EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4108552/2018

Hearing Held at Dundee on 23, 24, 28 and 29 January 2019, deliberation days on 31 January 2019 and 1 March 2019

Employment Judge: Mr A Kemp
Members: Ms J Torbet
Dr R A'Brook

Ms L Aberdein — **Claimant**
Represented by:
Mr C Edward
Advocate

The Chief Constable of the Police Service of Scotland — **Respondent**
Represented by:
Mrs S Gallagher
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The unanimous decision of the Tribunal is that

(i) the Claimant suffered a detriment by unlawful discrimination arising out of disability under section 15 of the Equality Act 2010 in respect of the introduction of part of an informal Action Plan for the period 26 September 2017 to 26 November 2017 under which the Claimant was required to work until 1am when on late shift and undertake Dundee Safe duties when doing so

(ii) the Respondent failed to maintain a reasonable adjustment that they had made for the Claimant not to work beyond 11pm by the introduction of part of an informal Action Plan for the period 26 September 2017 to 26 November 2017 under which the Claimant was required to work until 1am when on late shift and undertake Dundee Safe duties when doing so, in contravention of sections 20 and 21 of the Equality Act 2010

(iii) there was no dismissal of the Claimant in terms of section 39 of the Equality Act 2010 and the claim therefor is dismissed

(iv) the Claims made under sections 13 and 26 of the Equality Act 2010 are not successful and are dismissed.

2. The issue of remedy will be determined at a separate hearing on a date to be fixed.

REASONS

Introduction

1. This Hearing had been fixed as a Final Hearing initially, but by email dated 18 January 2019 it had been confirmed that it would be in relation to liability only, with remedy to be determined if necessary at a later date.

2. On the day before the hearing, the Tribunal had informed the parties by email, and Employment Judge Kemp repeated at the commencement of the Hearing, that he had been a partner at Clyde and Co (Scotland) LLP, and that at least two of his partners had acted for the Respondent. The parties indicated that they were content with his acting as a Judge in the case. It was

also disclosed to the parties at the commencement of the Hearing that one of the lay members, Dr A'Brook, had a family member serving a period of imprisonment, and the parties again confirmed that no objection was taken to his sitting on the case.

3. The Respondent admitted that the Claimant had a disability under the Equality Act 2010.

4. Evidence was given by the Claimant, and two witnesses being her partner Police Constable Steven Mackay and Police Federation representative Police Constable Gordon Forsyth. For the Respondent evidence was given by Inspector Kerry Lynch, Mrs Leigh Wilson, and Sergeant Alex Munro.

5. The parties had prepared a bundle of documents, most but not all of which were spoken to in evidence.

Issues

6. The parties had agreed between them the issues in the case as follows:

"Liability"

a) Was the Claimant directly discriminated against by the Respondent (section 13 of the Equality Act 2010)? In that respect:

i Firstly, did putting the Claimant on an informal Action Plan amount to less favourable treatment compared to a real or hypothetical comparator without a disability?

ii. If so, did the Respondent take those steps because of her disability?

iii. Secondly, did the treatment alleged in paragraph 15 of the Claimant's paper apart amount to less favourable treatment compared to a real or hypothetical comparator without a disability?

iv. If so, were those remarks made as a result of the Claimant's disability?

b) Was the Claimant discriminated against by the Respondent because of something arising in consequence of her disability (section 15 of the Equality Act 2010)? In that respect:

i. Did putting the Claimant on an informal Action Plan amount to unfavourable treatment?

ii. If so, did the Respondent take those steps because of something arising in consequence of her disability?

iii. If so, were the Respondent's actions a proportionate means of achieving a legitimate aim?

c) Did the Respondent fail to make reasonable adjustments in relation to the Claimant in terms of Sections 20 and 21 of the Equality Act 2010? In that respect:

i. Did the Respondent apply the PCP of requiring the Claimant to perform the operational duties of a police officer?

ii. If so, did that PCP put the Claimant at a substantial disadvantage compared to those without her disability?

iii. If so, did the Respondent fail to take reasonable steps to remove that disadvantage?

d) Did the Respondent harass the Claimant (section 26 of the Equality Act 2010) as alleged in paragraph 15 of the Claimant's paper apart?

"Time Bar"

a) Do the Claimant's complaints in relation to her alleged harassment by Sergeant Munro set out in paragraph 15 of the Claimant's paper apart amount to conduct extending over a period within the meaning of section 123(3)(a) of the Equality Act 2010?

b) If not, are these complaints time-barred under section 123 of the Equality Act 2010 (on the basis that the events narrated in these paragraphs took place at least 6 months prior to Claimant's 5.

c) If so, would it be just and equitable for the Tribunal to extend time for submission of these complaints?"

7. During its deliberations the Tribunal considered whether the list of issues required modification, an issue referred to further below.

Facts

8. The Tribunal found the following facts to have been established:

9. The Claimant is Ms Lana Aberdein. She was 44 years of age at the time of the hearing.

10. The Claimant applied to the Respondent to be a Police Constable. When she applied for the role she disclosed in a document seen only by occupational health advisers to the Respondent that she had a history of depression and anxiety. She passed a fitness test, and a medical assessment, prior to commencing a period of probation. She commenced her probationary period for that role on or around 2 September 2013.

11. The Claimant has had a disability under section 6 of the Equality Act 2010 at all material times. She was diagnosed with anxiety and depression in 1999. The anxiety manifests itself in racing thoughts, and constant worrying. The depression manifests itself in lack of motivation and energy, not thinking properly and not engaging socially. The conditions affect her sleep, such that she has trouble getting to sleep or remaining asleep, particularly if feeling under stress. If she is unable to sleep properly that affects her level of anxiety, and reduces her ability to concentrate. Increased anxiety can in turn affect her ability to get to sleep.

12. She takes medication for the conditions, namely Sertraline.

13. There were occasions when she found going to work difficult, she felt exhausted and was crying before going to work. She felt that her concentration was affected.

14. The Respondent is responsible for the provision of a police service in Scotland.

15. The Respondent has a number of Standard Operating Procedures (SOP) for management of issues arising with, amongst others, its police officers.

16. There is an Attendance Management SOP. Its provisions include:

(i) 1.3 which states

"This SOP aims to

- ensure appropriate support to those who are absent through illness or injury before considering the procedures in the Capability (Attendance and Performance) (Police Officer) SOP…..
- maximise attendance at work and
- minimise the disruption to service caused by sickness absence."

(ii) 3.4.5 which states:

"If an individual has a disability that may be contributing to attendance problems, reasonable adjustments must be put in place during the attendance process in line with the Disability in Employment SOP. The process will only progress to the relevant Capability (Attendance and Performance) SOP if absence is still a concern despite all reasonable adjustments having been put in place."

(iii) 4.11.1 which states:

"Within the context of this SOP the term Adjusted Duties relates to duties in respect of which reasonable adjustments have been made to accommodate an officer's disability.

Once agreed, and subject to continued satisfactory performance in the role, Adjusted Duty could be long term, but will be subject to annual review, IHR or Police Performance Regulations if the officer cannot continue in the current role and a suitable alternative role cannot be found.

This will only be recorded on SCoPE Disability tab under Adjustments, unless a Restricted Duty also applies.

The Disability in Employment SOP details the guidance and procedures in relation to disability in the workplace."

(iv) 6.8.3 which states:

"An individual should not normally be progressed to the relevant Capability (Attendance and Performance) SOP unless –

- earlier supportive action was offered but the individual either declined it, or failed to co-operate and as a result there has not been the necessary improvement in the individual's attendance; and/or
- the individual is showing unacceptable levels of persistent short-term absence and, notwithstanding supportive management action having been taken, there is not sufficient improvement in their attendance; and/or
- the individual is absent due to long term sickness and, notwithstanding supportive management action having been taken, there is no realistic prospect of return to work in a reasonable timeframe."

17. There is a Capability (Attendance and Performance) SOP. Its provisions include

(i) 1(b) which states:

"This SOP aims to provide an effective framework to manage a police officer underperformance and attendance in a fair and reasonable manner. This will involve giving appropriate training and support to ensure a culture of learning and development and improved performance and attendance wherever possible."

(ii) 3(g) which states:

"Reasonable adjustments will be made for officers with a disability (including the officer accompanying them to a meeting) throughout the process if required. Reasonable adjustments must also have been considered prior to the process if applicable as outlined in section 5.6(e).

(iii) 5.2 refers to improvement periods which "should normally be for a period of 12 weeks"

(iv) 5.6(d) which states

"If an officer has a disability that may be contributing to underperformance/attendance the Disability in Employment SOP must be followed prior to consideration of capability procedures being invoked. The capability procedure will only be initiated where the disability process has been followed and performance is still below the level expected despite all reasonable adjustments having been put in place. Where additional reasonable adjustments are identified through the capability procedure these should be implemented and advice should be sought from People and Development in relation to progressing the capability process."

(v) 6.1 which states

"(a) Improvement action should be initiated by the line manager and will normally arise from initial concerns regarding the officer's performance. Improvement action aims to resolve the area of concern and to ensure satisfactory levels of performance are achieved and maintained……

(g) The line manager should keep notes of the informal discussion that have taken place in line with section 5.5 and record all relevant information on SCOPE. The line manager must ensure it is clear to the officer that this is the informal stage of the capability procedure.…..

(k) If improvement action does not result in a satisfactory improvement in performance the line manager should seek advice from People and Development before informing the officer that there

will be a requirement to progress to the First Stage of the formal process outlined in section 6.3."

18. There is a Disability in Employment SOP. Its provisions include

(i) at section 5.1 reference to a map, found at Schedule E

(ii) 5.2.7 which states:

"SCOPE should be updated to record that an individual has a disability. This should include management information relating to the requirements of the individual but not medical information."

(iii) 5.5.12 which states:

"Where reasonable adjustments cannot be made in the individual's role consideration will be given to other options such as redeployment. Advice should be sought from P&D (People and Development) in all instances where redeployment may be required."

19. In January 2015 the Claimant applied for flexible working during her probation period to amend the shift pattern to reduce later hours working, which the Respondent granted. She stated as the reason that she did so to improve her home/life balance. It was not stated to be because of disability.

20. Following the successful completion of her probation on or about 2 September 2015 she commenced service as a Police Constable. Police Constables generally work a pattern of two early shifts which are 8-9 hours long, two late shifts which are 9-10 hours long and two night shifts which are 9 hours long, on a pattern of seven days on those shifts, followed by four days of leave.

21. She initially carried out duties as a Response Officer, which involves responding to incidents some of which are in the nature of emergencies, at grades 1 or 2, which are more serious in nature and can involve threat to life or of injury. The calls may relate to domestic abuse or road traffic incidents, or to crimes such as shoplifting or sudden deaths, amongst a wide range of

issues that can arise. She worked in shifts. She had a pattern of seven days working followed by four days leave. She worked on average 40 hours per week.

22. The Claimant applied to work part-time under flexible working arrangements, for a second time in about January 2016. The reason was "to provide a good work life balance and to assist with childcare issues currently experienced under my current pattern". It was again not for a reason related to disability. The Respondent accepted the application, which led to her working an average of 30 hours per week from 1 February 2016. The arrangements also ended her working on night shift, and led to an end to late shifts at 1am, unless at weekends or working for Centre Safe (referred to below) when the shift could end at 3 or 4am.

23. On or about 8 March 2016 when at work the Claimant suffered an anxiety attack. She was sent home by her line manager. She was absent through sickness for the period 8 March 2016 to 7 May 2016. When absent she was contacted by her line manager, then Sergeant Winter, and the Claimant explained that the reasons for the panic attack were a series of difficulties in her home life, and feeling "down". When absent she continued to suffer panic attacks and was reluctant to leave the house. The calls made by her line manager were set out in a log of the same. The Claimant was offered counselling provided by an external party. Her condition improved thereafter.

24. The Respondent's managers, and human resources department, (referred to as People and Development) were not until then aware of the Claimant having such mental health issues, as although there had been disclosure of them to the occupational health provider that information is not made available unless the constable does so, which the Claimant had not.

25. The Claimant was referred to the Respondent's occupational health provider, Optima Health, on 20 March 2016. She attended before an adviser at the provider on 11 April 2016 who advised that she was temporarily unfit for duty.

26. The Claimant returned to duty on 7 May 2016, initially at 50% of her shift and gradually increasing thereafter to a full shift pattern by about June 2016.

27. The management of the Respondent in the Tayside area was in the process of making a change to the role of all Community Support Officers ("CSOs"), to an extent. They wished there to be a greater level of response duties, with CSOs undertaking greater involvement in the response to crimes in their area. They were also to be involved to a greater extent in relieving Response Officers from some of their duties, such that Response Officers could return to responding to the more serious calls. Examples of such relief duties included accompanying those who had been injured to hospital, or attending the location of an incident to keep it safe or secure. CSOs were also to be engaged to a greater extent in duties such as Dundee Safe, or issues that arose from major events or other reasons, so that there were a sufficient number of officers both as Response Officers and CSOs able to attend when required.

28. Both Response Officers and CSOs were operational police officers under the Respondent's arrangements.

29. An operational police officer is placed on a shift that has an intended end time, but for operational or other reasons may not be able to finish the shift at that time. The reason for that can include matters such as an ongoing crime response, or attending a road traffic accident, where there is no relieving officer then available. There may then be a need to work beyond the normal time to end the shift, which does not usually extend beyond two hours.

30. After the Claimant returned to work as a Response Officer on 7 May 2016 she had a phased period, then worked on shifts that were two early shifts of 7am to 5pm and two late shifts of 4pm to 1am or 5pm to 3am.

31. On or around 16 September 2016 the Claimant was sent home from work when she experienced an exacerbation of her symptoms of anxiety. She held a telephone consultation that day with an adviser at Optima Health, who reported on 27 September 2016 that the Claimant was only fit for non-operational policing roles in light of her symptoms. The Claimant informed the adviser of the inability to take time out in dynamic situations when acting as a Response Officer, but that she hoped that matters would improve when she commenced as a CSO.

32. On the Claimant's return to work she held a discussion regarding a change of role to that of Community Support Officer (CSO). The CSO role involved less work responding to incidents, and more engagement with the public in a local community. When she commenced the role she visited schools, shops, youth clubs and other establishments to engage with those there. She spent time in the local community generally. The role involved both crime prevention and responding to issues or incidents that arose in the Maryfield area of Dundee. The role did involve an element of responding to more urgent calls, either when the incident occurred near where she was located at the time or when other officers, including Response Officers, were not available, but less than that for a Response Officer.

