EMPLOYMENT TRIBUNALS

Claimant: Mr S Knox

Respondent: Chief Constable of Merseyside Police

Heard at: Liverpool **On:** 11-15 and 18-21 March 2019, and (in the absence of the parties) 22, 25 and 26 March 2019

Before: Employment Judge Horne

Members: Mr G Pennie
Mrs J C Fletcher

REPRESENTATION:

Claimant: Mr D Bheemah, Counsel
Respondent: Mr D Tinkler, Counsel

RESERVED JUDGMENT

The judgment of the tribunal is that:

1. By a majority (the Employment Judge dissenting), the tribunal's judgment is that the respondent is liable for victimisation of the claimant by its employee (referred to in this judgment as "Mr D") subjecting the claimant to the following detriments:

    1.1 Delaying between 26 January 2018 and 25 May 2018 taking any action to search for e-mails that should have been provided as part of the response to the claimant's data subject access request ("SAR1") of 17 August 2017;

    1.2 Sending dismissive e-mails on 7 August and 30 August 2018; and

    1.3 Failing to escalate SAR1 to an appropriate person in a position of influence over the Anti-Corruption Unit.

2. The tribunal unanimously finds that the respondent did not victimise the claimant in any other alleged respect.

3. It is the unanimous judgment of the tribunal that the respondent is liable for harassment of the claimant on 26 October 2017 in relation to his disability.

4. It is the unanimous judgment of the tribunal that it has no jurisdiction to consider the following complaints on the grounds that they were presented after the expiry of the statutory time limit and it is not just and equitable for the time limit to be extended. The complaints are:

   4.2 The complaint that Superintendent Boyle discriminated against the claimant because of sex by refusing his "PER50" application;

   4.3 Both of the complaints of harassment related to sex.

5. Unanimously the tribunal's judgment is that the respondent did not harass the claimant in relation to disability by:

   5.2 allegedly breaking a promise in relation to providing support for the claimant to be awarded full pay;

   5.3 leaving a "return to work action support plan" at the claimant's home on 31 July 2017; and

   5.4 failing to provide adequate Occupational Health support.

6. The remainder of the claim is dismissed following withdrawal by the claimant.

CASE MANAGEMENT ORDER

1. There will be a further hearing to determine the claimant's remedy.

2. The time allocation for the remedy hearing is two days.

3. Within 14 days of the date when the Judgment is sent to the parties, they must inform the tribunal in writing of any dates to avoid when listing the remedy hearing.

4. If any party requires any Case Management Orders for the purpose of preparing for the remedy hearing, they must inform the tribunal of their proposed orders in writing within 14 days of this Judgment being sent to the parties.

REASONS

Acknowledgments

1. Before explaining how we came to our decision, we ought to acknowledge the considerable assistance we have received from counsel for both parties. The hearing was listed for 15 days to accommodate a long list of allegations spanning many years and multiple strands of equality. As it was, the evidence and

submissions were concluded in nine days. This simply would not have been possible had it not been for the intense focus that both counsel kept on the issues at the heart of the claim.

Contribution to these reasons

2. These reasons have been written by the employment judge, but are based on the contributions of the full tribunal. These include the reasons of the majority members of the tribunal where they disagreed with the employment judge's views. The full reasons (including the views of the majority) have been circulated to all members of the tribunal and their comments have been sought before the judgment was signed and sent to the parties.

Complaints and Issues

The claim

3. The claimant is a serving police officer. He has been on sick leave for over two years. By a claim form presented on 6 February 2018 and amended in a lengthy document dated 14 May 2018, the claimant raised numerous complaints of:

   3.1. Direct discrimination because of disability as defined in section 13 of the Equality Act 2010 ("EqA");

   3.2. Indirect disability discrimination as defined in section 19 of EqA;

   3.3. Direct sex discrimination as defined in section 13 of EqA;

   3.4. Indirect sex discrimination as defined in section 19 of EqA;

   3.5. Harassment related to a third person's disability as defined in section 26 of EqA;

   3.6. Harassment related to the claimant's disability as defined in section 26 of EqA;

   3.7. Harassment related to sex as defined in section 26 of EqA; and

   3.8. Victimisation as defined in section 27 of EqA.

4. All of those forms of prohibited conduct would have been unlawful under section 39 of EqA as read alongside section 42.

5. By e-mail dated 7 March 2019 and orally during the course of the hearing, a large number of allegations were withdrawn. As a result, by the time the tribunal began its deliberations, only eight allegations remained. The issues in relation to these surviving allegations were helpfully condensed into a written list which was further clarified by counsel during the course of the hearing.

Direct sex discrimination

6. There was one remaining allegation of direct sex discrimination. It arose out of a decision made by Superintendent Boyle to refuse the claimant's "PER50" application to change his shift pattern. That decision was made and communicated to the claimant at a meeting on 18 May 2016. Shortly before that date, and shortly afterwards, a request made by a woman ("Constable G") was granted. By the conclusion of the evidence it had become clear that Superintendent Boyle had not made the decision to grant either of Constable G's requests. It was no longer alleged that Superintendent Boyle had treated the claimant less favourably than he had treated a named comparator. Rather, the claimant's case was that Superintendent Boyle had treated the claimant less

favourably than he would have treated a hypothetical woman in comparable circumstances.

