENCE

6. The Tribunal heard evidence on oath on behalf of the Claimant from:

   The Claimant, Mrs Rebecca Tiffin (formerly Detective Constable); and
   Detective Sergeant Maxine Cilia.

7. The Tribunal also heard evidence on oath on behalf of the Respondent from:

   Detective Inspector Rebecca Molyneux;
   Detective Sergeant Pascale Tate (nee Middlebrook);
   Detective Sergeant Jeffery Jones;
   Detective Inspector Davinia Fielding;

Mr Karl Warn;
Detective Chief Inspector Paddy Mayers;
Detective Superintendent Rebecca Smith;
Detective Sergeant Carly Humphreys;
Detective Inspector Stewart Leahy;
Detective Inspector Andrew Jenkins;
Detective Chief Inspector (retired) Adam Colwood; and
Detective Inspector Clive Vale.

8. The Tribunal also read documents in 3 lever arch files totalling 1,224 pages.

9. From the evidence heard and read, the Tribunal made the following findings of fact.

FINDINGS OF FACT

Background

10. On 23 July 2001 the Claimant joined the Respondent as a police constable. In January 2007 she was appointed to be a Detective Constable.

Annual Fitness Assessment (AFA)

11. In January 2012, the Respondent introduced an Annual Fitness Assessment (AFA) which required all police officers to complete a "bleep" test. Although the test was yet to be introduced nationally, the Respondent, together with two other forces (Hampshire and North Wales) introduced the AFA early. The AFA policy included the following:

Annual Fitness Assessment

Introduction

This guidance outlines Surrey Police practice to ensure that all Officers meet the current fitness standards in order to be fully deployable. Policing can be physically demanding and Officers are often called upon to put themselves into conflict situations. Recent developments at national level suggest that attitudes are changing and therefore the Force has taken the decision to introduce this mandatory testing.

The annual fitness assessments will include:-

- *All warranted Police Officers up to and including the rank of Chief Constable.*

All Officers have a responsibility to co-operate with the Force and attend the necessary training. Those Officers who do not attend or participate in

the Annual Fitness Assessment may be subject to the misconduct procedure.

Opportunities to take the Annual Fitness Assessment will be provided at all Officer Safety Training sessions, as well as other times in the gym at HQ with the Force Fitness Advisor and will always be conducted at suitable, risk assessed locations.

Annual Fitness Assessment Requirements

All Police Officers will be required to complete the shuttle run (bleep test) to the nationally approved level (currently 5.4) once in each calendar year.

Prior to starting the assessment Officers will be required to sign the register to confirm there is no medical reason why they cannot take part, that they have already completed the assessment in that calendar year or that they have been referred to Occupational Health.

If an Officer does not reach the required level in the Annual Fitness Assessment, they may not be allowed to continue with officer safety training subject to the professional decision of the training team.

The results of the annual fitness assessment will be recorded on the printed register by the trainer and then transferred to the administrator who will update the records on People Solutions.

Inability to complete the Annual Fitness Assessment

Where an Officer thinks there is a medical reason that prevents them from completing the test they should fully discuss this with their line manager, who may refer them to Occupational Health. If an Officer fails the annual fitness assessment their line manager will be notified and will fully discuss the implications with the Officer. A risk assessment may also take place to assess the suitability of the Officer to remain in operational duties.

If there is no medical reason identified the line manager will arrange for the Officer to retake the test, usually within one month (unless the Officer has been referred to Occupational Health the retest should take place as soon as is reasonably practical).

If the Officer fails for a second time, a management referral to Occupational Health must take place, if not already completed.

Officers may be placed on an action plan and consideration should also be given to their removal from front-line duties. The Command Lead/Head of Department will be informed.

Occupational Health has the responsibility for assessing an individual's medical condition and providing professional opinion on their ability to carry out the role of constable.

Ultimately Police Officers need to be fit for the role. In the unlikely event of not being able to pass at the end of the action plan period, the Force may consider Unsatisfactory Performance Procedures. …

Unsatisfactory Performance Procedure (UPP)

12. This is a formal process for managing unsatisfactory performance when informal action and performance management techniques have been exhausted. Unsatisfactory performance refers to performance within the job (for example, failing the AFA) or poor attendance resulting from a lack of capability rather than wilful rule-breaking. The process applies to all officers except probationary officers and officers of ACPO rank.

13. Initially there is an informal action planning stage in which the poor performance is assessed and time is given for the officer to improve, usually over a period of three months. If there is insufficient improvement, the formal process involves 3 stages.

14. Stage 1 - a formal meeting is held for the first line manager to discuss with the officer what is unsatisfactory about their performance and to agree an action plan. A written improvement notice is issued setting out what is required and the date for compliance. The officer can request a review of the improvement notice and if so, the review is conducted by the second line manager. During the course of the improvement notice the officer's performance is monitored. At the end of the period a formal meeting is held to consider whether sufficient improvement has been made. If improvement is not sufficient, then stage 2 is as follows.

15. Stage 2 - the formal steps above are repeated with a further improvement notice issued. This is a final improvement notice which makes clear to the officer that if there is still no sufficient improvement at the end of this period, dismissal will be likely. If improvement is sufficient, then no further action is required but details of the formal action will be kept valid for 12 months. If performance again drops, the process can be re-entered where it ended. For insufficient improvement, the following stage is pursued.

16. Stage 3 - there is a further formal meeting at which the officer's continued employment is considered and dismissal is likely.

17. On 29 June 2012 the Claimant attended *"conflict training"* which included the AFA but the Claimant was unable to complete the AFA due to illness.

18. On 9 July 2012 DI Molyneux (the Claimant's 2nd line manager) informed the Claimant that as she had not successfully completed the AFA it counted as a failure and she had 4 months in which to pass it.

19. On 4 October 2012 the Claimant completed conflict training but did not complete the AFA. DI Molyneux therefore issued her with an informal

action plan requiring her to complete a fitness programme and pass the AFA within 5 months.

20. On 5 November 2012 the Claimant attempted and failed the AFA scoring 3.8 (the pass mark was 5.4).

21. The Claimant had a poor sickness absence record. On 17 January 2013 following her return from a period of sickness absence, she was issued with an informal action plan because of her sickness absence record. Her right to self-certify for future sickness absence was removed for 6 months.

22. On 27 March 2013 the Claimant again failed the AFA. On the same date she was issued with a formal notice of a stage 1 UPP meeting because of her failure to pass the AFA. The formal meeting took place on 8 April 2013 when the Claimant was issued with a written improvement notice requiring her to successfully complete the AFA within 3 months. On 29 May 2013 she again attempted but failed the AFA. Accordingly, on 27 June 2013 DI Molyneux referred the Claimant to occupational health. On 8 July 2013, the 3 month period was extended by a further 3 months until October 2013. On the same date, the Claimant again attempted the AFA but failed.