33. Optima Health carried out a further review on 31 October 2016. By then, she had commenced her CSO role (the precise date on which she commenced that role was not given in evidence). That role was in a team of six, based at Maryfield Community Policing Team, Dundee. The adviser noted that the Claimant had experienced an improvement in her symptoms but that she still had some concerns about the effect of very late working on her symptom control. He considered her fit to perform the CSO role but suggested that in the initial two months any requirement to work past midnight was "minimised as far as possible".

34. The Respondent acted on that recommendation and in fact the Claimant did not work past midnight from early November 2016 for a period of two months.

That change to the working arrangement was made as a reasonable adjustment under the terms of section 20 of the Equality Act 2010.

35. On 25 January 2017 Inspector Kerry Lynch met the Claimant for an Attendance Support Meeting. Inspector Lynch noted that the modification to avoid working past midnight had been undertaken for the two months period recommended, and a marked improvement in the Claimant's attendance, ability and wellbeing. The Claimant explained the benefits for her of a regular routine, and that not working beyond midnight allowed her to have a regular sleeping pattern. Inspector Lynch explained the expectations of an operational police officer whether in a response or community role, which was to be flexible and be able to work shifts. The Claimant stated that shift working was detrimental to her health. Inspector Lynch and the Claimant discussed the possibility of non-operational roles in the Respondent which did not involve shift working that may be detrimental to her, and that HR and the Force Medical Adviser would be consulted as to whether or not the Claimant was fit for operational duties. It was noted that the Claimant's modified shift pattern so as not to work beyond midnight had ended and she was expected to work the shift pattern of a CSO. The Claimant stated that she felt that working shifts would be detrimental to her health and that an absence was likely.

36. The Claimant was referred to Optima Health on 3 March 2017. Their Senior Adviser reported on 28 February 2017. The conclusion of the report was that the Claimant was fit for her role, with restrictions. The report noted that the Claimant admitted that she struggled to concentrate after 11pm and would have difficulty if required to attend a call at that time due to fatigue and reduced concentration. The recommendation was that "she does not work determining whether any suggested recommendations or adjustments are operationally achievable is a management responsibility and will be considered in line with Police Scotland's policies and procedures." It stated that the author anticipated that the Claimant was likely to be held to be a disabled person under the Equality Act 2010 although that was a legal matter.

37. The Respondent acted on that recommendation, and the Claimant's shifts did not extend beyond 11pm at that time. That further change to the working arrangement was made as a reasonable adjustment under the terms of section 20 of the Equality Act 2010.

38. On 3 May 2017 the Force Medical Adviser ("FMA") Dr James Marshall met the Claimant for the purposes of a further assessment, and provided a report that day. The report referred to the previous reports and recommendations. There was reference to the Claimant having also been diagnosed with an underactive thyroid, which can exacerbate depressions, impact sleep patterns, and affect energy levels and symptoms of fatigue, but did not significantly impact on overall health. The report stated

> "In my opinion PC Aberdein remains fit for work and this would include operational duties, OST (Officer Safety Training) and CAV (Campaign Against Violence) duties, provided recommended adjustments can be accommodated within her work role."

He stated that the adjustments were likely to be required long term.

39. The adjustments that the Respondent could make, in answer to a question on that, was stated to be

> "Continue to support current shift patterns.
> No night shift work and not to work beyond 23.00.
> Driving should be restricted to basic duties only with no emergency response.
> The need for and effectiveness of adjustments in supporting her in maintaining attendance and effectiveness at work should be reviewed periodically by management."

40. He referred thereafter in answer to a question as to whether "working shifts will affect her sleep pattern which in turn will affect her anxiety and depression":

> "PC Aberdein has had difficulties adjusting to sleep disruption when working shifts in the past. Shift work disruption to circadian rhythms and sleep patterns is well recognised. The quality of restorative sleep is an important factor in maintaining stability in mental health conditions such as anxiety and depression. Night shift work will disrupt this and also effect timings, dosage and effectiveness of medication.
>
> Working current hours has enabled her to establish routine, maintain her physical health and well being and enable coping strategies to be effective. She has been able [to] provide satisfactory levels of performance in her work role and sustain attendance at work. In my opinion working shifts including full night work will disrupt this and have an adverse impact on her mental health."

41. He referred further to her coping better with a community role than with response duties.

42. The Respondent at that stage accepted that recommendation, and the Claimant continued to work with duties not extending past 11pm, or involving emergency response driving duties. That amended working arrangement was made as a reasonable adjustment under the terms of section 20 of the Equality Act 2010.

43. On 11 May 2017 Mrs Leigh Wilson an HR Adviser of the Respondent emailed Dr Marshall to ask if the Claimant met the criteria for ill health retiral. He replied on 12 May 2017 that neither shift work nor response driving were specifically included in the core duties recognised for purposes of ill health retirement, but that there could be a referral to the SMP (Selected Medical Practitioner) who determined issues of ill health retiral, and that that outcome, of an ill health retiral, could not be ruled out. He added that "Restriction on shifts has been an adjustment that has enabled PC Aberdein to maintain her attendance and effectiveness at work and given the underlying health conditions it is likely to be necessary for the foreseeable future."

44. The Claimant's line manager during most of 2017 was Sergeant Alex Munro. At that stage his shifts did not however coincide with those of the Claimant. He formed the impression that she had not been as well organised as she should be, and he tried to support her with regard to that, and had assisted her in completing paperwork that was either not properly completed, or late. He did not take action against her on an occasion when she arrived at work about two hours late. He was generally supportive of her.

45. Sergeant Munro's line manager was Inspector Lynch. Inspector Lynch was concerned that the Claimant was doing materially less work than other equivalent CSOs, that she was not being proactive in responding to issues or incidents that arose, and reporting substantially less crime than equivalent CSOs. She was also concerned at whether the recommended adjustment of finishing work at 11pm was practicably achievable for a CSO.

46. The Claimant's written output was materially less than that of other CSOs. She provided materially fewer crime reports than her peers. There was no target number of such reports, nor any minimum number that were required.

47. On 6 June 2017 Sergeant Munro completed an Attendance Support Interview with the Claimant at which the report from the FMA was discussed. She was aware that there was to be a case conference the following day, which she was not to attend. She had contacted an external provider provided by the Respondent for counselling, and the Police Federation, for support. The Federation is an organisation of police officers that provide support to fellow officers. The Claimant stated that she was coping well with the adjustments that had been made, but was worried about the assessment of her capability to carry out her role that she understood was to be discussed at the case conference. It was agreed that she would inform Sergeant Munro of any concerns that she had, and that he would address them.

48. The case conference took place on 7 June 2017 and was attended by Superintendent Andrew Todd, Inspector Kerry Lynch, Sergeant Alexander Munro, Leigh Wilson, and a note taker, from the Respondent side, and Constable Alexander Smart attending as the Police Federation representative on the Claimant's side. The note of that meeting that was produced thereafter is reasonably accurate. Superintendent Todd was the most senior officer at the meeting. An informal Action Plan was proposed, for a period of two months, which involved gathering further evidence, and Superintendent Todd asked Constable Smart to inform the Claimant of the resources available from the Federation. It was informal in respect that it was not a requirement to comply with it, and failure to do so was not a disciplinary or performance matter under any SOP.

49. The informal Action Plan was introduced for the period 9 June 2017 to 15 August 2017. The Claimant was to contact her GP for further advice, contact the Police Federation to ascertain whether they could assist and to explore options for a gradual increase of hours extending the hours beyond 23.00. HR was to contact Dr Marshall for further advice as to whether a sleep disorder was preventing the Claimant working night shifts. Those follow up actions took place. They were recorded on a form that updated the position following the informal Action Plan, and noted that the GP had not indicated any changes to medication, or that Dr Marshall had advised of any disorder.

50. The recommendation to finish work at 11pm had the potential to be difficult for the Respondent to manage in practice. The nature of police work is such that there was a possibility that an incident of some kind arose, attended by the Claimant, that did not conclude by 11pm, in respect that it was ongoing. At that stage, there was also a possibility that there was no other operational police officer available to attend to relieve the Claimant. If such a situation arose, and the Claimant did leave work at 11pm, those involved, particularly members of the public, could be adversely affected. That adverse effect could include their safety or wellbeing being impaired.

51. Despite those possibilities, the Respondent had introduced as an adjustment to the Claimant's shift pattern that she ended the late shift at 11pm after the occupational health recommendations to do so.

52. No such difficulty as was the potential referred to above arose in practice in the period from about April 2017 to 16 November 2017.

53. A second case conference was held on 29 August 2017. Those attending were the same as at the first, save that there was no attendance by a Federation representative. Mrs Wilson referred to discussions with Dr Marshall who had confirmed that no further treatment could be offered, ill health retiral was unlikely, and that it was a management decision as to whether to place the Claimant in a modified role. Sergeant Munro reported that the GP had stated that there was no sleep disorder diagnosed but that sleep disruption and consequent tiredness was a feature of anxiety and depression. He reported that her performance was adequate but that she had a reasonably light workload due to the restrictions then in place. Superintendent Todd stated that it had been a huge achievement for the Claimant to maintain good attendance thus far, and that it would be beneficial to her development to identify what her ideal or optimum working hours were, which could be done by small adjustments to her shifts. The example was given of if she was required to stay on at the end of a shift due to an ongoing incident. He stated that it would require close monitoring and support by line management.

54. Mrs Wilson contacted Dr Marshall by telephone after that meeting, on a date not given in evidence, indicating that what was proposed following the second case conference were small adjustments to the Claimant's shifts for a period of two months to assess the extent of her ability to work beyond 11pm if required, and he stated to her something to the effect that provided that it was infrequent and irregular in his opinion it was appropriate. That call was not recorded in writing in any way.

55. On 19 September 2017 Mrs Wilson emailed Inspector Lynch saying that she had tried to return her call, and asking "Shall we have a chat about how we try to find a comfortable level for Lana to work at, given the OH restriction, but also ensuring that she is working at a reasonable level but also has something in reserve too (for eventualities that arise)".

56. A second informal Action Plan was developed by Sergeant Munro on the basis of Inspector Todd's decision and input from Inspector Lynch and Mrs Wilson for the period 26 September 2017 to 26 November 2017 which comprised (i) working to 1am on Friday and Saturday evenings when on late shift duties and completing Dundee Safe duties at that time and (ii) attending and responding to ongoing incidents, taking the lead role in relation to the same, preparing and submitting crime reports timeously and to a suitable standard. Under the heading of "How will I achieve this?" it was stated:

> "Work to 0100 hours and complete Dundee Safe duties under the direction of the Duty Dundee Safe Sergeant. Attend ongoing incidents, take the lead role in relation to ongoing incidents, make suitable decisions in relation to these incidents, submit and investigate crime reports to a suitable standard and ensure that these are investigated timeously."

57. Under the heading "How will I know when I have achieved this?" was written

> "By successfully completing these duties without having any adverse effect on your health and deal with incidents to a suitable standard whilst on Dundee Safe.
>
> By completing these duties to the required standard whereby weekly feedback will be received from Sgt Munro or Jenkins."

58. The purpose of the second informal Action Plan was to seek to ascertain whether the Claimant could work beyond 11pm in a response role, such that if an incident occurred and did not conclude by 11pm the Claimant would be able to continue to handle it until another officer was able to relieve her, and to have her act in a more proactive way in responding to issues, handling

them herself making suitable decisions, and preparing the appropriate documentation thereafter to a suitable standard. It was in part a trial of her resilience, seeking to ascertain whether the Claimant could cope with such duties at such hours without experiencing mental health problems, and in part an attempt to move her towards a better standard of performance and level of contribution.

59. In light of shift patterns it was likely that working on Dundee Safe would occur on up to four occasions in that two month period. The period of 11pm to 1am was chosen as it would be most likely that alternative resource could be obtained within two hours if an incident did occur which required the Claimant to continue working after 11pm.

60. The proposed second Action Plan was communicated to Mr Forsyth as the Claimant's Federation representative shortly before it was due to commence, on a date not given in evidence, at a meeting with Inspector Lynch. It was not recorded in writing. It had been explained that it was looking to extend the finishing times to be more in line with the rest of the team, with a support mechanism to help maintain that, and it could then be reviewed. Mr Forsyth did not express any objection to the proposal.

61. Inspector Lynch communicated that second Action Plan to the Claimant at a meeting held shortly before the Action Plan commenced, the date of which was not given in evidence and which was not recorded in writing. Inspector Lynch spoke to the Claimant about the operational duties required of a police officer, including a CSO, and that that role involved an element of response duties. The Claimant said that she used to be able to do response duties, and did not know why she could not do so at that time.

62. The Claimant agreed with the informal second Action Plan at that meeting, and understood why it was proposed. She was also aware that it was for a limited time, and that afterwards it would be assessed.

63. At some point, on a date not given in evidence, the Claimant contacted privately a psychologist who gave her advice, and informed her that she may both be suffering from agoraphobia, and Post Traumatic Stress Disorder ("PTSD"). The cause of that PTSD was not given in evidence.

64. Following the commencing of the second informal Action Plan the Claimant became more anxious, and her sleeping pattern was affected adversely, (although precisely when that took place was not given in evidence).

65. In or around mid October 2017 the Claimant moved to a different team which meant that she worked on the same shift pattern, subject to her having an earlier end time on late shift and no night shift duty, as Sergeant Munro.

66. On 25 October 2017 during the morning the Claimant was tasked with a 999 call which had not completed, during which a baby had been heard to cry. The Claimant attended the call alone, but ought to have done so with another officer present. The Claimant attended at the property and spoke with the occupant. The call was a potential domestic abuse incident and the Claimant ought to have gained access to the property and ascertained if those within it were safe and well. She did not. She only listened at the door. Having spoken to the occupant she left. She did not speak to neighbours, or make other enquiries such as ascertaining whether there had been any earlier reported incidents at that property, as she ought to have done. Sergeant Munro spoke with the Claimant after the incident to inform her of the aspects she had not handled appropriately. He did so in an appropriate manner.