7. The claimant accepted that, if the refusal of the claimant's "PER50" request amount to discrimination, the discriminatory act had to be treated as having been done on 18 May 2016. It was not contended that the decision formed part of an act extending over a longer period.

8. The issues for us to decide in relation to direct sex discrimination were therefore as follows:

   8.1. Would it be just and equitable to extend the time limit?

   8.2. Did Superintendent Boyle treat the claimant less favourably than he would have treated a woman whose circumstances were not materially different?

   8.3. If so, was the treatment because of the claimant's sex?

Harassment related to sex

9. There were two allegations of harassment in relation to sex. The first ("Harassment 1") was that, between November 2016 and January 2017, Constable Rylands had called the claimant "Dolly Parton", whistled the tune, "Nine to Five" in the presence of the claimant and others, and had stuck A4 sized photocopied pictures of Dolly Parton on the claimant's computer. The claimant accepted that, if this conduct formed part of an act extending over a period, that period must have come to an end by the time the claimant commenced his absence on 23 February 2017.

10. The respondent did not dispute that Constable Rylands has conducted himself as alleged, except that it was denied that Constable Rylands had actually called the claimant "Dolly Parton", and there was a very real issue as to how long Constable Rylands had continued indulging in this behaviour.

11. In relation to Harassment 1, what we had to decide was:

   11.1. Would it be just and equitable to extend the time limit?

   11.2. The factual issues about the nature and duration of Constable Rylands' conduct;

   11.3. Whether the conduct was related to the claimant's sex;

   11.4. Whether the conduct was unwanted; and

   11.5. If so, whether it had the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

12. "Harassment 2" was an allegation relating to the events of 22 February 2017. It is the claimant's case that he had said to Sergeant Laycock, in the presence of Sergeant Williams, that he was unable to do two early shifts that he had been allocated. It is alleged that, thereafter, Sergeant Williams said to the claimant, "why not, what makes you any different?". The claimant was then allegedly "grilled" about his personal circumstances and told that there was no reason why he should be treated differently from anybody else. He contends that he was told that he should "just get on with it".

13. The claimant did not seek to argue that Harassment 2 formed part of an act extending over a period.

14. The issues for the tribunal to decide were:

14.1. Would it be just and equitable to extend the time limit?

14.2. Did Sergeants Laycock and Williams conduct themselves in the manner alleged?

14.3. If so, was that conduct related to the claimant's sex?

14.4. Was the conduct unwanted?

14.5. Did it have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Harassment related to disability

15. We had to consider four further allegations of harassment, these being related to the claimant's disability. They all concern the period of time in which the claimant was absent on sick leave. It is common ground that at the time of all the alleged harassment, the claimant had a disability consisting of the effects of stress, anxiety and depression. The first allegation, which we shall call "Harassment 3", is set against the background of a home visit made by Chief Inspector Garvey-Jones and Inspector Creer to the claimant's home in the summer of 2017. The formal allegation raised by the claimant is that the home visit took place on 4 June 2017. The visit came at a time when the claimant was receiving full pay which, because of the length of his sickness absence, would ordinarily be reduced to half pay in a few weeks' time. During the course of the home visit, Chief Inspector Garvey-Jones told the claimant that she would support him. There was a dispute of fact as to whether, additionally, she told him that she would prepare a favourable report to be placed before the Chief Constable to support an award of continued full pay. Against that background, Harassment 3 alleged that Chief Inspector Garvey-Jones broke her promise and failed to provide such a report. The claimant accepted that, for the purposes of time limits, the harassment should be treated as having been done on 15 August 2017, the date of the Chief Constable's meeting. It was, however, the claimant's case that Harassment 3 was part of an act extending over a period such that the claim was presented within the time limit. This was because of the close connection between the home visit and a later alleged act of harassment.

16. It was common ground that Chief Inspector Garvey-Jones had not in fact prepared a report either to support or to undermine the claimant's application for full pay by the time of the Chief Constable's meeting. The dispute of fact was whether or not this had been promised in the first place.

17. What we had to decide was:

17.1. Whether the alleged conduct was part of an act extending over a period;

17.2. If not, whether it would be just and equitable to extend the time limit;

17.3. Whether the conduct was related to the claimant's disability;

17.4. Whether the conduct was unwanted;

17.5. Whether, having regard to the context and in particular the dispute about whether there had been any promise to provide a report, Chief Inspector Garvey-Jones' conduct in failing to provide the report had the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

18. The next allegation ("Harassment 4") concerns conduct that allegedly took place on 29 July 2017 during a home visit by Inspector Creer. It became reasonably clear to us during the course of the evidence that the claimant had got the date wrong, but we did not regard this error as being fatal to the allegation. What was alleged was that Inspector Creer had left a letter on the claimant's kitchen table and that the letter had required him to return to work on 1 September 2017 when his current sick note was due to expire. Because of the similarity between this allegation and a later one, the respondent did not seek to contend that the tribunal's jurisdiction was affected by time limits.