23. On 16 July 2013 the Claimant broke down at work and was sent to occupational health for an emergency appointment. On 22 July 2013 the occupational health report confirmed that the claimant was unfit for duty and was referred for counselling. She returned to work on recuperative duties on 19 August 2013.

24. In September 2013, the Claimant was diagnosed with borderline hypothyroidism and referred to a consultant endocrinologist.

25. On 16 September 2013 an occupational health report stated:

"This officer was seen today in Occupational health for a follow up appointment. The officer has now returned to work and is returning to normal shifts.

The officer reports an improvement in her health and wellbeing, in addition she reports that is happy to be back at work.

The officer is continuing her work with Karl Warn towards increasing her fitness levels.

The officer remains under the case of her GP for further investigations into her health, it is recommended that a re referral is submitted for the officer when she has the results of her investigations from her GP. …"

26. On 7 October 2013 the Claimant attended for the AFA but did not run it and that was considered as a fail. Accordingly, she was issued with formal notice of a stage 2 UPP meeting.

27. On 24 October 2013, the Claimant was signed off work by her GP with work-related stress. She was then absent on sick leave from 24 October 2013 until her return to work on 6 July 2015, a period of 21 months.

28. On 11 December 2013 an occupational health report confirmed that the Claimant was unfit for duties but was fit to attend meetings.

29. Although the Claimant remained absent on sick leave, the UPP process for both attendance (stage 1) and failure to complete the AFA (stage 2) continued. On 16 January 2014 the Claimant attended the stage 1 attendance UPP meeting chaired by DI Leahy and the stage 2 performance UPP meeting chaired by DCI Colwood. A final written improvement notice was issued by DCI Colwood.

30. On 12 February 2014 an occupational health report contained the following:

"Current Medical Position:

I have obtained a report dated 16th January 2014, from DC Tiffin's specialist at Kingston Hospital. She is still undergoing investigations in relation to her symptoms, i.e. exhaustion and tiredness, thinning hair and aching muscles etc. She has been started on a new medication which she has been taking for the last two weeks, with a slight improvement in her symptoms. She is due to have a further investigation, with a review by the specialist in early March 2014.

DC Tiffin continues to have symptoms of anxiety and depression, largely as a result of work issues which have been reported previously. She has been prescribed a new medication with her symptoms of anxiety and she is due to be reviewed by her GP tomorrow. She has had six sessions of Counselling, with limited benefit. I agree with the assessment of her GP that she needs an antidepressant medication which is likely to be prescribed tomorrow.

Fitness for Work and Recommendations:

In view of DC Tiffin's ongoing symptoms, I am of the view that she remains unfit for work at present.

As she is still undergoing investigations in relation to her physical symptoms, she also remains unfit for the Fitness Test at present. I am optimistic that, once her symptoms of depression and anxiety are adequately managed with treatment, as mentioned above, she may feel better inclined to engage in an exercise programme to improve her level of fitness. With this approach, it is possible that she may be able to attempt the Fitness Test later in the year.

31. This was the first medical confirmation seen by the Respondent regarding the Claimant's condition of depression. The Respondent thereby had knowledge on this disability from this date.

Grievance

32. On 17 February 2014 the Claimant submitted a formal grievance regarding "bullying/unfair treatment" and "disability discrimination" alleged to have been conducted by DI Molyneux and DS Middlebrook. The tribunal found that, although no supporting detail regarding disability discrimination was provided in the grievance, this amounted to a protected act under section 27 Equality Act 2010.

33. On 20 March 2014 the Claimant's appeal against the stage 1 attendance written improvement notice was rejected.

34. On 23 April 2014 an occupational health report stated:

"Current Medical Position:

This lady is continuing to be investigated regarding her physical health problems. Her specialist team has recently taken her off medication that was previously appearing to be beneficial. She is to be reviewed by them in July 2014. She is on some medication for her mental health symptoms which appear related to stress which she has stated relate to work issues going on since 2012. The mental health medication is currently at a low dose and has been started two months ago.

She has previously had some counselling and is currently awaiting Cognitive Behavioural Therapy through the NHS for which she has had the initial assessment. She has been provided some onward referrals by her specialist team for her physical health problems.

Overall she has not improved in her health since she was last seen by Dr Phoolchund.

Fitness for Work and Recommendations:

This lady is currently unfit for work. She also is unfit for the fitness test at present. I do not recommend a programme for improving her physical fitness at this time. …"

Grievance Outcome

35. On 2 June 2014 DCI Smith produced a written outcome in respect of the Claimant's grievance. She had been unable to interview DI Molyneux, against whom the grievance had been made, because she was absent on maternity leave and had refused to take part in the investigation until her return to work in February 2015. The Claimant requested DCI Smith to produce her report before DI Molyneux returned and she therefore did so.

However, she made it clear that she had not sought DI Molyneux's views whilst she was on maternity leave but she had sought information from others in the office to try to get a balanced view. She said there would be several issues she could not resolve due to the absence of DI Molyneux. Her outcome report included the following:

"Conclusions:

DC Tiffin has submitted a grievance that covers several areas. I have addressed these areas within my report. I cannot however comment on any fitness issues, or action plans subject to performance due to other processes currently underway. I have identified that action is required in respect to the perceived culture within the office. This was attributed to DI Molyneux's management style and her perceived friendship with her DS's. This will be addressed on her return from maternity leave and training given, if required.

The resolution sought by DC Tiffin was to show her current absence as an injury on duty. As her absence does not fall under the definition of an injury sustained in the execution of an officers duty this will not be re-coded as such. In respect to other points raised in her grievance I have identified a number of learning points and these are shown in the recommendations below.

Actions to complete:

- *A cultural assessment to be undertaken of PPIU Staines by the learning and development department, any action recommended as a result of the assessment to be put in place. This may not reveal any of the issues as it would appear the new management is well liked by the current staff, however due to comments made during the investigation I believe this will be worth while.*

- *Management style training for DI Molyneux required on her return from maternity leave, this is to be put in place by her new line management in Intelligence. DCI Bex Smith to ensure this is followed up by DCI Colwood.*

- *DI Molyneux to be spoken to regarding the findings of this report by DCI Bex Smith on her return from maternity leave."*

36. Also on 2 June 2014 the UPP processes were put on hold because the Claimant's application for ill health retirement was being actioned by the pensions board. However, the medical report regarding the Claimant's depressive illness in support of her application did not confirm that her condition had the sufficient degree of permanence to entitle her to make such an application. On 17 October 2014 the Claimant presented an appeal against this decision.

37. On 28 July 2014, Dr Cheng wrote a report which included the following:

"Currently affected capabilities

- *She is unable to retain and concentrate to explain facts and procedures to a reasonable standard;*

- *She is unable to run due to general deconditioning and obesity.*

Attendance/Reasonable adjustments

Mindful that she has been on sickness absence since 24/10/13, in her present condition, she can perform non-confrontational policing duties part-time, say, 25 hours per week, increasing on a gradual staged basis to her contracted 28 hours per week, provided the above limitations are taken into consideration.