67. Dundee Safe was an operation conducted by the Respondent in relation to the city centre of Dundee, similar to CAV and an initiative named Centre Safe. It sought to ensure that those in the city centre particularly after closing hours at the weekend from 11pm onwards went home safely, and that any incidents were responded to effectively. Some of those leaving such premises were substantially under the influence of alcohol. There were incidents involving violence from time to time. Many premises closed in the period 1am to 3am.

68. There were two dates when the Claimant was on a late shift in the initial period of the second Action Plan being on 27 and 28 October 2017. Sergeant Munro advised the Claimant during the early part of her shift on 27 October 2017 that she should attend for Dundee Safe duties that evening. The Claimant did not do so. Her name was not on the operational order, on a computer system named SCOPE, of those who were scheduled to be on Dundee Safe that evening. The Claimant ought to have attended for the Dundee Safe that evening. She remained in the office at Maryfield Police station, and did so until 1am on that shift.

69. The Claimant did not also attend for Dundee Safe duties on 28 October 2017 as she ought to have done, but did remain on shift in the office at Maryfield Police Station until 1am.

70. On 7 November 2017 Sergeant Munro conducted an Attendance Support assessment of the Claimant, and noted that she did not meet the criteria for attendance support management and requested that she be removed from the same by email.

71. At some point in or around November 2017, the date of which was not given in evidence, the Claimant discussed matters with Sergeant Munro. She explained that she was anxious about work, and had required to increase her medication. He made a remark to the effect that she should not require to increase her medication to be able to function properly at work. He did so out of concern for her wellbeing, and in an appropriate manner.

72. At some other point in or around November 2017, the date of which was not given in evidence, Sergeant Munro informed the Claimant of an opportunity as an officer at court, which would involve more of a 9am – 5pm working pattern. He did so in an attempt to be supportive. The Claimant decided not to apply for that position.

73. On 14 November 2017 during the mid afternoon the Claimant was tasked with a call to a car which had been left in the road at a 45 degree angle which was causing a potential obstruction for other road users. The Claimant attended that call. The car had gas cannisters on the rear seat. It was causing an obstruction, with vehicles having to manoeuvre around it. The Claimant called the Scottish Fire and Rescue Service for advice on the cannisters, but they did not assist in providing advice about the cannisters or any risk posed by them. Sergeant Munro was working nearby and, having heard radio calls about the incident, attended. He noted that the car was an obstruction and informed the Claimant that it required to be removed. He spoke with the Scottish Fire and Rescue Service to obtain from them advice on the cannisters, was insistent that advice be given on them, and was advised that they were not dangerous. Arrangements were made to remove the car. Sergeant Munro took a photograph of the position of the car to demonstrate to the Claimant that it did pose an obstruction for vehicles on the road, contrary to her view. He discussed with her the steps she had not taken properly, being not seeking to remove the car, and not being forceful enough with Scottish Fire and Rescue Service in securing advice from them on the risk, if any, posed by the cannisters. He did so in an appropriate manner. He also noted later that the Claimant had not completed a crime report for the incident.

74. Sergeant Munro advised Inspector Lynch of the incident on 14 November 2017, and the earlier incident on 27 October 2017, as he was concerned that they demonstrated the Claimant not making suitable decisions, and not acting safely.

75. In the incidents on 25 October 2017 and 14 November 2017 the Claimant did not appreciate the extent to which she had failed to deal with them correctly. In each of them she had not made suitable decisions. Sergeant Munro's concerns on those aspects on which suitable decisions had not been made were justified.

76. The decisions that the Claimant made in relation to those incidents on 27 October 2017 and 14 November 2017 were not affected by the Claimant's mental health.

77. On 14 November 2017 Inspector Lynch met with the Claimant to discuss the second informal Action Plan. The Claimant asked for further consideration and additional time to complete it, and said that for two weeks of the period she had been on leave. It was not established in evidence whether that meeting took place before or after the car incident which had occurred on the same date. Inspector Lynch agreed that she should have further time.

78. At some point on a date not given in evidence the Claimant informed Mr Forsyth that Sergeant Munro was treating her unfairly and was being overbearing towards her. She did not provide details of the same.

79. On 16 November 2017 the Claimant commenced a further period of absence, during which she was signed off work by her General Practitioner. Her GP's note of that day records that the Claimant was

> "Tearful and upset. Works in Police, prev[iously] had contacted Occupational Health as felt working shifts didn't help her mood, better when worked till 11pm after that, but now changed to 1am finish. Coping OK initially with support of counsellor she has arranged privately. Says counsellor queries PTSD. Unable to go into work today, heart racing, indecisive, thoughts racing. Says sergeant she works with is not supportive. Feels sertraline has helped her low mood until now, support from mum and some limited help from partner, has also used online resources to good effect in past. Not suicidal. Agreed Med3 2/52 she will contact counsellor and occupational health again, see 2/52 or sooner sos."

80. On 20 November 2017 Inspector Lynch attended at the Claimant's home and emailed Mrs Wilson to report that meeting on 22 November 2017.The report included that the Claimant stated that she felt under pressure being on an

Action Plan, that she had always struggled with police work and it was not just shifts that caused her ill health. It asked whether there was other support that could be offered.

81. In the period from 28 October 2017 to the end of the second informal Action Plan on 26 November 2017 the Claimant would have had two late shifts on which she would have attended for Dundee Safe duties until 1am under the second Action Plan. She did not do so as she was off work from 16 November 2017.

82. The Claimant contacted her GP again in 27 November 2017, and the dosage of medication was increased.

83. Mrs Wilson replied to Inspector Lynch on 22 December 2017 having discussed the issue with Inspector Lynch earlier, doing so to have a record. It recorded that Dr Marshall did not consider that the Claimant met the criteria for ill health retiral. It stated that the Action Plan was to "find her optimum hours of duty to ensure that she is not working at full capacity frequently, with nothing in reserve. As this is a concern, she appears to be exhausting herself and as such, if this is a regular occurrence then she will not be able to sustain this. The Action Plan is to identify what hours are best suited to Lana longer term to establish an appropriate flexible working pattern which will suit both Lana and the organisation." It concludes by mentioning an Action Plan, measuring that and take any necessary action to remedy that.

84. The Claimant contacted her GP again on 3 January 2018 when it was noted that she was very anxious.

85. Sergeant Munro called the Claimant to enquire after her health on 8 January 2018 and held a brief conversation with her.

86. On 9 February 2018 there was a meeting between the Claimant and Inspector Lynch, held at the Claimant's home, with Mrs Wilson and Mr Forsyth also

attending. The Claimant indicated that her anxiety was too severe to attempt a return to work then or in the near future. She thought that she had always given her best performance. She referred to issues between her and Sergeant Munro, without providing details of what those issues were. She indicated that an office-based role, by which she meant one that was non-operational, was better for her. Mrs Wilson explained that she did not meet the criteria for that. No written record of that meeting was produced after it took place.

87. Inspector Lynch decided that the Claimant's performance may not have been adequate. Inspector Lynch issued a Notice of Requirement to Attend Performance Meeting under Regulation 14 of the Police Service of Scotland (Performance) Regulations 2014 on 20 March 2018. It had attached to it the second informal Action Plan, and the Performance Regulations, (although the Regulations were not provided in the bundle of documents). The second informal Action Plan had been updated to refer to the incidents in October and November 2017 referred to above, and had reference to a further allegation as to the Claimant wrongly completing a court enquiry resulting in a complainer in a stalking case being incorrectly advised that the accused had been released on bail (on which no evidence was led). The issue was said in the form to have been resolved by a colleague (also not addressed in evidence).

88. The date and location of the hearing were later changed to allow representation by the Federation, and to have the meeting at the Claimant's home after she disclosed that she had been diagnosed with agoraphobia, and a revised Notice of Hearing was sent with amended details for date and place. The purpose of the meeting was to discuss whether or not a first written improvement notice would be served under the terms of the Capability (Attendance and Performance) SOP, which would be a formal notice with improvements in performance required, as distinct from the informal Action Plans that had been given previously. The notice was of a meeting, and if that meeting led to a decision of a formal process being required, that formal

process would then begin. It would then lead to a meeting conducted by more senior officers than Inspector Lynch. The Notice itself was not a formal process, but that Notice and the meeting that took place were part of a stage to decide whether a formal process should be commenced.

89. The meeting took place on 12 April 2018. It was chaired by Inspector Lynch. Although she was not the direct line manager, that being Sergeant Munro, in light of the Claimant's expressed concerns regarding Sergeant Munro made at the second case conference, Inspector Lynch carried out the meeting, Mrs Wilson of Human Resources was also present. The Claimant was present, and accompanied by her partner Steven McKay who is also a police constable, and Constable Gordon Forsyth the Claimant's Federation representative. The note of that meeting is a reasonably accurate record of it.

90. There was an initial discussion regarding the nature of the meeting with it being held at the Claimant's home as a reasonable adjustment, and Inspector Lynch "checked that Gordon Forsyth (Fed rep) was happy with this too." No response was recorded, but the inference was that he was happy with the meeting being held, and did not raise any concern over the terms of the second Action Plan referred to within the Notice of Hearing. There was a discussion with regard to the location of any second meeting, if needed, on which it was stated by Mrs Wilson "hopefully not", and that although that meeting could not be at the Claimant's home, it could be at a neutral venue. The meeting then addressed the matters alleged in the Notice with regard to performance. The Claimant refuted the allegations that she had not completed calls during the period of the second Action Plan adequately being those on 27 October 2017 and 14 November 2017. The Claimant alleged that Sergeant Munro had not been supportive and had been unfair. She alleged that he had made mention of her medication and that she was uncomfortable about his doing so. Mrs Wilson explained circumstances where such comments may be made. The Claimant stated that as she was disabled she expected the Respondent to offer her a non-operational role. Mrs Wilson explained that the Claimant did not meet the criteria for doing so. Mrs Wilson

referred to the adjustment to finish a shift at 11pm but that officers were often held after their usual finish times for emergencies and exigencies of duty. Mrs Wilson outlined the adjustments that had been made for the Claimant. The Claimant was asked if she wished to add anything else, but she became upset at that point and the meeting ended. The Claimant was informed that she could submit further details in writing afterwards, or do so by her representative. The meeting ended subject to her being able to make such representations up to 20 April 2018.

91. On 15 April 2018 the Claimant wrote to Inspector Lynch to resign with four weeks' notice. She referred to "constructive dismissal tactics from my supervisor" (Sergeant Munro) and alleged discrimination arising from disability. No details were given of the same.

92. Mrs Wilson replied for the Respondent on 18 April 2018 and asked for further particulars of the claims, and referred to assistance from the Federation or a referral through Inspector Lynch to occupational health. The Claimant did not reply.

93. There was at no stage of the Claimant's service with the Respondent any target number of crimes for any officer to report set by the Respondent. The number of such reports made by an officer was an indicator of the extent of the workload of that officer.

94. The Claimant commenced Early Conciliation on 14 April 2018 and the Certificate in relation thereto was granted on 14 May 2018.

95. The Claim Form was presented to the Tribunal on 13 June 2018.

Submissions for Claimant

96. Mr Edward very helpfully produced a full written submission. The following is a very basic summary.

97. The Respondent had not made reasonable adjustments under section 20 of the Equality Act 2010. The provision, criterion or practice was the requirement to carry out the work of an operational officer under the second Action Plan. It placed the Claimant at a substantial disadvantage. The Respondent did not take reasonable steps to remove the disadvantage. Steps were initially put in place, then removed. There was no evidence of operational difficulties for doing so.

98. There had been discrimination arising in consequence of disability under section 15 of the Act. The second Action Plan was a change from an exploratory one to a mandatory one, and not justified. Progressing to a formal capability process was unfavourable treatment. The plan had been made because of the adjustments she was working under, which arose from her disability.

99. The second Action Plan was direct discrimination under section 13. It occurred because of the Claimant's disability, and no comparator was necessary but if one was, that was a hypothetical one. There was no evidence that officers without a disability were placed on Action Plans to test their capacity.

100. The remarks by Sergeant Munro that the Claimant alleged to have been made amounted to harassment under section 26 or direct discrimination under section 13. The weight of evidence supported the Claimant. In so far as they may be time-barred it was just and equitable to allow the claim to proceed.

101. Mr Edward stated orally, expanding his final point as to constructive dismissal under section 39(2)(c) and (7) of the Act, that the claim in respect of dismissal arose from the discrimination, and alternatively for breach of the implied term as to trust and confidence as a result of which the Claimant resigned.

Submissions for Respondent

102. Mrs Gallagher had also very helpfully produced a written submission and the following is again a very basic summary. The written submission referred to a number of cases, all of which were considered although not all are referred to in the remainder of this Decision.

103. The claims of harassment or direct discrimination in relation to the remarks allegedly made by Sergeant Munro were time-barred. They were not part of a continuing act. They were out of time, and it was not just and equitable to extend time. In any event, his evidence should be accepted that they had not been made as alleged.

104. For the remaining matters, the burden of proof was on the Claimant. The Claimant had failed to establish any prima facie case. The Action Plans did not amount to less favourable treatment, and was not unfavourable treatment because of something arising in consequence of the Claimant's disability. In any event there was an objectively justified reason for the Respondent's acts.

105. The adjustments contended for by the Claimant were not reasonable, given the operational requirements of a police officer. The Respondent had acted reasonably in its actions.

106. In so far as the alleged harassment was concerned, there had not been an environment created that fell within section 26(1) and in any event the Respondent had taken all reasonable steps to prevent it under section 109(4) of the Act.

107. The Respondent sought the dismissal of all claims. Mrs Gallagher added orally that the Respondent had not had fair notice of the claim as to constructive dismissal, that had not been pled, was not in the agenda, and not in the list of issues such that it should not be permitted to be received.

Law

108. The law relating to discrimination is complex. It is found in statute and case law. There is guidance in a statutory code.

(i) Statute

109. Section 4 of the Equality Act 2010 ("the Act") provides that disability is a protected characteristic.

110. Section13(1) of the Act provides that:

> "**13 Direct Discrimination**
> A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

111. Section 15 of the Act provides as follows:

> "**15 Discrimination arising from disability**
> (1) A person (A) discriminates against a disabled person (B) if—
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
> (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."

112. Section 20 of the Act provides as follows:

> **"20 Duty to make adjustments**
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule

apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice 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……"

113. Section 21 of the Act provides:

"21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person…."