19. The issues for determination in relation to Harassment 4 were:

    19.1. Did Inspector Creer conduct himself as alleged?

    19.2. Was that conduct related to the claimant's disability?

    19.3. Was the conduct unwanted?

    19.4. Did the conduct have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

20. The next allegation ("Harassment 5") was based on an e-mail which Sergeant McKenzie had undoubtedly sent to the claimant on 26 October 2017. The wording of the e-mail, to which we shall return, speaks for itself, but it has been characterised in the allegation as a threat that the claimant would be subject to the respondent's unsatisfactory performance procedures if he did not return to work. There was no issue about the time limit.

21. Harassment 5 required us to consider the following issues:

    21.1. Was the conduct unwanted?

    21.2. Was it related to the claimant's disability?

    21.3. If so, did it have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

22. Harassment 6, which is the final allegation of harassment, started life as a general allegation of failure to provide sufficient Occupational Health assistance during the claimant's sick leave. During the course of final submissions, the claimant's counsel helpfully clarified that the alleged unwanted conduct consisted of "the respondent allowing the claimant to fall out of the system in July 2017". The respondent did not take any issue about the time limit.

23. Our task was to determine:

    23.1. whether the conduct was unwanted;

    23.2. whether it was related to the claimant's disability; and

    23.3. whether or not it had the purpose or effect as described above.

<u>Victimisation</u>

24. There was one complaint of victimisation. It had a single central theme, but there were many facets to it. It was common ground that the claimant had done a number of protected acts within the meaning of section 27 of EqA. The respondent accepted that these acts including the making of four requests for information. In the claim as formulated by the claimant, these requests were described as "freedom of information requests" to the "Data Protection Unit". In fact, the relevant department was the Data Access Unit, and the claimant's

requests were at all times treated as data subject access requests ("SARs"). We were not shown the actual requests that the claimant made, but the respondent does not dispute the fact that the claimant indicated in those requests that he required the information in connection with an employment dispute. It is also common ground that the claimant did further protected acts in February 2018 by raising multiple grievances, expressly or impliedly alleging discrimination.

25. The List of Issues handed to the tribunal on the second day of the hearing attempted to capture the victimisation issues in the following terms:

> "…Was the claimant subjected to detrimental treatment by the respondent failing to deal with his requests for information within the statutory time limits or within a reasonable period or at all?"

26. During the evidence and submissions, it became clear that there was more dividing the parties than that simple question would suggest. First, it was clear that the claimant's case was that the respondent had victimised the claimant not just in delaying the provision of information, but also by providing information that was allegedly incomplete. Second, it was clear that there was a very real issue about whether anybody had acted with the prohibited motivation. In the language of section 27 of EqA, we had to decide whether any employee or officer of the respondent had subjected the claimant to the alleged detriment *because* the claimant had either done one or more of the protected acts or was believed to be going to do so.

27. During the course of the hearing, there was a discussion about who, on the claimant's case, had acted with the prohibited motivation. Counsel for the claimant confirmed that it was not part of the claimant's case that Mrs Jaymes of the Data Access Unit (DAU) had been motivated in that way. No such allegation was put to any of the witnesses who gave evidence. Rather, it was the claimant's case that there had been "general collusion behind the scenes". The claimant was given the opportunity to apply to have witnesses recalled so it could be put to them that they had been a party to the general collusion. Having taken instructions, the claimant's counsel indicated that he would not be seeking to have any witnesses recalled for this purpose.

28. From the claimant's evidence, and his counsel's cross-examination of Mrs Jaymes, it was clear that the claimant had a strong sense of grievance about the the respondent's disclosure of information that went considerably beyond the handling of his SARs. In particular, the claimant was suspicious about the fact that some of his notebooks went missing and that there was information missing from his Pronto device when it was handed to him in November 2017. We had to be careful in our approach to these concerns. On any reasonable reading of the claim and the list of issues, the victimisation complaint was confined to the way in which the respondent dealt with the SARs. Alleged mishandling of other information requests was of potential relevance, but only if it would help us to resolve the actual issues in the case.

Evidence

29. We considered documents in an agreed bundle which we marked CR1. Additionally, we considered a table (C2) analysing shift changes, a black folder of supplemental documents provided by the claimant (C3), a long list of freedom of information requests and completion times (C4) and a completed stress questionnaire which we labelled R2. This latter document was admitted into

evidence after having heard competing arguments from the parties. We gave our reasons orally at the time. Further written reasons will not be provided unless a party makes a request within 14 days of this Judgment being sent to the parties.

30. The claimant gave oral evidence on his own behalf but did not call any witnesses. The respondent called Mrs Gibson, Chief Inspector Garvey-Jones, Chief Superintendent Boyle, Constable Rylands, Sergeant Laycock, Sergeant Williams, Inspector Creer, Sergeant McKenzie and Mrs Jaymes. All witnesses confirmed the truth of their written statements and answered questions.