Opinion

… Having taken a careful history and clinically assessed her, I conclude that she is disabled from performing the ordinary duties of a police officer, but not permanently until 2038.

She should be able to work, in the fullness of time, full-time outside the police environment with appropriate ergonomic adjustment, supportive monitoring and supervision."

38. In a medical report dated 20 October 2014 Dr Hodgkiss concluded that the Claimant was currently depressed and was undergoing investigation of her thyroid function by a specialist in endocrinology. In the event there was no evidence of any firm medical diagnosis of hypothyroidism during the Claimant's employment and the Tribunal found that the Respondent did not at any time have knowledge of any disability based upon this condition.

39. On 8 January 2015 Dr Wright, consultant psychiatrist, reported as follows:

"Clinical Opinion

Re: Present Disability

At the present time I consider Mr Tiffin to be likely to be disabled from the ordinary duties of a police officer. In particular, the effects of her depression and anxiety will diminish her ability to sit for reasonable periods and to concentrate, to understand retain and explain facts and procedures, to evaluate information and record details, and her ability to make decisions.

Re: Prognosis and Duration of disability

Ms Tiffin has a 7 year history of depressive illness …

This is a prolonged history, and to date Ms Tiffin's response to treatment has been limited, showing some treatment resistance. However, depressive episodes are usually time limited and she has not yet had all treatment options available, so I do expect this episode to improve, but cannot give a specific timeframe on this. …"

40. On 16 January 2015 it was confirmed that the Claimant had withdrawn her appeal against the refusal of ill health retirement, and she was therefore informed that the UPP processes in respect of both her attendance and performance would be restarted.

41. From January to June 2015 the Claimant remained absent on sick leave. The UPP processes regarding attendance and performance continued through the various stages. She continued to be under the care of her GP and a consultant psychiatrist. However, by 2 June 2015 the Force Medical Officer, Dr Yarnley, reported as follows:

"In response to your specific questions:

1. *Is Rebecca fit for the current role?*

   I understand the current role has been explained to Rebecca and she considers this to be a reasonable fit for her past experience and capabilities. In relation to her medical fitness I have made note of my concerns above but on balance I consider it is reasonable for her to return to this role with the concerns I have raised being taken into account.

2. *Is the employee for fit for full operational duties?*

   I have no doubt she is not fit for full operational duties nor do I consider she will be for some time. I do not consider she will be able to successfully complete the fitness training or officer safety training. It is likely to be 3 to 6 months before she will be able to do so. In addition I do not consider she would be emotionally robust enough to deal with some of the potential issues that would confront within an unrestricted role. I am expecting that she will be able to do so in the medium-term i.e. within the next six months.

3. *What work adjustments are required.*

   A clear plan as to how her reintegration will be programmed over the next 3 months to the role identified and that she has to work to a programme demonstrating she is moving towards fitness targets that would allow for a return to unrestricted duties over the next 6 months. It is noted the issue of physical fitness is unlikely to be a medical matter.

Her Federation Representative also stated she would be able to reduce her hours from 28 to 16 per week, which I support if this is possible.

4. *Are there any work restrictions?.*

   Please see above.

5. *Estimated time to return to full duties?.*

   Please see above."

Return to Work

42. On 6 July 2015 the Claimant returned to work on recuperative duties working 16 hours over 2 days per week. She was not employed in her original role in the Safeguarding Investigation Unit (SIU) but in the Prisoner Investigation Unit (PIU). As part of her return to work, DS Jenkins provided a Supportive Informal Action Plan to the Claimant:

Improvement Required	***How to achieve objective***	***Completion Date***
You are required not to have any occasions of long term sickness absence (21 consecutive days or more).		*6 months from date of issue*
You are required not to have more than 3 occasions of sickness absence and/or (amounting to) no more than 8 days in a rolling six month period.	*An uplift of 50% has been applied to the frequent absence criteria as a reasonable adjustment to take into account that your absence is due to a medical condition likely to be covered under the Equality Act 2010*	*6 months from date of issue*
You are required to return to full hours and full operational duties within 6 months of returning to work. This has been deemed as possible by the FMO.	*To increase your hours and duties in line with the rehabilitation plan agreed with your line manager, giving consideration to the advice provided by OH. This is flexible upon regular review, but as initially agreed this will be:* *Current – 4 hrs per shift* *w/c 20th Aug – increase to 6 hrs* *w/c 31st Aug – increase to 8 hrs*	*6 months from return to work*
To pass the Force fitness test in 3-6 months time, as recommended by OHU	*To make arrangements with the Force Fitness Advisor (Karl Warn) for a supportive plan to increase fitness to be in a position to pass the Force Fitness test in 3-6 months time.*	*6 months from return to work*
To keep your line manager		*6 months from return to*

and Federation representative updated with any matters that may affect your wellbeing or fitness to work.		*work*

This action plan will be in place for a period of 6 months (usually between 3 and 6 months)

The aim of this action plan is to support you in achieving acceptable standards of performance and/or attendance. If improvement to the standards required is not achieved or is not consistent your manager may progress to the next stage of the Unsatisfactory Performance Procedure.

Name of Issuing Officer/Manager: DS Andy Jenkins Date 29/07/15"

43. This plan, as stated, was designed to support the Claimant to achieve acceptable standards of performance and attendance after the lengthy period of absence on sick leave of 21 months.

44. In the meantime, DI Molyneux had returned to work and on 28 August 2015 DCI Smith met with her to discuss the Claimant's grievance. On 4 September 2015 DCI Smith produced an updated grievance outcome to the Claimant with additions and comments from DI Molyneux.

45. On 14 December 2015 the Claimant again failed the AFA test. She scored only 2.6.

PIYN Reorganisation and Resignation

46. On 13 January 2016 the Claimant applied for a Student Support Officer position at Hollyfield School. On 20 January 2016 she was informed of her new posting under the Policing in Your Neighbourhood (PIYN) organisational change implemented by Surrey Police. She had provided her preferences in this order:

(1) Safeguarding Investigation Unit
(2) CID
(3) Occurrence Management Unit

47. In fact she was not posted to any of these preferences but was posted to the Area Policing Team (APT) which was a uniformed branch.

48. On 14 February 2016, the Claimant having been offered the Student Support Officer position with Hollyfield School, resigned. Her last day of work and service were 26 February 2016 and 13 March 2016 respectively. Her resignation letter read as follows:

"Dear Sir

Please find this letter to formally notify you of my resignation as a Detective Constable with Surrey Police. I hereby give 4 weeks notice as required.

I'm resigning as I feel I can no longer work within Surrey Police due to a number of past and present situations arising within the workplace

Yours faithfully
Rebecca Tiffin DC2984"

49. On 17 May 2016 the Claimant presented her claim to the Employment Tribunal.

DECISION

50. The Claimant's claims were clarified by her solicitor in "Details of Complaint and Further Particulars of Claim" on 1 June 2016. The further particulars were clarified at the preliminary hearing on 15 August 2016 and they are reproduced below with the clarifications and amendments made during the course of the tribunal hearing.