114. Section 23 of the Act provides that

"(1) On a comparison of cases for the purposes of section 13….. there must be no material difference between the circumstances relating to each case

(2) The circumstances relating to a case include a person's abilities if –

(a) on a comparison for the purposes of section 13, the protected characteristic is disability….."

115. Section 26(1) of the Act provides as follows:

"**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."

116. Section 26(4) of the Act provides that:

"(4) 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."

117. Section 39 of the Act provides:

"**39 Employees and applicants**

…….

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

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

(c) by dismissing B;

(d) by subjecting B to any other detriment.

……

(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

…….

(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

118. Section 42 of the Act provides:

"**42 Identity of employer**

(1) For the purposes of this Part, holding the office of constable is to be treated as employment—

(a) by the chief officer, in respect of any act done by the chief officer in relation to a constable or appointment to the office of constable….."

119. Section 136 of the Act provides:

"**136 Burden of proof**

If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

120. Section 212(1) of the Act defines "substantial" as "more than minor or trivial".

121. The provisions are construed against the terms of the Equal Treatment Framework Directive 2000/78/EC. Its terms include Article 5 as to the taking of "appropriate measures, where needed in a particular case", for a disabled person, "unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."

122. The Police Service of Scotland (Performance) Regulations 2014, so far as relevant to this case, are set out in the Appendix:

(ii) Case law

Direct discrimination

123. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In ***Amnesty International v Ahmed [2009] IRLR 884*** the EAT recognised two different approaches from two

House of Lords authorities - (i) in ***James v Eastleigh Borough Council [1990] IRLR 288*** and (ii) in ***Nagaragan v London Regional Transport [1999] IRLR 572***, HL. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan***, the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) V Governing Body of the Jewish Free School and another [2009] UKSC 15***

124. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions) – as explained in the Court of Appeal case of ***Anya v University of Oxford [2001] IRLR 377***.

Less Favourable Treatment

125. In ***Glasgow City Council v Zafar [1998] IRLR 36***, also a House of Lords case, it was held that it is not enough for the Claimant to point to unreasonable behaviour. She must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

Comparator

126. In ***Shamoon v Chief Constable of the RUC [2003] IRLR 285***, a House of Lords authority, Lord Nichols said that a tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no

difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

127. The comparator, where needed, requires to be a person who does not have disability but otherwise there are no material differences between that person and the Claimant. Guidance was given in ***Balamoody v Nursing and Midwifery Council [2002] ICR 646,*** in the Court of Appeal.

128. Further guidance was given in ***High Quality Lifestyles Ltd v Watts [2006] IRLR 850*** and ***Stockton on Tees Borough Council v Aylott [2010] ICR 1278***. In ***Eagle Place Services Ltd v Rudd [2010] IRLR 486*** a personal injury solicitor worked exclusively for one client. The solicitor, Mr Rudd, had detached retinas in both eyes and reasonable adjustments were agreed of reduced hours, rest breaks, and working from home. The Tribunal held that he had been dismissed following a disagreement over permanent homeworking arrangements because the employer considered his disability made him 'an inconvenient liability that would inhibit or damage its commercial objectives', even though the client was happy with his work with the adjustments in place. The Tribunal rejected his disability related discrimination claim, but upheld his direct discrimination claim. The EAT held that he ought to have succeeded in both direct disability discrimination and disability related discrimination. The appropriate hypothetical comparator was held to be 'a fellow lawyer of the same grade and skills as the claimant who shared a similarly good relationship with the client, who for reasons other than disability required adjustments to be made to enable him to work, and in respect of whom reasonable adjustments had been agreed to the satisfaction of both employer and employee and in respect of whom, commercial performance, even having regard to the proposed adjustments, was not an issue'.

Discrimination arising from disability

129. The process applicable under a section 15 claim was explained by the EAT in ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305***:

> "The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words 'because of something', and therefore has to identify 'something' – and second upon the fact that that 'something' must be 'something arising in consequence of B's disability', which constitutes a second causative (consequential) link. These are two separate stages."

130. In ***City of York Council v Grosset [2018] EWCA Civ 1105, [2018] IRLR 746***, Lord Justice Sales held that

> 'it is not possible to spell out of section 15(1)(a) a … requirement, that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability'.

131. The EAT held in ***Sheikholeslami v University of Edinburgh [2018] IRLR 1090*** that:

> "the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."

132. Further guidance had earlier been given by the EAT in ***Pnaiser v NHS England and another [2016] IRLR 170***, as follows:

> "(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> (b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
>
> (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see ***Nagarajan v London Regional Transport [1999] IRLR 572.*** A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).
>
> (d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in ***Hall)***, the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a

justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in ***Land Registry v Houghton UKEAT/0149/14, [2015] All ER (D) 284 (Feb)*** a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that 'a subjective approach infects the whole of section 15' by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability.

> Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.
>
> (i) As Langstaff P held in ***Weerasinghe***, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

Unfavourable treatment

133. In ***Williams v Trustees of Swansea University Pension and Assurance Scheme [2017] IRLR 882*** the Court of Appeal did not disturb the EAT's analysis, in that case, that the word "unfavourable" was to be contrasted with less favourable, the former implying no comparison, the latter requiring it. The Equality and Human Right's Commission Code of Practice on Employment states at paragraph 5.7 that the phrase means that the disabled person "must have been put at a disadvantage."

134. That analysis was supported by the Supreme Court decision, reported at ***[2019] IRLR 306***, in which the decision of the court was given by Lord Carnwarth, whose speech included the following:

> "Since I am substantially in agreement with the reasoning of the Court of Appeal, I can express my conclusions shortly, without I hope disrespect to Ms Crasnow's carefully developed submissions. I agree with her that in most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word 'unfavourably' in s 15 and analogous concepts such as 'disadvantage' or 'detriment' found in other provisions, nor between an objective and

a 'subjective/objective' approach. While the passages in the Code of Practice to which she draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section…….”

Justification

135. There is a potential defence of objective justification under section 15(1)(b) of the Act. In ***Hardys & Hansons plc v Lax [2005] IRLR 726***, heard in the Court of Appeal, it was held that the test of justification requires the employer to show that a provision, criterion or practice is justified objectively notwithstanding its discriminatory effect. 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. That “necessary” is qualified by “reasonably” reflects the applicability of the principle of proportionality and does not permit a margin of discretion or range of reasonable responses.

136. The EAT held in ***Land Registry v Houghton and others UKEAT/0149/14*** that the Tribunal requires to balance the reasonable needs of the Respondent against the discriminatory effect on the Claimant.

Reasonable adjustments

137. Guidance on the claim as to reasonable adjustments was provided by the EAT in ***Royal Bank of Scotland v Ashton [2011] ICR 632*** and in ***Newham Sixth Form College v Sanders [2014] EWCA Civ 734,*** and ***Smith v Churchill’s Stair Lifts plc [2005] EWCA Civ 1220*** both at the Court of Appeal, The application to the Act was confirmed by the EAT in ***Muzi-Mabaso v HMRC UKEAT/0353/14.*** The guidance given in ***Environment Agency v Rowan [2008] IRLR 20*** remains valid, being that in order to make a finding of failure to make reasonable adjustments there must be identification of:

(a) the provision, criteria or practice applied by or on behalf of an employer; or

(b) the physical feature of premises occupied by the employer;

(c) the identity of non-disabled comparators (where appropriate); and

(d) the nature and extent of the substantial disadvantage suffered by the claimant.

138. Mr Justice Laws in ***Saunders*** added:

> "the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP."

139. The distinction between claims under sections 15 and 20 was explained by the EAT in ***Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43*** as follows:

> "The Equality Act 2010 now defines two forms of prohibited conduct which are unique to the protected characteristic of disability. The first is discrimination arising out of disability: section 15 of the Act. The second is the duty to make adjustments: sections 20–21 of the Act. The focus of these provisions is different. Section 15 is focused on making allowances for disability: unfavourable treatment because of something arising in consequence of disability is prohibited conduct unless the treatment is a proportionate means of achieving a legitimate aim. Sections 20–21 are focused on affirmative action: if it is reasonable for the employer to have to do so, it will be required to take a step or steps to avoid substantial disadvantage.
>
> Until the coming into force of the Equality Act 2010 the duty to make reasonable adjustments tended to bear disproportionate weight in discrimination law. There were, I think, two reasons for this. First,

although there was provision for disability-related discrimination, the bar for justification was set quite low: see section 5(3) of the Disability Discrimination Act 1995 and Post Office v Jones [2001] ICR 805. Secondly, the decision of the House of Lords in Lewisham London Borough Council v Malcolm (Equality and Human Rights Commission intervening) [2008] 1 AC 1399 greatly reduced the scope of disability-related discrimination. With the coming into force of the Equality Act 2010 these difficulties were swept away. Discrimination arising from disability is broadly defined and requires objective justification."

Harassment

140. The terms of the statute are reasonably clear, but guidance was given by the Court of Appeal in ***Pemberton v Inwood [2018] IRLR 542*** in which the following was stated by Lord Justice Underhill:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))."

Dismissal

141. The definition of dismissal in section 39 of the 2010 Act includes a resignation by an individual in circumstances in which she is entitled to do so without notice because of the Respondent's conduct. Under the statute the Respondent is deemed to be the employer. The definition is the same as that for a dismissal under section 95(1)(c) of the Employment Rights Act 1996, and case law from that section is relevant to consideration of whether or not there was a dismissal, albeit that the context is different under the 2010 Act.

142. A dismissal where someone resigns on the basis of the employer's conduct is normally referred to as a constructive dismissal. The onus of proving such a dismissal falls on the Claimant. From the case of ***Western Excavating Ltd v Sharp [1978] IRLR 27,*** followed in subsequent authorities, to be able to claim constructive dismissal, four conditions must be met:

(1) There must be a breach of contract by the employer, actual or anticipatory.

(2) That breach must be significant, going to the root of the contract, such that it is repudiatory

(3) The employee must leave in response to the breach and not for some other, unconnected reason.

(4) She must not delay too long in terminating the contract in response to the employer's breach, otherwise she may have acquiesced in the breach.

143. In every contract of employment there is an implied term derived from ***Malik v BCCI SA (in liquidation) [1998] AC 20,*** which was slightly amended subsequently. The term was held in Malik to be as follows:

> "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

144. In ***Baldwin v Brighton and Hove City Council [2007] IRLR 232*** the EAT held that the use of the word "and" following "calculated" in the passage quoted above was an error of transcription of the previous authorities, and that the relevant test is satisfied if either of the requirements is met such that the test should be "calculated or likely". That was reaffirmed by the EAT in ***Leeds Dental Team Ltd v Rose [2014] IRLR 8***,:

> "The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the

relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

145. More recently in ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978*** the Court of Appeal gave guidance in what are "last straw" cases which included as one of the tests to apply whether there was a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence. The Court stated this:

> "16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "de minimis non curat lex") is of general application.…
>
> 19. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.
>
> 20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust

and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."

146. It is not inevitable that a finding of discrimination will lead to a finding also of a constructive dismissal – ***Amnesty International v Ahmed [2009] ICR 1450,*** in which the then President of the EAT stated:

"The fact that, as we have held, a decision based on them [the reasons for the decision not to promote] constituted unlawful discrimination does not inevitably mean that the decision violated the claimant's dignity, and in the peculiar circumstances of the present case we do not believe that it did so: Amnesty's reasons displayed no kind of racial (or ethnic, or national) prejudice on its part and could not reasonably be regarded as offensive to the claimant as an individual."

147. There must be a connection between the breach of contract, and the resignation, such that the resignation is caused by the breach, and not by some other factor.

148. If there is such delay before the resignation indicating that the individual has acquiesced (affirmed is the term used in English law) in any breach, there will not be a dismissal. The leading case on that principle is ***W E Cox Toner (International) Ltd v Crook [1981] IRLR 443.*** In ***Bunning v GT Bunning and Sons Ltd [2005] EWCA Civ 104*** there was a finding of detriment because of pregnancy, but not that there had been a constructive dismissal, as there had been acts which amounted to affirmation.

149. One issue of relevance in the assessment of delay is where the employee has been off sick during the period. The issue has been addressed in a number of authorities, but not in a manner that is always easy to reconcile.

150. In ***Bashir v Brillo Manufacturing Co [1979] IRLR 295.*** a two-month delay while off sick and claiming sick pay was held not to amount to affirmation.

151. In ***el-Hoshi v Pizza Express Restaurants Ltd UKEAT/0857/03*** the employee was off sick with depression for three months after the alleged repudiation, submitting sick notes and receiving sick pay; his claim for constructive dismissal was allowed to proceed as there was no affirmation, the EAT saying that receipt of sick pay is at best a neutral factor which should not prejudice the employee's rights.

152. In ***Fereday v South Staffordshire NHS Primary Care Trust UKEAT/0513/10*** it was held that the employee had affirmed after a delay of six weeks while receiving sick pay, it being said that such receipt is not necessarily a neutral factor, depending on the facts***.***

153. In ***Hadji v St Luke's Plymouth UKEAT/0095/12*** a period of four months between repudiation and resignation, spent on sick leave (but with the complication that the employee did not receive sick pay), was held to constitute affirmation, in the light of consideration being given by him to possible alternative roles within the organisation, up to the eventual decision to leave.

154. In ***Chindove v William Morrison Supermarkets Ltd UKEAT/0201/13*** a period of sickness absence of six weeks before resigning was held not to amount to affirmation. The then President of the EAT indicated that, as a general principle, a tribunal might be more indulgent towards the period of delay because the need to make a decision one way or the other is arguably less pressing than if the employee is continuing actually to work for the employer.

155. In ***Mari (Colmar) v Reuters Ltd UKEAT/0539/***13 the Claimant was in a senior position, was off sick with stress and when she returned claimed that she was given no work commensurate with her position and was badly treated by the employer and fellow employees. She went off sick again, this time for 19 months, at the end of which she resigned and claimed constructive dismissal. She had claimed sick pay for 39 weeks during this period. The employer argued that she had affirmed her contract and the tribunal agreed. The employer relied on her receipt of sick pay as only one of four factors showing affirmation, the others being (i) her insistence on having access to work email reinstated, (i) her request to be considered for permanent health insurance payments and (iii) continuing discussions with the employer about other matters consistent with wishing to return to work.