31. During the course of the hearing two disputes arose connected with the presence of the respondent's witnesses in the tribunal room. The first related to whether they should be present during the claimant's oral evidence. The parties cooperated well to resolve that dispute: it turned out that the claimant's anxiety stemmed not so much from the physical presence of the officers in the room, but from their wearing police uniform. The officers agreed to remove their uniforms and attended the next day in civilian clothes.

32. The second dispute required a contested decision from the tribunal. It arose for the first time during cross examination of Mrs Gibson. The claimant wished to have certain of the respondent's witnesses excluded from the hearing room whilst questions were asked on a particular topic. Prompted by the respondent's counsel, the claimant's counsel accepted that the logic of his application would drive him to ask additionally for the tribunal to make an order that witnesses should not discuss the case outside the tribunal room, even when their evidence had been completed. We refused both applications, giving our reasons orally at the time. Again the deadline for requesting written reasons will expire 14 days from when this judgment is sent to the parties.

33. This is a convenient opportunity for us to record our impressions of some of the witnesses who gave evidence to us.

    33.1. First, the claimant. He spoke to us with conviction and we had no doubt that he genuinely believed what he was telling us. When assessing the reliability of the claimant's evidence, we could not ignore the fact that he could well have given a more robust account had he had access to the personal diary which he had been keeping on his "S-Notes" platform accessible via his "Pronto" device. The circumstances in which the claimant has been denied access to the S-Notes forms part of the victimisation complaint. Nevertheless, we had to approach some parts of his evidence with caution. He had a deep sense of mistrust in the respondent, which he himself had described as "paranoia" during a home visit on 26 January 2018. This did not make it any less likely that he was telling the truth, but it did mean that we had to be wary when it came to evaluating his objectivity. Some of the factual disputes related to matters about which two people might reasonably form a different impression, such as the manner and tone in which two sergeants had spoken to the claimant on 22 February 2017, and whether it was reasonable for him to perceive conduct as creating a particular environment for him. The claimant was having to form his impression of those events through a prism of deep suspicion. Another difficulty we had was with the reliability of the claimant's memory. This is not meant as a criticism of the claimant. It is likely that the passage of time has made it difficult for the claimant to remember events clearly. An example is the stress questionnaire. In his oral evidence, the claimant was quite adamant that no

stress questionnaire had been completed. When the document R2 was put to him, he accepted that it was a completed stress questionnaire and that he had signed it. Another example is that the claimant has alleged a variety of dates on which Chief Inspector Garvey-Jones allegedly made him the promise that underpins Harassment 3. She only visited him once. Another example of the unreliability of the claimant's recollection was vividly brought home to us on the first morning of his evidence. His comparison table at C2 purported to show a stark difference in the number of shift changes that the claimant had been given, compared to certain female officers. A couple of hours of patient questioning by Mr Tinkler quietly demonstrated that the claimant's figures in this table were wholly misconceived. When computing his own shift changes he included those that had been given to him at his own request and others that had been made to accommodate days of leave. This mistake had not been made for the female comparators.

33.2. The first witness for the respondent was Mrs Gibson. The claimant's counsel himself commended her to us as “very honest and very reliable”. We saw no reason to disagree.

33.3. We regarded Chief Inspector Garvey-Jones as a straightforward witness and had little difficulty in accepting her version of events.

33.4. Chief Superintendent Boyle spoke in an authoritative manner and appeared sure in his own recollection of events. The reason why we make this observation is because it is relevant to a submission made by the claimant's counsel at the conclusion of the hearing. Chief Superintendent Boyle was telling us about a meeting that had taken place nearly three years ago. Mr Bheemah’s skilful argument was that the passage of time cannot be said to have diminished the cogency of the evidence because Chief Superintendent Boyle appeared to be so definite in his recall of events. We disagree. A person can speak with conviction about what they genuinely believe to have occurred, but that does not mean that their memory is reliable. The claimant's own evidence is a case in point.

33.5. Constable Rylands struck us as somebody who was doing his best to tell us the truth, but we had to bear in mind that the passage of time could well have affected his memory. His evidence touched on disputes over precise words spoken in undocumented conversations and whether his conduct had continued to the point where it had gone beyond a joke: a matter about which two people could reasonably disagree.

33.6. We regarded Sergeant Laycock as a straightforward witness. His recollection of events was assisted by thorough and careful notetaking.

33.7. Sergeant Williams’ evidence was more vague. We had to be alive to the danger that the passage of time might have clouded her memory.

33.8. We considered that Inspector Creer and Sergeant McKenzie were giving us an accurate account of what had happened and when. That is not to say that we agreed with their opinions, particularly when it came to the appropriateness of providing the claimant with some of the letters and e-mails he was given.