Burden of Proof – Equality Act 2010

51. For discrimination claims under the Equality Act 2010 the burden of proof is set out in section 136 of the Act. If there are facts from which the Tribunal could decide in the absence of any other explanation that a person contravened the provision concerned the Tribunal must hold that the contravention occurred. But that does not apply if the person shows that he or she did not contravene the provision.

52. There is guidance from the Court of Appeal in Madarassy v Nomura International plc [2007] IRLR 246. The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination, they are not without more sufficient material from which a Tribunal could conclude that on the balance of probabilities the Respondent had committed an unlawful act of discrimination. The Claimant must show in support of the allegations of discrimination a difference in status, a difference in treatment and the reason for the differential treatment.

53. If the burden of proof does shift to the Respondent, in Igen v Wong [2005] IRLR 258 the Court of Appeal said that it is then for the Respondent to prove that he did not commit or is not to be treated as having committed the act of discrimination. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof and to prove that the treatment was in no sense whatsoever on the prohibited ground.

54. Section 23 requires that on a comparison of cases there must be no material difference between the circumstances relating to each case.

Discrimination Arising from Disability – section 15 Equality Act 2010

55. Equality Act 2010

Section 15

(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

56. This complaint was set out in the further particulars of claim at paragraphs 36 and 37 as follows:

36. The Claimant contends that the Respondent treated her unfavourably because of the Claimant's sickness absence, … and her inability to pass the bleep test all of which were arising out of her disability. The Claimant contends that the following amounts to unfavourable treatment:

36.1 She was placed on an informal action plan in July 2015:

57. The Claimant was placed on a Supportive Informal Action Plan dated 29 July 2015 and quoted above. The Tribunal found, however, that this did not amount to unfavourable treatment. It was, according to its title, supportive of the Claimant on her return to work after a lengthy period of sickness absence. The aim of the plan was to support the Claimant in achieving acceptable standards of performance and attendance. Insofar as attendance was concerned, an uplift of 50% was applied to the frequent absence criteria as a reasonable adjustment to take into account the Claimant's disabilities. She was not required to return to full hours until the expiry of 6 months from her return to work. So far as the AFA was concerned, the time limit of 3 to 6 months was based upon Dr Yarnley's report dated 2 July 2015 which is quoted above.

58. DS Jenkins stated in his evidence that the meeting at which the action plan was discussed was "a very positive meeting" and he said that he recalled that the Claimant was keen to pass the fitness test.

36.2 She was not posted to a CID role;
36.3 She was effectively demoted from her DC rank;
36.4 She was no longer able to pursue her career in CID

36.5 She posted to an unsuitable role that would require her to deal with confrontational situations;
36.6 She was posted to an unsuitable role on the assumption that she would be absent on sick leave;
36.7 She was posted to a role where it would be necessary for her to pass the bleep test;
36.8 The combined impact of 36.1 to 36.7 which forced the Claimant to resign.

59. The Tribunal found that, as stated above, the Claimant was posted to the uniformed APT role. The decision regarding her posting was made at a meeting held on 6 January 2016 attended by DCI Vale as part of a group of senior police officers and staff. No notes of the meeting were taken but decisions were made regarding all police officers affected by the reorganisation. Up to 400 postings were involved. DCI Vale could not recall any particular discussion regarding the Claimant's position but, having been requested by her to provide reasons why she had been posted to APT, he did so on 18 February 2016 as follows:

"Dear Becks,

I see you have resigned today and have been waiting for an explanation on why you were posted to APT. I was in the PIYN meeting where we discussed staff preferences and the decision was made about you. To be honest, I don't remember an explicit conversation about you, but I would summarise the reasoning as follows:

- *Unfortunately you have been off for long periods, which resulted in being served UPP stage 2 documents due to absence.*

- *You then had an informal action plan around your fitness test in July 2015. And have not been able to pass the test, which is a prerequisite for all those working as operational police, such as being DC in CID.*

- *I note that you have had support from each of your line managers, OH, GP and Carl Warn but you have been unable to keep to the attendance and fitness requirements.*

- *As CID will be so much smaller come April - 16 DCs – any absence would have a large impact on the operational effectiveness of that team. Due to this and the issue that it seems unlikely you will pass your fitness test, my view is that you could be better managed in the APT where the teams are much larger than CID.*

- *Furthermore, as you've been absent from CID for so long, you would have needed an element of tutoring. I don't have the opportunity to do that, as there are only 2 full time tutors in the new CID.*

I hope this goes some way to explain the rationale on your posting. However if not, and would like to sit down to discuss please let me know a date.

Best regards
Clive Vale"

60. DCI Vale emphasised that he did not personally make the decision regarding the Claimant's posting but he was part of the meeting in which all the decisions were made. His account of the reasons set out above were a summary of his own thinking about what the reasons were. It was not part of any formal record of the meeting.

61. The Claimant submitted that posting her to a uniformed role that she did not want or desire constituted unfavourable treatment. DCI Vale conceded that most officers in CID would view a posting to a uniform role as a step backwards with a loss of status. In these circumstances, the tribunal found that the posting to APT amounted to unfavourable treatment.

62. Additionally, it was clear from DCI Vale's evidence regarding the rationale for the posting, as set out above, that the posting was based upon matters related to the claimant's sickness absence and her inability to pass the AFA, both of which arose out of her disability.

63. The Tribunal then went on to consider the Respondent's defence of justification. The Respondent's position was that the attendance requirements and the fitness requirement were proportionate means of achieving legitimate aims as follows:

"71. Paragraph 41 of the Grounds of Complaint is denied. Further, the application of the alleged PCPs was a proportionate means to achieve the legitimate aims of:

a) having officers who officers who are fit to perform the role of a police officer. (The requirement was to complete the 'bleep test' to level 5.4, which is approximately 3.5 minutes of running. Officer safety training/conflict training is required bi-annually in order to ensure officers can protect themselves and others in conflict situations. All officers are required to undergo this training in order to ensure they are safe whilst out and about); and

b) having officers, who are able to attend work regularly in order to perform their role of protecting and serving the public."

64. The Tribunal found that those were legitimate aims. And the means to achieve those legitimate aims were proportionate as set out in DCI Vale's rationale for the Claimant's posting to APT.

65. The intention and purpose of the posting to APT was to ameliorate the effects of past and any future sickness absence and to assist the Claimant

and that was a legitimate aim. DCI Vale said that part of the reason was to protect the Claimant from a difficult job in SIU in which the pressures were great and officers were, uniquely, subject to biannual psychological assessments. He considered that this would be inappropriate for someone who had, and probably still was, suffering from stress.