Burden of proof

156. There is a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of ***Igen v Wong [2005] IRLR 258***, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. The claimant must first establish a first base or prima facie case of direct discrimination or harassment by reference to the facts made out. If she does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the tribunal to conclude that the complaint should be upheld. If the explanation is adequate, that conclusion is not reached. In

Madarassy, it was held that the burden of proof does not shift to the employer simply by a claimant establishing a difference in status (here her disability) and a difference in treatment. Those facts only indicate the possibility of discrimination. They are not of themselves sufficient material on which the tribunal "could conclude" that on a balance of probabilities the respondent had committed an unlawful act of discrimination. The tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case, as explained in ***Laing v Manchester City Council [2006] IRLR 748***, an EAT authority approved by the Court of Appeal in ***Madarassy***.

157. The two stage approach was endorsed in ***Hewage v Grampian Health Board [2012] IRLR 870***. More recently, in ***Ayodele v Citylink Ltd [2018] ICR 748***, the Court of Appeal rejected an argument that the ***Igen*** and ***Madarassy*** authorities could no longer apply as a matter of European law, and that the onus did remain with the Claimant at the first stage. As the Court of Appeal very recently confirmed in ***Efobi v Royal Mail Group [2019] EWCA Civ 19*** unless the Supreme Court reverses that decision the law remains as stated in ***Ayodele***. Lord Justice Elias also explained the nature of the onus as follows, at paragraph 44:

> "The onus of proof at stage one was upon the claimant so it was for the claimant to adduce the information which he was alleging supported his case. In so far as this was in the hands of the employer, the claimant could have identified the information required and requested that it be provided voluntarily or, if that was refused, by obtaining an order from the Tribunal."

158. He added later on in that paragraph the following:

> "If the employer fails to call the actual decision makers, he is at risk of failing to discharge the burden which arises at the second stage, but no

adverse inference can be drawn at the first stage from the fact that he has not provided an explanation as Lord Justice Mummery said in terms in para. 58 of Madarassy"

(iii) EHRC Code

159. The Tribunal also considered the terms of the Equality and Human Rights Commission Code of Practice on Employment, the full terms of which were considered but the following provisions in particular:

> **"Hypothetical comparators**
>
> 3.26.
>
> Constructing a hypothetical comparator may involve considering elements of the treatment of several people whose circumstances are similar to those of the claimant, but not the same. Looking at these elements together, an Employment Tribunal may conclude that the claimant was less favourably treated than a hypothetical comparator would have been treated.
>
> Example: An employer dismissed a worker at the end of her probation period because she had lied on one occasion. While accepting she had lied, the worker explained that this was because the employer had undermined her confidence and put her under pressure. In the absence of an actual comparator, the worker compared her treatment to two male comparators; one had behaved dishonestly but had not been dismissed, and the other had passed his probation in spite of his performance being undermined by unfair pressure from the employer. Elements of the treatment of these two comparators could allow a tribunal to construct a hypothetical comparator showing the worker had been treated less favourably because of sex.
>
> 3.27
>
> Who could be a hypothetical comparator may also depend on the reason why the employer treated the claimant as they did. In many cases it may be more straightforward for the Employment Tribunal to establish the

reason for the claimant's treatment first. This could include considering the employer's treatment of a person whose circumstances are not the same as the claimant's to shed light on the reason why that person was treated in the way they were. If the reason for the treatment is found to be because of a protected characteristic, a comparison with the treatment of hypothetical comparator(s) can then be made.

Example: After a dispute over an unreasonably harsh performance review carried out by his line manager, a worker of Somali origin was subjected to disciplinary proceedings by a second manager which he believes were inappropriate and unfair. He makes a claim for direct race discrimination. An Employment Tribunal might first of all look at the reason for the atypical conduct of the two managers, to establish whether it was because of race. If this is found to be the case, they would move on to consider whether the worker was treated less favourably than hypothetical comparator(s) would have been treated.

3.28

Another way of looking at this is to ask, 'But for the relevant protected characteristic, would the claimant have been treated in that way?'

Comparators in disability cases

3.29

The comparator for direct disability discrimination is the same as for other types of direct discrimination. However, for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself).

s 23(2)(a)

3.30

It is important to focus on those circumstances which are, in fact, relevant to the less favourable treatment. Although in some cases, certain abilities may be the result of the disability itself, these may not be relevant circumstances for comparison purposes.

Example: A disabled man with arthritis who can type at 30 words per minute applies for an administrative job which includes typing, but is rejected on the grounds that his typing is too slow. The correct comparator in a claim for direct discrimination would be a person without arthritis who has the same typing speed with the same accuracy rate. In this case, the disabled man is unable to lift heavy weights, but this is not a requirement of the job he applied for. As it is not relevant to the circumstances, there is no need for him to identify a comparator who cannot lift heavy weights."

Substantial disadvantage

6.15

The Act says that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, and is assessed on an objective basis.

Reasonable steps

6.28

The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- whether taking any particular steps would be effective in preventing the substantial disadvantage;
- the practicability of the step;
- the financial and other costs of making the adjustment and the extent of any disruption caused;

- the extent of the employer's financial or other resources;

- the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

- the type and size of the employer.

6.29

Ultimately the test of the “reasonableness” of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

6.33

[Under the heading of reasonable adjustments in practice] Altering the disabled worker’s hours of work or training”

Dismissal

10.13 (c)

s. 39(7)(b) constructive dismissal – that is, where because of the employer’s conduct the employee treats the employment as having come to an immediate end by resigning (whether or not the employee gives notice)”

Observations on the evidence

160. The Tribunal considered that the Claimant was seeking to give honest evidence. She believed that Sergeant Munro had spoken the words she claimed he had. She was however not able to recall a number of aspects of what happened in her evidence, stating that she did not remember. Her recollection of some details was not accurate. The Tribunal did have some

concerns over the reliability of her evidence in parts as referred to in more detail below. The evidence disclosed that stress and anxiety affected her concentration, and the Tribunal considered that giving evidence was likely to be a stressful experience for her.

161. Mr McKay and Mr Forsyth gave brief evidence on her behalf. Both are serving police officers, and the Tribunal accepted their evidence as being credible and reliable in general terms.

162. Mr McKay said that either Inspector Lynch or Mrs Wilson said at the meeting on 12 April 2018 that the Claimant had to do the Action Plan, but that was not their evidence, and it was not consistent with the written record of the meeting. On that aspect Mr McKay's evidence was not preferred.

163. Mr Forsyth stated that the Claimant had told him about comments alleged to have been made by Sergeant Munro to the Claimant, but that that had been at the time of moving to a formal Action Plan, by which is understood the meeting in April 2018. He said that she had written them down and sent that to him, but that document was not produced to the Tribunal. His evidence of a discussion with the Claimant earlier was to the effect that Sergeant Munro was being unfair and overbearing, and that was likely to have been in about November 2017. The later detail came from the Claimant herself, and although reported by Mr Forsyth accurately, was a report of what the Claimant then, in or around April 2018, had been said in or before November 2017.

164. Inspector Lynch was the first witness for the Respondent. The Tribunal was impressed with her clear evidence, and its candour. It was satisfied that she was both credible and reliable. She made concessions on some of the aspects put to her, and was careful and conscientious in what she said. Where there was a conflict with the evidence of the Claimant, that of Inspector Lynch was preferred.

165. Mrs Wilson was the second witness. She was an experienced Human Resources professional. Generally the Tribunal accepted her evidence, but there was one aspect that it was troubled by, in relation to a discussion with Dr Marshall regarding the second Action Plan, as noted below. Ultimately it accepted her evidence as being credible, but the extent to which it was reliable is commented upon below.

166. Sergeant Munro was the final witness for the Respondent. The Tribunal was impressed with his evidence, which he gave clearly and in a straightforward manner. Where there was a conflict with the evidence of the Claimant as to what he had said or done, the Tribunal preferred his evidence. He accepted that he had used a phrase with regard to medication, but the nature of that, and its context, demonstrated to the Tribunal that he had done so in a supportive manner, referred to further below. It was also in the Tribunal's assessment clear that he had been supportive of the Claimant, including helping her complete documents such as a school parking plan, which she had said was a lie.

167. There were two incidents where the Claimant was criticised by him for decisions she took. They are referred to further below. The Claimant in her evidence denied that she had acted inappropriately. The Tribunal concluded however that Sergeant Munro was correct in his evidence that there had been failures by her in those two issues. The Tribunal also accepted his evidence that she had not been as well organised as she might, that he had tried to support her with regard to that, and had assisted her in completing paperwork that was either not properly completed, or late.

168. Much of the evidence centred around a second informal Action Plan which had two requirements, one to work to 1am under a policy called Dundee Safe, the other to be engaged in more response duties. The decision to do so was clearly made, from the evidence, by Superintendent Andrew Todd. One key question was the reason why those requirements were made. He did not

however give evidence. That meant that the Tribunal did not have the best evidence of the reason why that decision was taken.

169. What was also noticeable was that the Claimant's representative from the Federation was not present at a case conference at which that decision was taken. There was no written evidence of the Federation being involved with the Action Plan itself shortly thereafter. There was no written evidence of it then being explained to the Claimant, in the form of any minute of a meeting with her to do so, although the Tribunal accepted the evidence that Inspector Lynch had done so.

170. Mrs Wilson stated in her evidence that Dr Marshall, the Force Medical Adviser who had previously advised against the Claimant working after 11pm, had been consulted about the proposal for small adjustments to the shift and consented to that. There was however no written evidence of that, either in the form of a file note, an email to confirm (although such evidence did exist on other matters) or being found within the note of the second case conference. It had not been raised in the evidence of Inspector Lynch, and Sergeant Munro recalled no discussion about it at the second case conference.

171. Dr Marshall did not give evidence. The Claimant in her submission did not appear to challenge the evidence from Mrs Wilson on that matter. It was not however clear to the Tribunal what exactly had been said to Dr Marshall about the proposal, and when that was, and thus it was not entirely clear on what basis his comment had been made. Initially the case conference held on 29 August 2017 referred to a decision by Superintendent Todd as to "small adjustments". The note of that meeting did not record what those adjustments were. That issue was raised in a later email between Mrs Wilson and Inspector Lynch. The Tribunal concluded that it was more likely that Mrs Wilson had spoken to Dr Marshall after the second case conference, and had referred to small adjustments, on which an answer that that would be acceptable if infrequent and irregular is more apt. If the question had been

put of shifts to 1am on Dundee Safe, up to four times in two months, the answer would more likely be a yes or no one.

172. The proposal to have the Claimant work between 11pm and 1am in a role at Dundee Safe that involved, potentially at least, higher levels of stress was one that may have benefitted the Respondent if successful, as it increased the extent of her working hours (in the sense of the time of work, later at night, rather than the total hours worked) during such period and if successful may have extended the working hours further. That may also have benefitted the Claimant if successful as it made her career as a CSO more likely to continue. But it also may have exacerbated her mental health, already known to be somewhat fragile. There was therefore something of a risk taken with the Claimant's mental health in that proposal. In light of that, the Tribunal considered that having both advice from the FMA that that was safe, and imparting that advice to the Claimant, were of high importance. What was being done in that proposal was amending the adjustments that had been made on account of the Claimant's disability. The Tribunal would have expected such an important step to be documented in writing in some way, such as to record the FMA advice of its safety, and that that had been passed on in some way to the Claimant. That neither happened was a matter of concern.

173. What was also of concern was the nature of the evidence led in some respects. The cross examination of the Claimant did not include specific questions on some aspects of the evidence later given by the Respondent's witnesses. The clearest example of this, where there was an objection, was when Sergeant Munro stated that the dropped 999 call incident had later been followed up, and it was suggested by him that a three week old baby had been found to have suffered abuse. The Tribunal heard that evidence subject to submissions later as to whether it should be accepted or not. In fact no specific submission was directed to it. The Tribunal considered that the evidence should not formally be entirely excluded, but that it was not appropriate to place any weight on it as it had not been referred to in the

Response, there had been no document produced in the bundle with regard to it, although Sergeant Munro confirmed that others had prepared a crime report with regard to it, and that there had been the follow up described, and it had not been put in cross examination to the Claimant.

174. There were aspects of the evidence not put to the Claimant in as much detail as there might have been. For example, it was put that Sergeant Munro had been supportive, and had assisted her in completing a school parking plan. In his own evidence he expanded on that, and also referred to an incident when the Claimant was late for work, which he had not followed up. That particular incident had not been put to the Claimant.

175. There were also aspects of the case as it was set out in submission that had not been put to the Respondent's witnesses in as much detail as there might have been. It was alleged that the second Action Plan was, or became, mandatory, and the issue of the hypothetical comparator dealt with above, are two examples.

176. There were therefore areas where the Tribunal did not have either all the evidence that it might have had, or all the evidence that might normally be expected. That made the Tribunal's task in resolving the issues arising from this Claim more difficult. That included what precisely was said to the Claimant when the second Action Plan was given to her, what Dr Marshall had been told as to the proposal of small adjustments and his reply, and the conversation at the Claimant's home in February 2018, for none of which was there any written record.

177. There are further considerations that require comment. There was a list of issues agreed between the parties, referred to above. It generally concentrated on the second informal Action Plan. But that Action Plan was for the period 26 September 2017 to 26 November 2017. Its period was not completed as the Claimant went off sick before that period ended. She did not return to work. The decision in relation to that Action Plan was taken by

Superintendent Todd at a case conference on 29 August 2017. There may have been an issue over whether that decision and the Action Plan that followed it were time-barred. That was not however a point taken by the Respondent. Had it been, the Tribunal would have concluded that it was just and equitable to consider that claim, in light of all the circumstances including the absence from work of the Claimant.

178. Although there was a focus on that Action Plan, to what extent it was the cause of the Claimant's resignation was a contentious issue. It is referred to further below.

179. There are a number of issues that arose:

(i) There was no further report from Occupational Health in relation to the absence of the Claimant. That was surprising given the period of absence, and the earlier history. It was not however a point raised in evidence and the Tribunal did not consider it appropriate to have regard to the absence of an updated report.

(ii) Similarly the Notice of Hearing was sent when the Claimant was off work sick, and no Occupational Health advice was sought as to whether or not she was fit to attend that. Nevertheless she had Federation representation and no issue with regard to the propriety of holding the meeting at that time was raised, and again the Tribunal did not consider it appropriate to have regard to the fact of the Claimant being absent from work at that time.

(iii) Although the SOPs were referred to in evidence, they were not explored in any detail, such that the Tribunal were referred to certain provisions, but did not have evidence as to how they were applied in practice, whether they were correctly applied, and if not why that was.