33.9. In view of the fact that we have reached a majority decision in relation to the victimisation complaint, our impressions of Mrs Jaymes’ evidence require a little unpicking. We all agreed that Mrs Jaymes spoke authoritatively

on the processes that are required to be followed under the data protection legislation. We all accepted that she had given us an accurate account of the steps she personally had taken. It was our collective finding that Mrs Jaymes had spoken with a superintendent at the Anti-Corruption Unit (ACU), who had given her various explanations of what searches would be needed in order to retrieve the e-mails that the claimant was requesting. Where the tribunal disagreed was in our assessment of whether those explanations were credible and whether the lack of credibility was something that Mrs Jaymes must have realised. Our majority thought that the ACU must have been able to retrieve the information which the claimant sought more easily then it was saying it could, and that that fact must have been obvious to Mrs Jaymes. The employment judge did not think that there was an adequate basis for such a finding. There was no evidence other than that of Mrs Jaymes about what the ACU existed to do, and how information held on its database could be retrieved.

34. The respondent did not call any witness from the ACU. There was a difference of opinion between the members of the tribunal as to what we ought to make of this fact:

    34.1. It was the view of the majority that we could conclude from the failure to call such a witness that the ACU was actually capable of retrieving more information than they were letting on. The majority believed that it should have been clear to the respondent that they would need to justify the incomplete results of the SAR by reference to the detailed workings of the ACU. The key issue was that the claimant was not provided with, or was delayed in being provided with, access to information to which he was entitled and was, as he saw it, fundamental to his ability to make an effective claim to a tribunal.

    34.2. The Employment Judge disagreed. The claim was about the failure to respond to the claimant's statutory requests for information (which he had described as “freedom of information requests” but which in substance were SARs and were treated as such). It was alleged in the claim that all of these requests had been made to the “Data Protection Unit”. The respondent would therefore have been forgiven for thinking that it was the Data Protection Unit who, being both named in the claim and being responsible for complying with SARs, was the body of people alleged to have acted with the prohibited motivation. They did not have to justify their actions or delays objectively. All they had to do was explain why they had acted as they did on the information that was provided to them. It would therefore make perfect sense for them to call a witness from the DAU to tell us what she had been told by other departments and the action that she had taken on receipt of that information. It would not have been necessary to call a witness from a different department to face questions on whether that information was factually correct or not.

Facts

35. The respondent is the Chief Constable for a large police force where the claimant holds the rank of Constable.

36. The claimant and his partner have four children. At the time of the events with which this claim is concerned, the claimant's father had sadly recently died, and

his mother was elderly and disabled. He and other family relatives took turns to visit his mother and care for her.

37. It goes almost without saying that operational policing is not a 9-to-5 job. The respondent needs to ensure that police officers are available in sufficient numbers to cover policing demands early in the morning and late at night. One method of ensuring resilience in operational teams is to place officers on a three-week shift pattern. Typically, shifts will be different from week to week. The shifts incorporate a variety of early morning and late shifts, with the late shifts commonly finishing at 1.00am. Staffing levels are further targeted towards operational need by means of an agreement known as the Variable Shift Agreement ("VSA"). By the terms of the VSA, a police officer can be required, sometimes at short notice, to depart from their normal shift. As a result of a restructure that took place in late 2016, decisions on implementing shift changes began to be made by the Force Resourcing Unit ("FRU"). From January 2017, local sergeants were expected to implement requests made by the FRU and, if a particular officer could not accommodate the shift change, the sergeant was expected to find a replacement before notifying the FRU of any unavailability.

38. Competing with the need for resilience is the pressure to allow police officers to work flexibly where this is necessary to accommodate disabilities and caring responsibilities. The means by which the respondent attempts to strike this balance is a formalised flexible working procedure known as "PER50". A police officer submits a PER50 request in writing, stating their preferred shift pattern and their reasons for wanting it. Their line manager (who, in the case of a constable, will be a sergeant) adds their own comments in support of the application. The PER50 is then submitted to the Command Team for the basic Command Unit to which the officer is assigned. Prior to the restructure, the Command Team for the Liverpool BCU included Chief Inspector Garvey-Jones, Chief Inspector Jenkins and Superintendent Boyle.

39. In 2010 the claimant was granted a PER50 request to change his shift pattern. From that time onward until he began his sick leave in 2017, he remained on altered PER50 shifts. Now that the claim has shrunk in its scope, it is unnecessary to set out his shift pattern in full. One important detail, however, is that in 2015 his shift pattern included late shifts starting at 5.00pm and ending at 1.00am on Tuesdays and Wednesdays in two weeks out of any three.

40. Our detailed history of events begins in 2015, at a time when the claimant was based at Speke Police Station. Amongst his colleagues were a female officer, Constable G, and a man, Constable Rylands. Their supervisor was Sergeant Trubshaw.