66. The CID Unit was much reduced, down to 16 officers, and he took the view that the Claimant would have the opportunity for better management in the much larger APT consisting of approximately 250 officers. He considered that it would be a role in which she might flourish, pass the AFA, and then could make an application to move on to another role if she so wished. He confirmed that the posting to APT was not a demotion, and would not result in the loss of the Claimant's PIP/CID accreditation. In all operational roles, that is CID, SIU, OMU and APT, the Claimant would, like all other officers, have to pass the AFA before being allowed to conduct any face to face duties. All would include confrontational situations. The Tribunal found that the APT posting, although unwanted by the Claimant, was a proportionate means of achieving a legitimate aim.

67. The Tribunal did not accept that the APT was an unsuitable role nor that the assumption of possible future sickness absence was discriminatory. The APT posting was justified and was in large part a positive posting with the aim of providing a reasonable adjustment to deal with the Claimant's disability.

<u>Failure to Make Reasonable Adjustments - section 20 Equality Act 2010</u>

68. Equality Act 2010

Section 20

(1) The duty comprises the following three requirements.
(2) The first requirement is a requirement, where a provision, criterion or practice [PCP] *of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

69. This complaint was set out in the further particulars of claim at paragraphs 38 to 43 as follows:

38. The Claimant has been subjected to the following provisions criteria or practice (PCPs):

38.1 The Respondent's performance/attendance procedure:

70. The Tribunal accepted that these PCPs in the form of the Unsatisfactory Performance Procedures ("UPP") were applied to the Claimant.

38.2 The requirement to undergo and pass a standard bleep test/ and or alternative bleep test:

71. The Tribunal found that the PCP of being required to pass a standard bleep test was applied to the Claimant. She was never required to undergo and pass the alternative bleep test, that was not a PCP.

38.3 The requirement to have … satisfactory levels of … attendance:

72. The Claimant was required to have satisfactory levels of attendance. This was a PCP.

38.4 …
38.5 The application of the performance/attendance procedures with the same sickness absence triggers as non-disabled officers.

73. Throughout her employment, other than during the period when the Claimant was pursuing her application for ill health retirement (from June 2014 to January 2015), the Claimant was subject to the performance procedures which applied to all officers. Up to the issue of the Supportive Informal Action Plan regarding attendance dated 29 July 2015 the Claimant was subject to the same attendance procedures and the same sickness absence triggers as non-disabled officers. In the Plan an uplift of 50% was applied to the frequent absence criteria. These were PCPs.

39. The PCPs separately or cumulatively put the Claimant and individuals that share her disability at a substantial disadvantage in comparison to individuals who do not share her disability in that:

39.1 She was placed on an informal action plan in July 2015:

74. The Tribunal found that this was not a substantial disadvantage for the same reasons given above for the finding that it did not amount to unfavourable treatment.

39.2 She was not posted to a CID/ SIU role:

75. The Tribunal found that this was a substantial disadvantage for the same reasons as the finding above that it was unfavourable treatment.

39.3 She was effectively demoted from her DC rank:

76. The Tribunal found that this was not a substantial disadvantage. The Claimant was not demoted as confirmed by DCI Vale.

39.4 She was no longer able to pursue and or develop her career in CID/SIU:

77. The Tribunal found that this was not a substantial disadvantage. The Claimant was not prevented from pursuing or developing her career in

CID/SIU in the future so long as she was able to maintain satisfactory levels of attendance and pass the AFA.

39.5 She posted to an unsuitable role that would require her to deal with confrontational situations:

78. The Tribunal found that this was not a substantial disadvantage. The post was not unsuitable as found above at paragraph 67 above.

39.6 She was posted to a role where it would be necessary for her to pass the bleep test:

79. The Tribunal found that this was a substantial disadvantage because all operational roles required an AFA pass, and because of her disability the Claimant was unable to pass the test.

39.7 She was forced to resign from her role as a police officer and has suffered salary and pension loss:

80. The Tribunal did not find that this was a substantial disadvantage, the Claimant was not "forced" to resign. That was her choice and done at least in part because she had secured alternative employment which suited her. This is not a case which involves a claim for constructive dismissal.

40. The following reasonable adjustments may have removed the substantial disadvantage that the Claimant faced:

40.1 Not applying the performance/attendance procedures

81. The Respondent's attendance criteria includes the following:

"Attendance Criteria

Under the provisions of the attendance criteria, individuals will normally be rejected when, in the previous three years, they have been absent from duty through sickness:

- *For an average of more than ten working days per year; or*
- *On more than nine separate occasions, or*
- *In a pattern of absence that causes the line manager to feel unable to rely upon regular attendance or performance in the future*

Absences covered by the Equality Act 2010, under disability, will not automatically be discounted, however an uplift may be applied as a reasonable adjustment. Each case will be assessed on an individual basis to ensure that the Force has made reasonable workplace adjustments, taking into account personal circumstances.

There is no legal obligation for Surrey Police to discount all disability related absences."

82. In the case of Bray v London Borough of Camden [2002] UKEAT/1162/01) it was said that an employer is not under a legal obligation to discount all, or indeed any, absence due to a disability when considering whether to dismiss by reason of ill health capability.

83. The Tribunal found that it would not be a reasonable adjustment to disapply the attendance procedures. There was no evidence that the Claimant was, or would become, permanently unable to attend work by reason of her disabilities. On the contrary, the medical evidence obtained during the course of the consideration of the application for ill health retirement indicated that the Claimant's conditions did not have the required degree of permanence. While an adjustment to the attendance requirements and trigger points would be reasonable (see below), the disapplication of the policy as whole was not reasonable.

84. So far as the performance procedures were concerned, the Tribunal also found that it would not be a reasonable adjustment to disapply the requirement to pass the AFA. While there may be some adjustment in the time limits for compliance (see below), a complete disapplication would not be reasonable. The requirement to pass the AFA applied to all operational officers within Surrey Police (and eventually nationally) and was a necessary requirement for safety and operational reasons.

85. Although the Claimant made reference to other police officers who Ms Cilia said had been allowed to continue at work without having passed the AFA, the tribunal had no evidence before it regarding their circumstances. The Claimant's application for the late introduction of a spreadsheet regarding other officers was refused during the course of the hearing because of the lateness of the application and because it was not necessary for the fair disposal of the proceedings. Full reasons were given for the Tribunal's decision.

40.2 Adjusting the trigger points:

86. So far as the attendance procedure was concerned, the trigger point was adjusted in the supportive informal action plan referred to above dated 29 July 2015. An uplift of 50% was applied to the frequent absence criteria as a reasonable adjustment to take into account disability-related absence. It follows that this reasonable adjustment was applied.

40.3 Not requiring the Claimant to do the fitness test or allowing her more time to prepare for it.

87. Not requiring the Claimant to do the fitness test was not a reasonable adjustment. But she was allowed more time to prepare for it and other reasonable adjustments were put in place.