(iv) Two provisions not referred to in evidence appear in the Disability in Employment SOP, and were noticed by the Tribunal during their deliberations. They are:

(a) section 4.5 which provides:

> "Disabled people may still be subject to employment procedures such as absence management, capability, ill health etc. However the disability management process must have been followed prior to these processes being implemented and reasonable adjustments to these processes will be considered. Advice should be sought from P & D [People and Development] as required."

(b) section 5.5.11 which provides:

> "A Reasonable Adjustments Decision Making Form (060-001) available on the Intranet should be must by line managers to record any reasonable adjustments considered and the rationale for decision making. Details of all reasonable adjustments should be recorded on SCOPE in line with the Guidance on Recording Reasonable Adjustments available on the Intranet."

(v) There was no evidence with regard to either provision, and the Form referred to was not produced in evidence. That was despite it being acknowledged by Mrs Wilson that adjustments had earlier been made for the Claimant, firstly by reducing working after midnight as far as possible, and secondly by not working after 11pm.

(vi) The adjustment to 11pm was itself subject to a change by the terms of the second Action Plan. It was not established in evidence whether the Disability in Employment SOP was engaged during the consideration of the second Action Plan. It is not referred to in the second case conference note, nor in subsequent emails.

(vii) The updated document Action Plan document did not address in terms her actual performance in those incidents, or whether or not she had made suitable decisions, which was a phrase appearing on the Action Plan. It was however an inference from the Notice of Hearing and updated Action Plan that that was the intent.

(viii) One document spoken to in evidence was a form of summary of the circumstances in the case, but when an aspect of that was put to

Sergeant Munro he stated that he had not been the author of that part, and he did not know who had been.

180. The Tribunal considered that in order properly to address the issues that arose from the pleadings and evidence, the issues required to be amended. They are as set out below. The Tribunal considered whether to invite the parties to present further submissions, but in light of the terms of the overriding objective, the fact that both parties were legally represented at the Hearing, and that the Tribunal concluded that a decision could be taken on the basis of the evidence led before it and the submissions it had heard, did not take that course.

181. The Tribunal found this both a particularly complex case, and one that was very finely balanced. Each side had strong arguments to make on all of the issues that arose. The decision has been a particularly difficult one. The Tribunal deliberated on two separate days. Its decision was a unanimous one.

Discussion

182. The Tribunal applied the law set out above to the facts that it had found, as follows:

(i) Direct discrimination

183. It is convenient to refer to the list of issues and address each in turn, and then add further issues for the reasons set out above.

184. **a) Was the Claimant directly discriminated against by the Respondent (section 13 of the Equality Act 2010)? In that respect:**

i. Firstly, did putting the Claimant on an informal Action Plan amount to less favourable treatment compared to a real or hypothetical comparator without a disability?

185. The Tribunal first considered whether it was possible to address the reason why question, in light of ***Shamoon***, as the Claimant contended in her submission which invited the Tribunal to decide the issue without addressing the characteristics of a hypothetical comparator. The reference in ***Shamoon*** was that it may "sometimes" be possible to do so. If the answer appears clear, then that route may be taken, but that was not the case here. There was an argument that the reason for the second Action Plan was the disability, and was inherent in the act of putting the Claimant on the second Action Plan. The intent was to seek to find out if the Claimant had the resilience to work after 11pm if required to do so in an ongoing incident. But that was not the only matter involved. There was also undertaking Dundee Safe duties, and carrying out more response work effectively. The reference to making "suitable decisions" was to an aspect of performance, and not one because she had a disability (contrary to the Claimant's submission).

186. The Tribunal concluded that the issue was not sufficiently clear to make it appropriate to take the course of action referred to in ***Shamoon***.

187. The Tribunal then considered who the hypothetical comparator was, as there was no evidence as to a real comparator. The Claimant's submission was that there was no evidence that other officers without a disability were placed on Action Plans to test their capacity, as the Claimant was. That is true, and the absence of such evidence means that there is little if any evidence to test the prospective treatment of a hypothetical comparator against.

188. The Tribunal concluded that the appropriate hypothetical comparator was someone without a disability who was not able to work beyond 11pm, for example because of the care of a child or elderly relative.

189. The evidence from Inspector Lynch was that all CSOs required to be flexible in working shifts, and that any of them could be required to work beyond the normal end of shift if there was some form of ongoing incident or other operational need.

190. The difficulty that the Tribunal faced was that there was no cross examination on that point, or on the comparison with a hypothetical comparator, and no evidence on which the comparison could be based from the way that other issues had been handled in respect of other officers even if they were not strictly actual comparators. This was not a matter clearly addressed in the Claimant's evidence and when the Claimant was asked about the possible need for a CSO to work beyond the end of a shift she accepted that that was the case.

191. The Tribunal concluded that it did not have the evidence to make the finding that the Claimant had been treated less favourably than a hypothetical comparator would have been, and that as the Claimant had the onus of proof to do so, that onus not having been discharged, it required to hold that the claim of direct discrimination had not been established.

ii. If so, did the Respondent take those steps because of her disability?

192. The Tribunal did not require to consider this issue.

iii. Secondly, did the treatment alleged in paragraph 15 of the Claimant's paper apart amount to less favourable treatment compared to a real or hypothetical comparator without a disability?

193. The allegations against Sergeant Munro were that in or around November 2017 he said to the Claimant "You don't even do nightshift"; "You shouldn't need medication to come to work" and "I'll be your therapist". He denied having done so, but explained that he had made a remark as to medication in a different context, set out more fully below.

194. The Tribunal was satisfied that the evidence of Sergeant Munro that he had not made the remarks alleged against him, and that where he did admit to doing so in respect of medication that that had been to state that the medication should not be increased to respond to stresses at work he had done so appropriately and to be supportive, should be accepted.

195. The Tribunal was impressed by the manner in which he gave evidence. His clear and simple denial of having made any comment, save as to medication, was not overstated. He had generally been supportive of the Claimant. He had for example assisted her with the completion of documentation, assisted her in seeking to become more organized, and had not taken the performance management steps he might have when she had been late attending for a shift. The Claimant alleged that his assisting her in completing a school parking plan was a "lie", but the Tribunal did not agree. Neither party had placed before the Tribunal written evidence on that aspect, however.

196. The Claimant's evidence as to the remarks alleged was, the Tribunal concluded, not likely to be accurate. She believed it, but she had not raised any matter formally at the time of the alleged events, nor had she raised a formal grievance, nor had she provided particular details to Inspector Lynch or Mrs Wilson when there was an opportunity to do so. She did have an increasingly difficult relationship with Sergeant Munro, particularly in about October and November 2017 when he worked directly with her, and the two incidents referred to above relating to the 999 call and obstruction with a car took place. Those incidents were ones, for the reasons set out below, where he was entitled to have concerns over her performance. The Claimant's own evidence was that she had handled them "pretty well", and she disagreed with the suggestion in cross examination that she could have handled them better the Tribunal did not accept. The Tribunal noted that other aspects of her evidence were shown not to be correct, for example her claim in the Claim Form that she was told that any second meeting after that on 12 April 2018 would have to be held in the office when the note of the meeting that day and evidence of witnesses clearly established that if it were needed a neutral

venue would be considered. The Tribunal also noted that on many occasions in her evidence she indicated that she could not recall details.

197. Mr McKay in his evidence said that the Claimant had told him about a remark as to medication to the effect that she shouldn't need it to come to work and that the dose was too high, but he could not recall when that was. She had also said to him that she was being undermined by Sergeant Munro. That evidence was of course hearsay, and is not substantially different from Sergeant Munro's evidence on that phrase. Mr McKay did not give evidence to support the other phrases alleged to have been said by Sergeant Munro.

198. The Tribunal concludes that the remarks as alleged were not made.

199. In so far as the remark made with regard to medication is concerned, although the Claimant did not give evidence that she did hear that particular remark, if one proceeds on the basis that she considered that it created a hostile, degrading, humiliating or offensive environment for her, that perception was not the Tribunal considered reasonable for her to have held, given the circumstances set out above.

iv. If so, were those remarks made as a result of the Claimant's disability?

200. This question does not arise.

201. **b) Was the Claimant discriminated against by the Respondent because of something arising in consequence of her disability (section 15 of the Equality Act 2010)? In that respect:**

i. Did putting the Claimant on an informal Action Plan amount to unfavourable treatment?

202. The Tribunal considered whether the second Action Plan did amount to unfavourable treatment, there being no particular challenge to the first Action Plan. There were a number of factors that indicated that it did not:

(i) The second Action Plan had two elements, firstly working on up to four occasions in the period of two months that it covered until 1am on Dundee Safe, and secondly undertaking more response duties, making suitable decisions and documenting that. It was however an informal one. Whilst the Claimant's submission characterises it latterly as having been "mandatory" that is not accurate. It was in the nature of a target to be aimed at, not a minimum to be achieved.

(ii) The Federation as the Claimant's representatives made no protest about the second Action Plan. It appears to have been raised with Mr Forsyth by Mrs Wilson around the time of the second case conference, which he did not attend. He did not raise any issue about it at the formal meeting in April 2018, although the note of it records a discussion with regard to the Action Plan and that her line managers were trying to ensure that 11pm was the appropriate finish time, which would have been an obvious time to raise a challenge about that Action Plan.

(ii) The Claimant, who had not been present at the second case conference at which that was decided, did not object to it when explained to her, although there was limited evidence about that issue either from Inspector Lynch or the Claimant. Her consent did however appear from the conversation on 12 November 2017 when she asked for more time to complete it.

(iii) In her evidence, the Claimant accepted in general the need for an operational officer to be flexible and that a shift may not in practice end as scheduled because of ongoing operational requirements.

(iv) The GP entry for 16 November 2017 indicated that it had been "OK initially"

(v) The Tribunal ultimately accepted Mrs Wilson's evidence that the FMA had given his consent to the proposal of a small adjustment to the shift provided that that was infrequent and irregular, despite the lack of pleading on that, the absence of that being explained to the Claimant,

and the lack of any documentation. It did however consider it likely that she had done so after the second case conference as the proposal is likely only to have been discussed on the first occasion at that meeting. The decision maker on the overall strategy was Superintendent Todd, and there is no record or evidence of a prior conversation with him about that suggestion. It is likely to have arisen at that meeting, and then in the form of a comment as to "small adjustments" the detail of which was developed thereafter.

(vi) The purpose of the second Action Plan was partly to test whether the Claimant was able to work to an extent beyond 11pm, not as a permanent matter but within a two month period effectively as a trial. The position thereafter depended on the outcome of that trial, or test of resilience as it was put. It was also however about taking a lead role, and making suitable decisions.

(vii) There were to be up to only four occasions within that period when the working after 11pm was to take place.

(viii) The Respondent had informed the Sergeants who would arrange a colleague to be with the Claimant or themselves work with the Claimant during those periods at Dundee Safe. Sergeant Munro was available for support if needed.

203. Against that however was the terms of the report by Dr Marshall as to the detrimental effect of disturbing sleep patterns, that the Claimant had been working on an adjustment to finishing at 11pm which had worked for a period of about 7 months without incident, that she had expressed concern at working shift patterns that may lead to periods of absence, that she was in fact anxious about the proposal to work to 1am on Dundee Safe even if that was not articulated, and that the anxiety built up to the extent that on 16 November 2017 she reported symptoms to her GP that then led to an absence of five months until her resignation. Mr McKay had referred in evidence to the Claimant's sleep pattern being disturbed, although precisely when was not confirmed. The Claimant also explained that she had privately consulted with a psychologist.

204. An important factor for the Tribunal was that the test of resilience, as it was described, had two potential outcomes. One was that the Claimant was able to work the hours without issue. Another was that she was not able to do so, and that her mental health was made worse in some way that could have manifested itself in a panic attack, or the need for increased medication. The requirement to work beyond 11pm may also have affected circadian rhythms as Dr Marshall explained. In these respects the extent of the potential for impact on mental health could not be gauged, but it was referred to in general terms in the report of Dr Marshall. That report confirmed the opinion that the Claimant was fit for operational duties provided that the recommended adjustments were accommodated. The second Action Plan did not do so, but changed the adjustments for at least a part of the time. Under the question of "how will I know when I have achieved this" was written "By successfully completing these duties without having any adverse effect on your health …." That indicated to the Tribunal an assumption by the Respondent that the outcome would be successful, but that was not an outcome that was inevitable, and was not one that could be predicted with any reliability by those who were not medically qualified. It indicated to the Tribunal that the terms of the FMA report had not been fully appreciated, and a failure fully to engage adequately with the recommendations that were made, and had initially been accepted. It had an element of considering that the Claimant had control over her health, which was unwarranted. It also was indicative of taking a risk with the Claimant's mental health.

205. The implication of that report and the events that followed may have been that the Claimant was not fit for operational duties, on the basis that the condition of adjustments was not being accommodated. The Respondent did not however seek to address that matter in writing with the FMA, and at no point was the issue referred to the SMP who would make a decision as to ill health retiral. Dr Marshall's role was only an advisory one on that point.

206. That was against the background of the Claimant being someone who had anxiety and depression, amongst other conditions, and who had had periods of absence, and had had two panic attacks at work.

207. On balance, the Tribunal concluded that the second Action Plan was unfavourable treatment in so far as it required work beyond 11pm on Dundee Safe duties. In respect of its other elements, however the Tribunal considered that it was not unfavourable treatment because of disability. The steps were taken to address performance concerns as referred to above and were not related to her disability.

ii. If so, did the Respondent take those steps because of something arising in consequence of her disability?

208. The Tribunal considered that the steps taken in respect of working to 1am on Dundee Safe duties when on late shift under the second Action Plan were so taken because of the Claimant's disability. It was the Claimant's mental health issues which led to advice from Dr Marshall not to work after 11pm in light of its affect on her ability to sleep, which in turn affected her mental health detrimentally. That part of the second Action Plan would not have been proposed had the Claimant not had that disability.

209. The remainder of the second Action Plan was not taken because of something arising in consequence of her disability, but to seek to improve performance within the role more generally.

iii. If so, were the Respondent's actions a proportionate means of achieving a legitimate aim?