41. On 14 September 2015, the claimant asked Sergeant Trubshaw if he could change the times of the Tuesday and Wednesday shifts. This was not a formal PER50 request, but an e-mail setting out his preference to begin his shift at 1.00pm and finish at 9.00pm. The reason he gave was that his youngest son had just started nursery. He did not explain why that fact would make it more desirable to him to finish his shift at 9.00pm. In our view the most likely explanation was that, like most working people, he would prefer not to have to work until the early hours of the morning if he could avoid it. He had previously needed to be at home until 5.00pm for childcare reasons, but with his youngest son at nursery he was free to leave the house earlier in the afternoon. That took away his need to work a late shift and meant that he was available for more

sociable hours if the respondent could accommodate them. As it happened, Sergeant Trubshaw informally approved the request and made manual changes to the shift rota.

42. On 14 December 2015, the claimant e-mailed Sergeant Trubshaw again. He asked for a longer-term change to the Tuesday and Wednesday shifts. He explained that the 1.00am finish had been "down to childcare", and that the 9.00pm finish was "a more family/work shift pattern". He asked for the new arrangement to be extended until 1 July 2016. Sergeant Trubshaw replied that she would support the claimant's request, but if he wanted it to be made permanent he would need to submit a fresh PER50 application. The claimant did not make any further PER50 applications at that time, but the informal arrangement continued as previously.

43. During the course of 2018, the respondent prepared to implement a major restructure described to us as "the biggest change to policing on Merseyside since 1974". The changes were cost driven, resulting from the budget cuts that the respondent had been experiencing since 2010. As part of the overhaul, the long established division of the Merseyside Policing Area into basic command units was to be abolished. Greater flexibility was to be expected of all police officers. Deployment of resources, including shift changes, was to be placed increasingly in the hands of the FRU

44. At some point in the first half of March 2016, Constable G submitted a PER50 request with the support of Sergeant Trubshaw. Constable G sought a shift pattern with different pairings of rest days in different weeks of the rota. The proposed shifts had a variety of start times, but none of them earlier than 8.00am. Across the three-week block, she offered to work five shifts ending at 10.00pm and two shifts ending at midnight.

45. Constable's G's rationale for her desired shift pattern was, essentially, that she was a single parent of a nine-year-old child and also lived with her 89-year-old mother for whom she had caring responsibilities. She acknowledged that her ex-husband assisted with childcare and that he had enabled her to work late shifts and weekends where possible. She asked to drop one weekend shift due to childcare. Sergeant Trubshaw added that Constable G would be working the same amount of late shifts as in the core (that is, the standard) three-week shift pattern.

46. Constable G's PER50 application was placed before the Command Team and granted by Chief Inspector Jenkins with the following comments:

> "I am happy to support this flexible working request based on the rationale below:
>
> This application is to care for the officer's nine-year-old child and elderly mother, [Constable G] is a single parent and lone carer. The officer's application for flexible working follows the core pattern of the block. The pattern is a three week pattern, mirroring the core three week pattern…There are four shifts out of 13 duty days that she does not work her team's pattern. [Constable G] continues to work the same ration of days, lates and weekend working and with the overlap will still get consistent supervision and will be regularly working with her team. There will be sufficient work available during the periods the officer proposes to work."

47. Formal approval was granted on 23 March 2016 by the Human Resources Department.

48. On 28 April 2016, the claimant e-mailed Sergeant Trubshaw to request a change of shift on 3 May 2016. The background to the claimant's e-mail is not entirely clear, but it appears that the claimant had been given advance warning that on Tuesday 3 May 2016 he would be required to work until 2.00am. That day being a Tuesday, the claimant had become accustomed to finishing his shift at 9.00pm. In his e-mail, the claimant gave a number of reasons for wanting to have the proposed duty changed. The first reason he gave was headed, "Childcare". He observed that being "up early the following day with four hours' sleep, that is not enough to operate safely or promote a healthy lifestyle". Under the heading, "Travel", the claimant added that he would not have a vehicle to get home at 2.00am and that a few days' notice was not enough to plan his arrangements to get home from work. "Furthermore", he added, "I have caring duties for my disabled mother on a daily basis". His e-mail mentioned that he was in his current role in order to accommodate and facilitate a healthy work/life balance. The changes to his shifts were "having a detrimental impact on my health and home life".

49. We are not sure exactly what Sergeant Trubshaw did on receipt of this e-mail. From the record of shifts actually worked, it appears that the claimant was allowed to go home earlier than 2.00am. Sergeant Trubshaw did not pass the claimant's e-mail to the Command Team, nor was there any need for her to do so.

50. At some point, shortly before 3 May 2016, the claimant submitted a further PER50 application. The purpose of the application was to formalise the arrangement for Tuesdays and Wednesdays, such that he would not be required to work beyond 9.00pm on those days. The effect of the change would mean that, across the whole three-week block, the claimant would be working until 9.00pm on four days, 10.00pm on three days and 11.00pm on one day. The remainder of his shifts would finish at 6.00pm or 7.00pm. The claimant's own rationale on the PER50 form simply stated "change in circumstances". Sergeant Trubshaw added further detail. In her supportive comments, she stated:

> "The basic shift pattern incorporates six day shifts and six late shifts, [the claimant's] proposal has five day shifts and eight late shifts, albeit the late shifts finish an hour or two earlier in most instances. However to counterbalance this the day shifts are finishing at 19:00hrs giving more coverage during peak times…[The claimant] has four young children with only one vehicle between himself and his wife, the shift pattern is requested in order to facilitate his childcare situation as his wife also works. Plus he also utilises public transport to and from work and requires the times to also accommodate this. There will be no additional cost to the organisation. I believe the shift pattern has a positive impact on the ability of the team to meet customer demand."