88. The AFA policy required the successful completion of the AFA on an annual basis. The policy contained provisions for a referral to occupational health if an officer had a medical reason which would prevent them from completing the AFA successfully. There was then the option of the alternative AFA which involved walking on an inclined treadmill but this was only available on the recommendation of occupational health for a medical reason, for example difficulty in hearing the bleeps or knee problems causing difficulty in turning. The policy also contained a provision which provided for failure to successfully complete the test. The policy stated:

"Assuming there is no medical reason, your line manager will discuss it with you and arrange for you to retake the assessment, usually within a month. … The Force Fitness Advisor can provide training programmes to assist staff in reaching the required standard. Occupational health will also offer support. … A second failure will lead to referral to occupational health. They will agree an action plan with you to help you pass and say when you should reach the standard by."

89. After the first and subsequent failures to successfully complete the AFA, the Claimant was given several further extended periods to take and pass the test allowing her more time to prepare and improve her fitness. Additionally, she was given support by Mr Warn and DI Molyneux. Mr Warn provided the Claimant with the opportunities to train and improve fitness including a training plan and courses and classes at the police gymnasiums in the Surrey Police area. Opportunities were provided to take part in practice runs of the bleep test on a weekly basis.

90. DI Molyneux allowed the Claimant flexibility to use the gym at Staines Police Station and she was encouraged to use her meal break to use the gym and the opportunity for extended breaks to do so if required. She also agreed a local agreement with the Claimant's detective sergeant if there was a quiet time in the shift to use it to train and she also personally went with the Claimant to run the bleep test with her. Additionally, DI Fielding started an unofficial running club which the whole department, including the Claimant, was invited to join so that officers and staff could improve their fitness. The Tribunal found that the Claimant was provided with ample support, flexibility and opportunity to improve her fitness in order to enable her to pass the AFA. These were reasonable adjustments.

40.4 Providing the Claimant with a restricted role in CID suitable for her level of restriction where passing the bleep test is not a requirement for the role:

91. The Tribunal did not find this to be a reasonable adjustment. All operational officers, including all of those in CID, were required to pass the AFA for reasons of safety and operational reasons. Restricted roles were available only on a temporary basis. It was not reasonable in the Claimant's circumstances, where she had never successfully completed the AFA, to put her on restricted duties on a permanent basis.

40.5 Providing the Claimant with a non-confrontational role in CID/SIU where passing the bleep test is not a requirement for the role;
40.6 Providing the Claimant with a non-confrontational role where passing the bleep test is not a requirement for the role:

92. The Tribunal found that it was not a reasonable adjustment to provide the Claimant with a non-confrontational role in CID or SIU or elsewhere on a permanent basis. Had she not resigned, then she would have been assigned to APT but would continue to be subject to the UPP performance procedure and would not be allowed to undertake confrontational duties until she had passed the AFA. If she had continued to fail, she would have reached the UPP stage 3 and faced dismissal. The Respondent's witnesses confirmed that restricted duties and roles were available but there was no evidence that any such roles for operational officers were available on a permanent basis. The Tribunal did not consider that these would be reasonable adjustments.

Indirect Disability Discrimination – section 19 Equality Act 2010

93. This complaint was withdrawn during the course of the hearing.

Victimisation- section 27 Equality Act 2010

94. Equality Act 2010

Section 27 – victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

95. This complaint was set out in the further particulars of claim at paragraphs 47 to 49 as follows:

48. The Respondent has subjected the Claimant to the following detriments:

96. The Claimant complained that she had been the subject of 12 separate detriments because she had made protected acts as follows:

49.2 Claimant's grievance 17 February 2014;

97. The Tribunal found that this qualified as a protected act as it made a complaint of disability discrimination although no details of the discrimination were provided.

49.3 28 February 2014 when the Claimant appealed the Stage 1 UPP;
49.4 Claimant's email to DCI Smith on 16 September 2015.

98. The Tribunal was unable to identify any protected act within the meaning of section 27 Equality Act 2010 in these documents. There was no allegation, implied or express, that any person had contravened the Act.

99. The 12 alleged detriments are dealt with below under the heading of "Harassment".

100. The complaint of victimisation fails in its entirety because the Tribunal could find no causal link between the protected act in the grievance dated 17 February 2014 and any of the alleged detriments set out below. The Claimant was asked directly by the Tribunal for the basis upon which she alleged that the detriments had been done because of the protected act. She was unable to point to any link between them. She referred to paragraph 126 of her witness statement in which she said: *"I also consider that I may have been the subject of such detrimental conduct because of the very fact I was challenging the organisation and complaining about my treatment."*

101. The Tribunal found that was not a sufficient basis to establish that any of the alleged detriments were motivated by the protected act. The Claimant's representative in his oral closing submissions accepted that this claim was "difficult to prove" but pointed to the fact that no notes of the meeting on 6 January 2016 at which the postings were agreed were held and failure to keep such a record meant that the burden of proof shifted to the Respondent. The Tribunal did not accept that proposition. The Claimant is required to show a protected act, alleged detriment and a causal link between the two (see Madarassy above). There was no evidence whatsoever of any causal link.

Harassment - section 26 Equality Act 2010

102. Equality Act 2010

Section 26 – Harassment

(1) A person (A) harasses another (B) if –
(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(2) in deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

Section 40 Employees and applicants: harassment

(1) An employer (A) must not, in relation to employment by A, harass a person (B) –
(a) who is an employee of A's

103. This complaint was set out in the further particulars of claim at paragraphs 48 and 50 to 52 as follows:

48.1 Placing the Claimant on an informal action plan (para 22):

104. The Tribunal found that this was not a detriment for the same reasons that it was not unfavourable treatment or a disadvantage as found above.

48.2 Failing to resume the Claimant's grievance in good time and until September 2015 (para 6)

105. DCI Smith explained her reasons for producing two versions of the grievance outcome and they are set out above. The first version was produced at the insistence of the claimant even though she could not interview DI Molyneux who was absent on maternity leave.

106. She then produced an updated outcome after she had spoken to DI Molyneux on her return to work. Although this was delayed until September 2015, the delay was explained by reason of the Claimant's continued absence on sick leave for part of this period and DCI Smith's own absence on sick leave. When she returned to work, she returned to a different job and had substantial work priorities which had accumulated during her absence of nearly 8 weeks. There was then further correspondence between her and the Claimant's representative, DS Cilia. The result was that DCI Smith was unable to meet with DI Molyneux to discuss the Claimant's grievance until August 2015. Accordingly, there was a delay but it was explained. The reasons for the delay were not related to the Claimant's disability.

48.3 Discouraging the Claimant from appealing her grievance outcome (para 6):

107. Having received the updated grievance outcome, the Claimant asked DCI Smith for a copy of the information that was provided by DI Molyneux. DCI Smith did not discourage the Claimant from appealing the grievance outcome and she explained her reasons in an email to the Claimant on 17 September 2015 as follows:

"I have made the decision that I do not think it would be helpful for you to have any more information on this matter. As already stated there isn't any material that is written, it was a verbal discussion between myself and DI Molyneux, therefore I don't have anything to give you.