210. The first question the Tribunal addressed was whether the aims were legitimate. The aims that the Respondent sought to achieve were

(i) Ensuring that the Respondent is maintaining an appropriate level of service and protection to the public and

(ii) Ensuring that all police officers perform their operational duties that they are fit to carry out to an acceptable standard

and the Tribunal readily accepted that they were legitimate aims.

211. The second question was whether or not they were proportionate. On that issue there were again arguments both ways.

(iii) The Tribunal concluded that the means were not proportionate to the aims. It considered that there was a risk to the Claimant's health in effecting the change to what had been an adjustment undertaken in response to the FMA advice as to working to 11pm only, which Inspector Lynch had agreed had been an adjustment implemented after that advice was given. That was balanced against the risk of an event happening when the Claimant was on a shift terminating at 11pm which she may either have left because that was the end time, or not been able to continue with because of the build up of stress and anxiety leading to some form of panic attack as had occurred earlier. The Tribunal were concerned at the lack of clear evidence, or of written record of that, or of the discussion with the Claimant when the second informal Action Plan was introduced to her. It was concerned at the lack of clarity as to what precisely had been explained to Dr Marshall by Mrs Wilson, and on what basis he had given advice. It was further concerned that Dr Marshall's advice had not been communicated in any way to the Claimant, such that she was not aware of the view he held, and only had the report dated 3 May 2017. The Tribunal considered that the terms of the second Action Plan did not lead to "infrequent and irregular" adjustments to the shift pattern. In any event, Dr Marshall was not called to give evidence on that, and there was no email, note of a call or other evidence to demonstrate whether he would regard the precise terms of the second Action Plan as being appropriate. Further, it was not satisfied that the restriction to 11pm could not be managed. The restriction to 11pm working had been managed successfully in the period of approximately seven months prior to the second Action Plan. The decision to attempt such "small

adjustments" was made by Inspector Todd, but he was not called to give evidence as to his own reasons for doing so. Taking the potential risk to the health of the Claimant balanced against the needs of the Respondent, the Tribunal concluded that it was not proportionate.

212. The conclusion of the Tribunal accordingly was that the second informal Action Plan was not a proportionate means of achieving a legitimate aim in so far as it required working after 11pm on Dundee Safe duties when on late shifts.

213. The Respondent sought to argue in submission that he was not aware of the potential effect on the Claimant, but the Tribunal did not accept that argument, given the terms of the various Occupational Health reports referred to above.

c) Reasonable adjustments

Did the Respondent fail to make reasonable adjustments in relation to the Claimant in terms of Sections 20 and 21 of the Equality Act 2010? In that respect:

i. Did the Respondent apply the PCP of requiring the Claimant to perform the operational duties of a police officer?

214. The Tribunal answers this question in the affirmative, but considers that the provision criterion or practice (PCP) requires to be more specifically expressed. It is clear from the terms of the second Action Plan that the Claimant was required to undertake the operational duties of a police officer. Such duties include those as a CSO. Those CSO duties are primarily community based, but there are occasions when they include an element of response policing, by which is meant responding at short notice to an incident, which may be a crime, or where the public may be in danger. That can either be as the incident occurs within the officer's geographical area, or because other resources are not available. The second Action Plan indicated to the Claimant that she required to undertake Dundee Safe duties, which was response work but did also fall within the duties of a CSO, with other

CSOs also undertaking such duties and that of an operational officer. That work was to be undertaken during the period that included 11pm to 1am.

215. It appeared to the Tribunal that the provision in the second informal Action Plan that was the appropriate one for consideration as a potential PCP was that requirement to work up to 1am on Dundee Safe duties. The provision as to being more proactive and making suitable decisions was different. It was based on concerns over performance. Those concerns arose independently of disability. The Tribunal did not regard those aspects as being part of the PCP relevant in the case.

216. The PCP it identified therefore was restricted to the requirement in the second Action Plan that the Claimant work in Dundee Safe duties to 1am when rostered on a late shift.

217. The Claim Form had asserted in addition that there had been a target number of crime reports required of the Claimant. The evidence did not support that. The Respondent's witnesses were clear that no such targets existed for any operational police officer. They indicated the extent of the work being carried out comparatively between officers. Mrs Wilson in particular spoke to making that comparison, and that it was clear from that that the Claimant produced materially less crime reports than other CSOs. In so far as emergency response driving was concerned, the Claimant was not required to do so, save that there was the potential for her to be driving when an incident occurred.

ii. If so, did that PCP put the Claimant at a substantial disadvantage compared to those without her disability?

218. The Tribunal considered that the Claimant was placed at a disadvantage compared to those without her disability, by the requirement to work to 1am on Dundee Safe duties. As the occupational health reports indicated, the Claimant had a limited tolerance to stress. She suffered from anxiety.

Response work such as on Dundee Safe by its nature did not always allow her the opportunity to take time out of a situation to reduce stress levels, or cope with the stress that existed at that time. Response work by its nature was unpredictable. But the separate issue was the working after 11pm. The recommendation had been made to cease work at that time as otherwise working beyond that affected her sleep pattern detrimentally. Dr Marshall had referred to earlier reports, and would have been aware of the recommendation as to working beyond midnight which was qualified by the words "minimised as far as possible." He did not use such words of qualification in his own report. Lack of sleep in turn increased her level of anxiety, increased fatigue, and affected her level of concentration. These were disadvantages that a person without a disability would not suffer. They were specifically related to her mental health issues. The relevance of the effect of a person's mental health was explained recently in ***Ishola v Transport for London UKEAT/0184/18.***

219. The next question for the Tribunal was whether that disadvantage was a substantial one, in the sense referred to in section 212(1) of the Act. It is a matter assessed objectively. The Tribunal concluded that it was substantial, but the issue was a difficult one. On the one hand the Claimant had earlier had periods of anxiety at work, and had required to leave. She had had periods of absence. That eventually led to the FMA report, and its recommendations, as set out above. The evidence that the FMA accepted the precise further adjustment proposed in the second Action Plan was not clear, as referred to in more detail below. There was evidence from the Claimant and Mr Mackay that she became anxious after the Action Plans were introduced, which affected her sleep pattern, although to what extent and when was not explained.

220. On the other hand, the FMA'S advice was not to avoid response work entirely, but to avoid emergency response driving duties, and he accepted small adjustments to the shift proposed provided that they were infrequent and irregular. The period of the second Action Plan was limited to two months,

and the period of working on Dundee Safe was for up to four occasions over that two month period. The outcome was up to four occasions of working to 1am over a ten week period in which there would be 45 shifts worked. That limited extent, for a plan that was not opposed by the Claimant or her Federation representative either at the time or at the meeting in April 2018, and where on two occasions the Claimant worked to 1am but not on Dundee Safe duties, without any evidence that it had a detrimental effect, was in the judgment of the Tribunal not such as can properly be described as substantial. That was supported by the GP entry which was to the effect that the plan was "OK initially".

221. The IDS Handbook "***Discrimination at Work"*** at paragraph 21.72 refers to two Tribunal decisions in which it was held that there was not a substantial disadvantage; one, ***Field v NCP Services Ltd***, in relation to tiredness as a result of cancer medication, the other ***Schular v Home Office***, where a wheelchair user complained at the failure to install expensive electronic doors. They are of limited assistance, being first instance decisions, and the facts are very different. The issue is one of fact and degree.

222. The Tribunal considered that the disadvantage had been a substantial one, as there was a risk of harm to the Claimant that was more than minor, and the potential harm was itself not minor. The Tribunal had regard in coming to that conclusion to the advice given by the FMA. Whilst there had not been a great deal of evidence of actual harm, and no medical report or similar evidence produced by the Claimant, there was very general evidence given of some disruption to sleep, and the absence of further actual harm was partly caused by the fact that the Claimant had not attended for Dundee Safe duties, either as she did not attend in October 2017 or because she was off sick in November 2017 and beyond.

iii. If so, did the Respondent fail to take reasonable steps to remove that disadvantage?

223. The Tribunal considered that the Respondent had failed to take reasonable steps to have removed that disadvantage. They did not seek expert advice from Dr Marshall on exactly what was proposed. They did not therefore have his advice that their proposal did fall in the ambit of the phrase "irregular and infrequent". It would have been reasonable to have also informed the Claimant of the medical advice, and to manage the work during Dundee Safe more fully, for example by nominating one officer to accompany her, rather than the more loose arrangements that were put in place.

d) Did the Respondent harass the Claimant (section 26 of the Equality Act 2010) as alleged in paragraph 15 of the Claimant's paper apart?

224. The factual basis for the claim of harassment, which is the same as for the related claim as to direct discrimination in respect of those remarks, was not held to have been established as the Claimant did not prove that the remarks she alleged had been made.

225. It was not therefore necessary to address the issue of time-bar, or whether to extend that on a just and equitable basis, nor to address the defence of taking all reasonably practicable steps.

Further issues

226. The Tribunal determined that it was necessary to expand the list of issues to deal with matters that arose in evidence, and in respect of which a decision is required as part of the background to the allegation that there was a dismissal. They also have the potential to arise under sections 13 and 15 if they arose "because of" disability. They include the matter of whether or not there was a dismissal, and they are addressed in chronological order:

1. What was the reason that the Claimant did not attend for Dundee Safe duty on 27 and 28 October 2017?

227. The Tribunal concluded that the Claimant had been informed of the requirement to attend for Dundee Safe on 27 and 28 October 2017. Her

reason for not doing so as given in her evidence was that she was not on the operational order, but the Tribunal did not accept that as a good reason. She had not indicated to the Respondent that she had any concerns over the proposal, nor had she asked for a further OH referral, nor had she attended her GP at that stage. She asked Inspector Lynch for more time to complete the Action Plan rather than to change it when they met on 12 November 2017. The Tribunal concluded that the Claimant had not met the second Action Plan in part, by deliberately not engaging in the Dundee Safe duties, and in respect of performance by her as referred to below in more detail, and that that failure was not because of her disability.

2. Did the Claimant's failure to make suitable decisions on 27 October 2017 and 14 November 2017 happen because of her disability?

228. The Tribunal considered that the two incidents were instances where the Claimant had not made suitable decisions, but that the decisions were not because of the Claimant's disability. They were not affected by her disability. They did not arise late at night for example and there was no evidence of her being fatigued or feeling under a material level of stress. Her own evidence was that she had, she considered, handled them appropriately, not that she had failed to do so because of any aspect of her condition or symptoms.

3. Was the decision to issue the Notice of Hearing taken, and the conduct of the hearing on 12 April 2018, because of the Claimant's disability?

229. The Tribunal concluded that it was not. That was for the following reasons:

(i) The Claimant had not attended for Dundee Safe duty when she ought to have done, under the arrangements she had agreed to earlier. It was reasonable to make enquiry about that prior to making a decision on the next steps, if any.

(ii) The Claimant had not completed documentation that she ought to have done and it was reasonable to make enquiry about that prior to making a decision on the next steps, if any.

(iii) The Claimant's performance when working with Sergeant Munro had given him reasonable cause for concern, and it was reasonable to make enquiry about that prior to making a decision on the next steps, if any.

(iv) The hearing was attended by her Federation representative, who did not object to what had happened earlier, or the fact of the hearing taking place.

(v) The hearing was held at the Claimant's home address, unusually, but as an adjustment on account of her disability.

(vi) The hearing was not convened by Sergeant Munro her line manager, but by his line manager Inspector Lynch with whom the Claimant had a good relationship and in respect of whom she had not raised any complaint or concern

(vii) When the Claimant became upset during the hearing, it was not fully concluded, but she was given the opportunity of making further representations either herself or by her representative.

(viii) No decision was taken in relation to that hearing, as the Claimant had resigned. It remained at a preliminary stage. No formal process to manage performance under the SOP was commenced.

4. Was there a dismissal in terms of the statute?

230. Despite this not being in the list of issues specifically, there is some reference to the termination of employment. The resignation is dealt with at paragraph 18 of the Claim Form which stated:

> "The Claimant experienced further deterioration in her mental health due to increased anxiety and depression, resulting from the performance review process, being placed on an Action Plan, and not receiving appropriate support. The Claimant considered that the respondent had treated her less favourably due to her disability and resigned her position due to the discrimination by the respondent."

231. The Response Form denied such allegations, particularly at paragraphs 26 – 31. It raised an issue of jurisdiction on certain issues but not that which related to the second Action Plan.

232. The issue of dismissal was addressed in Mr Edward's submission. Mrs Gallagher replied to that, arguing that there had been no fair notice of the point, but that if it was permitted to be argued that there had been no dismissal.

233. It appeared to the Tribunal that the Respondent had had fair notice of the allegation that there had been a resignation due to the treatment received, which itself was alleged to be due to her disability. The Tribunal considered that it was in accordance with the overriding objective to allow the point as to dismissal to be argued, and decided.

234. There are grounds to criticise the Respondent in some respects. Best practice was not followed in a number of respects. Significant issues were not recorded in writing as they ought to have been. Whilst the arrangements in the second Action Plan were said to be to benefit the Claimant, at best that is only partly right. The primary benefit was to the Respondent, in the attempt at having an officer who could work more flexibly than was being recommended. The fact of a finding that there was discrimination under section 15 of the Act is an important consideration. It does not however of itself mean that there was a dismissal.

235. The Claimant gave evidence that she felt that she was being forced out, and that the Respondent wished her to resign, in that it was setting her up to fail. The Tribunal also took into account that the second Action Plan has been found to be unlawful discrimination under section 15, that it did cause anxiety for the Claimant, and that she became unwell such that she was off work from 16 November 2017.

236. The Tribunal did not consider that the claim of an attempt to force her to resign was an accurate portrayal of what occurred. Her reasons for not attending for Dundee Safe on 27 and 28 October 2017, that she was not on the operational order, was not a good one. The incidents on 27 October and 14 November

2017 were matters in respect of which the Respondent were entitled to have concerns over her performance. In each respect, particularly the 999 call incident, she had not made appropriate decisions on how they should be handled. There was evidence that she did not complete documentation for the second incident, although she did go off work two days later. The two incidents had not taken place later in the day, close to her end time of 11pm. Her own evidence to the Tribunal was that she had handled the incidents appropriately, not that she had acted insufficiently in any way because of fatigue or otherwise. There was not sufficient evidence before the Tribunal to establish any connection between her disability and those two incidents.

237. The Respondent was seeking in general to be supportive of the Claimant. A series of adjustments were made for her. There were two informal Action Plans, and there was evidence that they were framed to try and make matters work for the Claimant, for example in the email from Mrs Wilson of 19 September 2017.