51. The claimant's application, like that of Constable G, was reviewed in the Command Team by Chief Inspector Jenkins. She decided to reject his application. Endorsed on his form were the following reasons for not recommending approval:

    - "The detrimental effect on the ability to meet customer demand."

- "Planned structural changes."

52. The claimant was dissatisfied with the decision and appealed against it. In due course he was invited to a meeting with Superintendent Boyle which took place on 18 May 2016. Depending on whose evidence one accepts, the meeting lasted either "up to 30 minutes" or "between 30 and 40 minutes". It is common ground that, during the course of the meeting, Superintendent Boyle reiterated the decision to refuse the claimant's request and explained the business rationale for it. They discussed some alternatives (which may have involved the claimant moving to a different basic command unit), and the claimant said that he would let Superintendent Boyle know his wishes in that regard.

53. It is also clear that there was some discussion about the reasons why the claimant wanted to have his shift pattern changed. Here there is a stark conflict of evidence as to what was said. The only contemporaneous record we have is to be found in Superintendent Boyle's electronic daybook. Dealing with this part of the conversation, the note reads:

> "The only thing he could mention as a reason for wanting to finish at 21:00hours was that he wanted to spend more time with his children."

54. Nearly a year later, the claimant submitted a formal grievance against Superintendent Boyle in which he alleged that he had given further reasons for wanting the shift change. His grievance reads:

> "I explained it was sex discrimination and provided a reason for that opinion. He skirted over that opinion. I told him my personal health was poor, he skirted over that. He was unsympathetic to my needs and I felt degraded."

55. Five days after the meeting, the claimant and Superintendent Boyle politely exchanged e-mails. The claimant agreed to abide by his existing shift pattern.

56. We have tried our best to resolve the dispute of fact about what was said at the meeting about the claimant's reasons for wanting a shift change. We thought it likely that the claimant would have wanted to make many, if not all, of the points to Superintendent Boyle that he had made to Sergeant Trubshaw in his e-mail of 28 April 2016. He was trying to get out of 1.00am finishes on Tuesdays and Wednesdays, and his reasons for wanting to do that would have been, in our view, very similar to his reasons for wanting to be released from a 2.00am finish on one particular Tuesday. We have also taken into account the reason why the claimant wanted the Tuesdays and Wednesdays to finish at 9.00pm in the first place. He no longer needed to be at home in the afternoon and would doubtless have welcomed the additional time in the evening with his older children as well as the opportunity to get a better night's sleep before his children woke up the following morning. It is quite likely that at least at some point in the conversation with Superintendent Boyle the claimant would have said that he wanted to spend more time with his children.

57. We were not, however, in a position to make findings about what if anything the claimant said about the effect on his health (as opposed to his work/life balance) or the impact of his caring responsibilities for his mother. Counsel for the claimant impresses upon us that it is inherently unlikely that in a meeting that could have lasted up to 40 minutes the claimant gave only one reason for wanting to change his shifts. The difficulty with the claimant's argument is that it depends on how long the meeting actually lasted and how much of that meeting

was taken up in discussing the other things which were undoubtedly mentioned. We were in no doubt that our task in trying to find the facts had been made significantly more difficult by the passage of some 21 months between the date of the meeting and the presentation of the claimant's claim. The difficulty was compounded by the fact that it took the claimant nearly a year to provide his own written account of what had been discussed. Bring unable to find exactly what the claimant had said about his reasons for wanting the shift change, we were unable to make any finding as to whether Superintendent Boyle had "skirted over" those reasons.

58. In late August 2016, Constable G made a further PER50 application to amend her shift pattern. The proposed shift pattern was modelled around the core shift pattern that her colleagues would be working. It included five shifts ending at midnight and five shifts starting at 7.00am. She gave essentially the same rationale for wanting the shift pattern as in her previous application. Acting Chief Inspector Lucan-Pratt approved the application on or about 1 September 2016.

59. During the summer of 2016, as part of the preparations for the forthcoming restructure, police officers across the Force were entered into a skills-matching exercise. Relevant aptitudes and qualifications, such as driving, were placed into an algorithm to determine the teams and locations into which officers would be best placed. On 4 August 2016, the claimant was notified that he had been selected for the Target Team based at Huyton Police Station. It is worth noting in passing that it was originally part of the claimant's claim that he had been selected for this role because he had allegedly complained of sex discrimination to Superintendent Boyle.

60. When the claimant learned of his new posting, he was concerned that it did not suit his skills and, more importantly, that it would be incompatible with the shift pattern he needed. He did not make any representations about the skills matching exercise. Instead, he submitted a further PER50 application. This time, the claimant sought a 9-5 shift pattern, that is to say Monday to Friday 9.00am to 5.00pm. His written application added:

> "Although I need a fixed pattern I would be willing to assist and be flexible to assist the team/organisation with relevant advanced notice."