I have considered your request to see the comments made by DI Molyneux on the report and I just don't think it will help you Becks. There is not much detail on there, and what I am trying to avoid is a situation where you go back and forth adding information, refuting bits and essentially getting nowhere. The grievance is complete and I will not do anymore work on it at this time.

Becks you are entitled to appeal and you have until the 22nd September to do this, there are two grounds to seek a decision and these are:

There was an abuse of the process
That the decision was unreasonable

I am not trying to be difficult or not give you what you want, the information just isn't in my gift, and I genuinely think a grievance will not give you the resolution or closure you require it won't give any formal sanctions or a breach of any discipline code, and often leads to an outcome that isn't agreed by both parties. I think there has been a lot of learning within the SIUs in Surrey and they are totally different teams from the time you worked without them, that is a great thing and I am pleased that as an organisation we have recognised the risk held by the teams and the need for more staff.

You won't get the acknowledgement through the grievance process that you state below as wanting as an outcome, it isn't about the force blaming anyone or apportioning blame it is to identify learning, which I think has been done. The SIU doesn't now need a cultural assessment as it has been completely changed, and DI Molyneux has been spoken to about how you felt and what you stated in your grievance."

108. The Claimant did not appeal against the final grievance outcome but she was not discouraged or prevented from doing so. The reasons given by DCI Smith were unrelated to the Claimant's disability.

48.4 Requiring the Claimant to undergo the bleep test, despite her disabilities (para 25)

48.5 Posting the Claimant back to a uniformed role (para 27)
48.6 Posting the Claimant to an unsuitable role that would require her to deal with confrontational situations (para 28);
48.7 She was posted to a role where it would be necessary for her to pass the bleep test (para 28)
48.8 Denying the Claimant a post in CID/SIU despite vacancies in both departments (para 28)
48.9 The reasons given to the Claimant by T/DCI Vale for not posting the Claimant in CID/SIU (para 29)
48.10 Denying the Claimant a right to appeal her posting (para 30)
48.11 Inspector Fielding's comment at the DS Briefing saying "you have Rebecca Tiffin now" and raising at eyebrow at the time of the comment (para 31).
48.12 the combined impact of 48.1 to 48.11 which forced the Claimant to resign.

109. In Grant v HM Land Registry [2011] EWCA Civ 769 the Court of Appeal said that in that case even if the conduct was unwanted, and the Claimant was upset by it, the effect could not amount to a violation of dignity, nor could it properly be described as creating an intimidating, hostile degrading, humiliating or offensive environment. It said that Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.

110. In Richmond Pharmacology v Dhaliwal [2009] ICR 724 it was said that dignity is not necessarily violated by things said or done which are trivial and transitory, particularly if it should have been clear that any offence was unintended. … It is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.

111. So far as **48.10** was concerned, there was no formal right to an appeal but the Claimant could have presented a grievance in respect of the posting to APT. However, by that time, she had already made an application for alternative employment outside and shortly afterwards took up the offer of that employment. DCI Vale explained that the requirements of any police force were that officers would go where they are posted and that applied to him and other senior ranks as much as to constables. A police force could not operate effectively and efficiently if its officers were able to choose their postings and appeal against decisions made by their senior officers. There was provision for preferences to be indicated by individuals. Not everyone received their first or indeed any preference and the Claimant was not the only person in this position.

112. So far as **48.11** was concerned, the Tribunal accepted DS Cilia's evidence that this event occurred. However, there was no evidence as to whether the act was intentional or not, nor what was meant by DI Fielding or what it meant to the audience. The accompanying words were unremarkable. Whatever the meaning or intended meaning of the conduct, the Tribunal

noted that the Claimant was not present at the time and it was reported to her later by DS Cilia. It was by any standards a trivial matter. It did not amount to an act of harassment.

113. Taking account of the wording and requirements of section 26 Equality Act 2010, the Tribunal found that the application and requirements of the Respondent's attendance and fitness procedures and the circumstances and outcome of the Claimant's posting to APT in January 2016 were not matters which fell within the definition of harassment. They all involved the proper application of the Respondent's procedures and practices. All of them are dealt with above under the other heads of complaint.

114. The Police Force is a uniformed, disciplined organisation with requirements and demands unlike any other organisation. As long as there is reasonable flexibility, and reasonable allowance and adjustment is made for disability, it is entitled to approach and apply its procedures and policies in a manner which is rather more strict than other organisations. These are necessary requirements for the safety of both police officers and the public, and for the achievement of operational effectiveness.

115. The Tribunal found that none of the above matters amounted to harassment within the meaning of section 26 Equality Act 2010.

Indirect sex discrimination (section 19 Equality Act 2010)

Section 19 – Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies a provision, criterion or practice which is discriminatory in relation to a protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a protected characteristic of B's if-

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) It puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

116. This complaint was set out in the further particulars of claim at paragraphs 53 to 55 as follows:

53. The requirement to successfully undergo the standard bleep test amounts to a PCP.

54. The PCP put or would put women at a particular disadvantage when compared with men … cannot … comply with the requirement to:
(i) …
(ii) Pass the standard bleep test

55. The PCP placed the Claimant at a disadvantage as she could not comply with the requirement to … pass the standard bleep test …

The Respondent will not be able to show that the PCP was a proportionate means of achieving a legitimate aim.

117. The requirements of the AFA (bleep test) are set out above at paragraph 11 of these Reasons.

118. The requirements of the bleep test were to achieve a score of 5.4 on a 15 metre shuttle run and this requirement was based upon a scientific assessment commissioned by the College of Policing following a recommendation of the Winsor Review for annual fitness testing of serving police officers.

119. The Tribunal found that it was a provision, criterion or practice which was applied to all police officers, including the Claimant, whatever their sex.

120. The parties agreed that the relevant statistics regarding pass/fail rates were set out at page 153L as follows:

	Male	Female	TOTAL
Number of times test was attempted	5876	2637	8513
Number of times test was passed	5862	2547	8409
Number of times test was failed	14	90	104

Pass %	99.76%	96.59%	98.78%
Fail%	0.24%	3.41%	1.22%

The above figures show the number of times that the fitness test was attempted, and the number of those that passed or failed the test from 1st January 2012 to 31st December 2016. This means that officer will be counted multiple times in the period.

121. This statistical data, collected over a 5 year period, shows a 3.17% difference in pass/fail rates between male and female police officers. It did not include any analysis of the reason for the disparity.

122. The pool for comparison consisted of all police officers serving with the Respondent during the period 1 January 2012 to 31 December 2016.

123. The Respondent claimed that the difference did not amount to a significant disproportionate impact on female officers and did not therefore amount to indirect discrimination. Further, it was said that the AFA was a proportionate means of achieving a legitimate aim, namely to ensure that police officers are sufficiently fit to perform the role of a police officer safely. (See paragraph 63 of the Reasons above.)