238. The Claimant had initially not challenged the second Action Plan, although she became anxious about it at some point. What led to the absence from work in November 2017, the Tribunal concluded, were the incidents where her performance was criticised by Sergeant Munro. She thought that he was being unfair and overbearing, as she told her partner and Mr Forsyth, although not with any details. At that point she had moved to work directly under his management, on the same shift, such that he was able to manage her more closely and observe her performance at first hand.

239. It appeared to the Tribunal that the resignation was caused by a combination of the Claimant's unfounded concerns with regard to Sergeant Munro and her misplaced belief that the Notice of Hearing and the Hearing itself would only lead to her dismissal as the Respondent was seeking to have her leave. That was not correct, in that the intention was to try and find a way forward. Mrs Wilson, for example, said in relation to a second formal meeting that it would "hopefully not" be required.

240. The Claimant's evidence that she was told at the meeting on 12 April 2018 that she had to return and complete the Action Plan was not accepted. It was not consistent with the written record of the meeting, which was not challenged in evidence, and contrary to the evidence that no decision had been taken on whether to proceed to the next stage of a formal hearing and if so what the outcome of that stage would be. It would be determined by more senior officers in any event, as spoken to by Mrs Wilson in her evidence and as borne out by the terms of the Regulations quoted above and in the Appendix which make clear what an officer can do in response to such a Hearing, and what the outcomes may be.

241. Similarly, the Claimant's evidence that the Respondent's witnesses would find something else against her was not accepted. The issues in respect of which she had been criticised by Sergeant Munro were proper areas for criticism. He had been justified in commenting to her about them at the time, and informing Inspector Lynch about them. The Claimant did not in her evidence accept that they were justified. Her perception about those incidents, and the risk as she saw it of further issues being raised to remove her, was not reasonable.

242. Further issues arose in the Tribunal's assessment of this issue:

(i) The hearing on 12 April 2018 was not directly a formal one, but it was in the nature of a preliminary step in a process which might have led to a formal outcome. If the decision had been taken that there were performance issues, matters would have progressed as a form of performance management, which would have involved a formal Action Plan and further formal meetings with regard to whether or not the performance met that plan. But that was not the only outcome of the hearing. Other outcomes could have been further informal Action Plans, by way of example. The hearing was the opportunity for discussion as to what had happened, and what should then transpire.

(ii) The Hearing did not conclude. The Claimant became upset. She had an opportunity to submit written material afterwards either directly, or by her Federation representative who was present. No decision was taken afterwards as the Claimant did not make representations, instead she resigned.

(iii) Certain of the other allegations made by the Claimant were not established. The Claim Form at paragraph 20 referred to an adjustment of not having to attend the office for further performance review meetings. The note of the meeting on 12 April 2018 however makes it clear that the discussion included using a neutral venue if a second meeting was to be required. That was appropriate, and the Claimant was not simply told that she had to attend the office for such a meeting if it took place. Paragraph 22 refers to a target for reported crimes, a PCP placing disabled officers at a particular disadvantage. The evidence disclosed no such target.

243. The second Action Plan was primarily based around concerns over capability in the sense of the ability to carry out the role of CSO, but was affected by lower level concerns at her contribution and performance. The Notice was sent, and the meeting held, over concerns as to performance following the incidents referred to. The issue appears to have been addressed by the Respondent solely as a performance issue, both in the Notice and at the meeting. The terms of the 2014 Regulations were referred to in the Notice, and the Regulations were enclosed with that Notice. The matters raised in discussion at the meeting were the incidents on 27 October and 14 November 2017. The part of the Action Plan related to working to 1am on Dundee Safe duties was not discussed. There were opportunities to do so during the meeting, but neither the Claimant nor Mr Forsyth took them. The trigger for the resignation, the Tribunal found, was the performance issues, the Claimant not accepting that she had not made suitable decisions, together with her unfounded fears that Sergeant Munro was harassing her, or that the Respondent was seeking to remove her.

244. The role of the CSO was changing, to include a greater element of response work. That was not for the Claimant specifically and alone, but all CSOs in the Tayside Local Police Area. There were resource reasons for doing so, ensuring that the balance of operational and non-operational officers was sufficient, and that the CSOs were available to carry out response work if and when required to do so. Putting that another way, there was a legitimate aim of managing the resource of police officers for public safety, and the means to do so were proportionate.

245. A material factor in the decision made by the Claimant to resign, spoken to by her in evidence, was her belief that Sergeant Munro was seeking to remove her, and had made inappropriate remarks, as set out in paragraph 15 of the Claim Form. For the reasons given above the Tribunal did not accept that evidence. To that she added a suggestion in evidence that he had advised her of the online method of resigning, which he denied in his own evidence. That allegation had not been pled in the Claim Form. The Tribunal did not accept that he had made such a comment to persuade the Claimant to leave. His evidence that he was not aware of such a facility the Tribunal accepted.

246. The Tribunal did not accept the Claimant's evidence on the alleged constructive dismissal tactics of Sergeant Munro. It was however the first matter she set out in her resignation letter.

247. A further aspect in the Tribunal's consideration was what it considered was the delay in the period up to the resignation together with the events during that period. The second Action Plan was introduced in September 2017. There were meetings with Inspector Lynch shortly before it was introduced at which the Claimant essentially stated that she agreed to it, and a meeting with Inspector Lynch on 14 November 2017 at which the Claimant did not raise objection about it, but instead asked for more time to complete it. At no point during that period did the Claimant's representative raise any objection

about the second Action Plan. That chapter of evidence appeared to the Tribunal to be clear indications of acquiescence.

248. The comment to the GP on 16 November 2017 was that the plan was "ok initially" appeared consistent with that. There were further discussions in February 2018. The second Action Plan was not the subject of particular challenge at the meeting on 12 April 2018 either by the Claimant or her representative.

249. Whilst the Claimant was absent through illness after 16 November 2017, the period of time until resignation was five months. Whilst the case law referred to above is not always easy to reconcile, there was no specific evidence as to receipt of sick pay and matters can be highly fact specific, the delay of five months was a lengthy period of time of itself. In general terms the greater the length of the delay, the less easy it is for an employee (as the Claimant is deemed to be for these purposes) to argue that there was a dismissal, and the greater the risk for the employee of having been held to have acquiesced. That delay of five months the Tribunal considered to be a substantial period, and it also appeared to the Tribunal to be consistent with acquiescence.

250. The Tribunal did not consider that there was any matter in the period from the start of the second Action Plan onwards, particularly in relation to the giving of the Notice of the hearing, or the hearing itself on 12 April 2018, which could amount to a "last straw" for the purposes of a constructive dismissal claim as explained in ***Kaur***.

251. The steps were not ones which could properly be criticised either generally or as having been related to, or arising out of, disability.

252. In all the circumstances, the Tribunal did not accept that a dismissal under section 39(7)(b) of the Equality Act 2010 had been established by the Claimant.

Conclusion

253. The Claimant's claim of discrimination arising from disability under section 15 of the Equality Act 2010 is successful in respect of part of the second Action Plan, and the claim in respect of reasonable adjustments under sections 20 and 21 of the Equality Act 2010 succeeds. The claims under sections 13 and 26 of the Equality Act 2010 are unsuccessful and require accordingly to be dismissed. The claim that there was a dismissal under section 39 of the Act is unsuccessful and requires to be dismissed.

254. In the event that either party considers that any matter set out in this Judgment and Reasons was not addressed fully in submission, an application for reconsideration may be made under Rule 70.

255. A hearing will be fixed separately to address the issue of remedy.

Employment Judge: **Alexander Kemp**
Date of Judgment: **20 March 2019**
Entered in register: **20 March 2019**
and copied to parties

APPENDIX

"**Arrangement of performance meeting**

14(1) A first line manager who refers a constable to a performance meeting must send a notice in writing requiring the constable to attend such a meeting.

(2) A notice under paragraph (1) must give details of—

(a) the procedures for determining the date and time of the performance meeting;

(b) the respect in which the constable's performance is considered to be unsatisfactory;

(c) the possible outcomes of a performance meeting, progress meeting and performance hearing;

(d) any proposed attendance at the meeting of a human resources professional or a police adviser to advise the first line manager on the proceedings;

(e) any proposed attendance at the meeting of any other named person and the constable's right to refuse to consent to their attendance;

(f) the constable's right to seek advice from a police representative;

(g) the constable's right to be represented at the meeting by a police representative; and

(h) the requirement to provide to the first line manager, in advance of the meeting, a copy of any document on which the constable intends to rely.

(3) A notice under paragraph (1) must be accompanied by a copy of any document relied upon by the first line manager in coming to the view that the performance of the constable is unsatisfactory.

(4) The first line manager must, if reasonably practicable, agree a date and time for the meeting with the constable.

(5) If no date and time are agreed under paragraph (4), the first line manager must specify a date and time for the meeting.

(6) If a date and time are specified under paragraph (5) and—

(a) the constable or the constable's police representative will not be available at that date and time; and

(b) the constable proposes an alternative date and time which satisfy paragraph (7),

the meeting must be postponed to the date and time proposed.

(7) An alternative date and time must—

(a) be reasonable; and

(b) fall not later than 10 working days from the date specified by the first line manager under paragraph (5).

(8) When the date and time of the meeting are determined in accordance with paragraphs (4) to (7), the first line manager must send a notice in writing to the constable specifying the date, time and place of that meeting.

Procedure at performance meeting

15.—(1) The procedure at a performance meeting is as follows.

(2) The meeting must be conducted by the first line manager.

(3) A human resources professional or a police adviser may attend the meeting to advise the first line manager on the proceedings.

(4) Any other person whose proposed attendance was notified to the constable in accordance with regulation 14(2)(e) may attend the meeting provided the constable has not refused to consent to their attendance.

(5) The first line manager must—

(a) explain how the constable's performance is considered to be unsatisfactory;

(b) provide the constable with an opportunity to respond; and

(c) provide the constable's police representative (if the constable has one) with an opportunity to make representations in accordance with regulation 6(4)(c) or (if applicable) 7.

(6) If, having considered any representations made in accordance with paragraph (5)(b) and (c) and any other representations made at the meeting (if any), the first line manager is satisfied that the constable's performance is satisfactory, the first line manager must inform the constable that no further action is to be taken.

(7) If, having considered any representations made in accordance with paragraph (5)(b) and (c) and any other representations made at the meeting (if any), the first line manager is satisfied that the constable's performance is unsatisfactory, the first line manager must inform the constable as to—

(a) the respect in which the constable's performance is considered unsatisfactory;

(b) the improvement that is required in the constable's performance;

(c) the period within which that improvement is required to take place (to be known as "the first improvement period");

(d) the fact that the constable will receive a written improvement notice;

(e) the validity period of that notice and the effect of regulation 10(4); and

(f) the circumstances in which the constable may be required to attend a progress meeting.

(8) The first line manager may postpone or adjourn the performance meeting to a later time or date if satisfied that it is necessary or expedient to do so and the procedure mentioned in regulation 14(4) to (8) applies to a postponed or adjourned meeting as it applies to the meeting postponed or adjourned.

Procedure following performance meeting

16.—(1) As soon as reasonably practicable after the date of the conclusion of the performance meeting the first line manager must prepare and send to the constable a written record of that meeting.

(2) If at a performance meeting the performance of the constable is found to be unsatisfactory, the first line manager must, as soon as reasonably practicable after the date of the conclusion of that meeting—

(a) prepare and send to the constable a first improvement notice; and

(b) give to the constable written notice of—

(i) the constable's right to appeal under regulation 18;

(ii) the name of the person to whom an appeal notice must be sent;

(i) the matters in relation to which an appeal may be made and the grounds of appeal;

(iv) the last date for lodging an appeal; and

(v) the constable's right to submit comments on the written record of the meeting.

(3) Subject to paragraph (4), the constable may submit written comments on the written record of the meeting to the first line manager not later than 7 working days from the date on which the copy of that record is received by the constable.

(4) The first line manager may, at the constable's request, extend the period mentioned in paragraph (3).

(5) The first line manager must ensure that the following are retained together and filed appropriately—

(a) the first improvement notice;

(b) the written record of the performance meeting; and

(c) the constable's written comments on that record.

First improvement notices

17. A first improvement notice prepared under regulation 16(2)(a) must—

(a) record—

(i) the respect in which the constable's performance is considered to be unsatisfactory;

(ii) the improvement that is required in the constable's performance; and

(iii) the length of the first improvement period;

(b) specify a validity period;

(c) inform the constable of the circumstances in which attendance at a progress meeting may be necessary; and

(d) be signed and dated by the first line manager.

Appeal against the finding and outcome of a performance meeting

18 (1) If at a performance meeting the first line manager finds that the performance of the constable is unsatisfactory, the constable may appeal against—

(a) that finding; and

(b) any term of the first improvement notice specified in paragraph (3) (referred to in this regulation and regulation 21 as "the relevant terms").

(2) An appeal under paragraph (1) may only be made on one or more of the grounds of appeal specified in paragraph (4).

(3) The relevant terms are—

(a) the respect in which the constable's performance is considered unsatisfactory;

(b) the improvement that is required in performance; and

(c) the length of the first improvement period.

(4) The grounds of appeal are—

(a) that the finding of unsatisfactory performance is unreasonable;

(b) that any of the relevant terms are unreasonable;

(c) that there is evidence that could not reasonably have been considered at the performance meeting which could have affected materially—

(i) the finding of unsatisfactory performance; or

(ii) any of the relevant terms; and

(d) that there was a breach of the procedures set out in these Regulations or any other unfairness which could have affected materially—

(i) the finding of unsatisfactory performance; or

(ii) any of the relevant terms.

(5) An appeal under paragraph (1) is to be commenced by the constable submitting a written appeal notice to the second line manager not later than 7 working days from the date of receipt of the first improvement notice.

(6) A notice under paragraph (5) must—

(a) set out the finding or the relevant terms (or both) against which the appeal is made;

(b) set out the grounds of appeal; and

(c) be accompanied by any evidence on which the constable intends to rely.

(7) The second line manager may, at the constable's request, extend the period mentioned in paragraph (5) if satisfied that it is appropriate to do so.

(8) The submission of an appeal notice under paragraph (5) does not affect the continuing operation of a first improvement notice sent under regulation 16(2)(a).