124. The Claimant's case was that the difference was statistically significant and put women officers at a particular disadvantage. The defence of justification was challenged. It was said that there was an alternative test, using a treadmill, which would have been an alternative means of meeting the legitimate aim without any discriminatory impact on women.

125. In Essop and Others v Home Office (UK Border Agency) [2017] UKSC 27, it was decided as follows:-

125.1 None of the various definitions of indirect discrimination included any express requirement for an explanation of the reasons why a particular PCP put one group at a disadvantage when compared with others. There was no requirement for example to show why the proportion of women who could not comply with a requirement was smaller than the proportion of men. It was enough that it was. Sometimes the reason why the disadvantage arises will be obvious, but sometimes it will not.

125.2 There was a contrast between the definition of direct discrimination, which did expressly require a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination on the other hand required a causal link between the application of the PCP and the particular disadvantage suffered by the group and the individual.

125.3 The reasons why those with a particular protected characteristic may find it harder to comply with the PCP are many and varied.

125.4 There is no requirement that the PCP in question puts every member of the group sharing the particular protected characteristic at a disadvantage.

125.5 It is commonplace for the disparate impact to be established on the basis of statistical evidence.

125.6 It is always open to the Respondent to show the PCP is justified.

126. In this case, there was a disparate impact on women officers shown by the statistical evidence collected over a 5 year period. The disparate impact was small, but there is no need for a "significant" disadvantage in section 19 of the Act. What is required is a "particular" disadvantage. Although statistically small, the Tribunal concluded that the disparate impact did amount to a particular disadvantage for women officers.

127. The Tribunal then went on to consider the Respondent's defence of justification.

128. In Homer v Chief Constable of West Yorkshire Police and West Yorkshire Police Authority [2012] UKSC 15, it was said that to be a legitimate aim, the aim must correspond with a real need.

129. So far as proportionality is concerned in the case of Hardy & Hansons Plc v Lax [2005] EWCA Civ 846, it was said:

"The principle of proportionality requires the Tribunal to take into account the reasonable needs of the business. But it has to make its own judgment upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary."

130. This requires the Tribunal to balance the discriminatory effect of the AFA against the Respondent's legitimate aim of ensuring the fitness of police officers by use of the AFA.

131. The EHRC Code of Practice on Employment (2001) paragraph 4.27 suggests that the question of whether the provision, criterion or practice is a proportionate means of achieving a legitimate aim should be approached in two stages.

132. Firstly, is the aim of the PCP legal and non-discriminatory, and one that represents a real objective consideration? The Tribunal found that the stated aim of the AFA test, as set out above, did fulfil these requirements and was a legitimate aim. There was a real need to ensure that police officers were fit enough to perform their duties safely.

133. Secondly, if the aim is legitimate, is the means of achieving it proportionate - that is appropriate and necessary in all the circumstances? The Tribunal found that the bleep test was a proportionate means of achieving the legitimate aim. A measure adopted by an employer does not have to be the only possible way of achieving the legitimate aim to be proportionate. In determining that the means were proportionate, the Tribunal took account of the relatively small disparate impact referred to above. Insofar as the alternative test was concerned, there was no statistical evidence regarding the possible discriminatory effect of that test. Additionally, the Claimant never attempted the alternative test, nor was she eligible to do so under the terms of the AFA process. No other means of testing fitness was suggested or apparent.

134. It follows that the Tribunal found that the PCP of the AFA was justified.

135. The Tribunal went on, however, to consider what was described in the Essop case as "coat-tailing". That is where a Claimant is unable to comply

with the PCP for a reason unrelated to the disadvantage suffered by the pool for comparison.

136. The Tribunal found as a fact that the reason why the Claimant was unable to successfully complete the AFA test was because of unfitness related to her disabilities. Indeed, that was part of the Claimant's pleaded case under section 15 of the Act set out at paragraph 56 above. There it was said that her inability to pass the bleep test arose out of her disability.

137. In the occupational health report dated 12 February 2014 (referred to above) it was said:

"As she is still undergoing investigations in relation to her physical symptoms, she also remains unfit for the fitness test at present. I am optimistic that once her symptoms of depression and anxiety are adequately managed with treatment as mentioned above, she may feel better inclined to engage in an exercise programme to improve her level of fitness. With this approach, it is possible that she may be able to attempt the fitness test later in the year."

138. Then again in 28 July 2014 the medical report included:

"Currently affected capabilities… She is unable to run due to general deconditioning and obesity."

139. And later, on 2 June 2015, the Force Medical Officer reported:

"… I do not consider she will be able to successfully complete the fitness training or officer safety training. It is likely to be three to six months before she will be able to do so. …"

140. It follows that, whatever the reason for the statistical disparate impact of the AFA on female officers, so far as the Claimant was concerned it was her personal fitness which prevented her from successfully completing the bleep test.

141. In summary, the Tribunal found that the bleep test was justified insofar as any group disadvantage was concerned. The Claimant did not suffer a particular disadvantage because of her sex, but because of her lack of fitness.

142. It follows that the complaint of indirect sex discrimination is not well founded.

<u>Jurisdiction – Time limits</u>

143. Equality Act 2010

Section 123

(1) Subject to sections 140A and 140B, proceedings on a complaint within section 120 may not be brought after the end of-

(e) the period of 3 months starting with the date of the act to which the complaint relates, or
(f) such other period as the employment Tribunal thinks just and equitable.

…

(3) For the purpose of this section -
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

144. The Claimant made submissions regarding jurisdiction and time limits in the further particulars of claim at paragraphs 57 to 59 as follows:

57 The Claimant commenced ACAS early conciliation on and a certificate was issued on 4 May 2016 (ACAS EC Reference Number R135052/16/48. The last act relied on in respect of this matter occurred on 13 March 2016 and the Claimant's ET1 was submitted on 17 May 2016 therefore the Claimant claim and these further particulars of claim have been submitted within the limitation requirements.

58 Some of the acts and/or omissions set out in the paragraphs above occurred more than three months before the Claimant submitted this claim. However, they, together with the acts and/or omissions set above amounted to a conduct extending over a period within the meaning of section 123(3)(a) of the Equality Act 2010. Hendricks v Commissioner of Police for the Metropolis (2002) EWCA Civ 1686 and Cast v Croydon College [1998] ICR 500

59 Further and alternatively, the Claimant contends that insofar as her claims are out of time, it is just and equitable in all the circumstances for the Tribunal to extend time.

145. The Tribunal considered that it was arguable that some of the events which fell outside the time limits were part of conduct extending over a

period. Also, it was just and equitable to extend time because most of the events were well documented and there was no prejudice to the Respondent if time was extended. The Tribunal considered that it had jurisdiction to consider all the complaints.

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Employment Judge Vowles

Date: 10 July 2017

Sent to the parties on: .....

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For the Tribunal Office