61. Because of the way the claim has shrunk in scope, it is not necessary to go into the detail of how the Command Team dealt with the claimant's PER50 application. For our purposes it is sufficient to note that Chief Inspector Garvey-Jones went to some lengths to try to persuade the claimant to consider a more flexible shift pattern, but the claimant was adamant that he needed the fixed shifts. The claimant met with Chief Inspector Garvey-Jones, following which the claimant gained the understanding, rightly or wrongly, that his work based at Huyton Police Station would be in the Community Team rather than the Target Team. Eventually, Chief Superintendent Costello approved the claimant's PER50 request, so that the claimant would be working a 9-5 shift pattern with effect from 30 January 2017.

62. The claimant found out in late November 2016 that his application had been successful. By this time, he had just over two months to go before he moved to Huyton and the new shift pattern took effect. He told his existing colleagues at Speke Police Station. One of these colleagues was Constable Rylands. At the

time, the claimant and Constable Rylands were friends. Constable Rylands was pleased for the claimant. He knew that the Target Team involved a considerable amount of work at unsociable hours. In his opinion, police officers were relatively well paid compared to typical daytime workers. It struck him as remarkable that the claimant had been able to secure a 9-5 shift pattern within the Target Team. Constable Rylands started teasing the claimant good-naturedly, by making references to the famous Dolly Parton song, "Nine to Five". He whistled the song in the claimant's presence and printed a picture of Dolly Parton to which he added the words "nine to five" and placed it on the claimant's workstation.

63. Initially, at least, the claimant accepted Constable Rylands' jokes as well-intentioned "banter". The claimant never directly challenged Constable Rylands about his behaviour. At the very highest, the claimant's evidence is that he would leave the room or not enter it if Constable Rylands was there. The claimant raised grievances in February 2018 – over a year later – alleging that many different individuals had discriminated against him and harassed him. Constable Rylands was not named as one of them.

64. There were female police officers within the respondent's organisation who worked standard office hours. Constable Rylands did not engage in the same Dolly Parton-related jokes towards those female officers. He told us, though this is not accepted by the claimant, that he did tease a female police officer about her shift pattern which included an unusually long rest period between shifts. He told us that he jokingly remarked to her that he would not see her all week. It was hard to test this particular assertion because of the age of the events he was talking about.

65. We found it difficult to find either way whether or not Constable Rylands actually called the claimant "Dolly Parton". We also found it difficult to make findings about when the claimant first believed that the Constable Rylands' "banter" had got beyond a joke. Was it whilst the claimant was working alongside him at Speke Police Station? Or was that a view that the claimant reached many months later? The delay in presenting the claim and the absence of any complaint even after 12 months has significantly contributed to our difficulty in deciding which of those two possibilities it was.

66. The claimant started in his new role in the Target Team on 30 January 2017. His line manager was Sergeant Laycock. Initially, the claimant spent much of his time working on gang injunctions which fell outside the direct operations of the Target Team. For this reason, and because of his shift pattern, he and Sergeant Laycock had little day-to-day contact.

67. Within the first few days at Huyton Police Station, the claimant realised that, going forward, his main work would be within the Target Team and not within the Community Team. Amongst the Target Team, he felt like the "odd one out" because his shift pattern meant that he would often start work and finish work at different times to his colleagues and could not easily be included on operations.

68. About three days into the claimant's new role, he attended a meeting with Sergeant Laycock and the rest of his team. Also present were members of the Implementation Team. The purpose of the meeting was to identify any problems associated with the new structure. Sergeant Laycock raised an issue about how flexible working patterns were recorded on the computer system. The method of recording had the effect of misrepresenting the number of officers on leave at a

particular time, which affected the ability of supervising sergeants to approve requests for time off work. The claimant thought that this observation was a direct reference to his own working pattern. He felt humiliated and degraded. His original claim included an allegation of harassment in relation to these events, but that allegation was withdrawn.

69. Between 10 and 13 February 2017, the claimant and Sergeant Laycock exchanged e-mails in relation to release from duties in connection with the gang injunctions. Sergeant Laycock's approach was supportive.

70. On 15 February 2017, it came to Sergeant Laycock's attention that the claimant had used a police vehicle and left it with less than three quarters of a tank of fuel. Sergeant Laycock believed that, without a minimum of three quarters of a tank, the next user of the vehicle might run out of fuel midway through a pursuit. He politely reminded the claimant by e-mail of his expectation. The claimant felt that Sergeant Laycock's e-mail was unjustified. As the claimant saw it, there had been more than three quarters of a tank left when he had stopped driving the car. He felt that Sergeant Laycock had singled him out. In fact the claimant's suspicions were misplaced. Sergeant Laycock would have treated anybody else in the same way. It is possible that Sergeant Laycock may have been given inaccurate information about how much fuel the claimant had left, because someone else may have driven the vehicle in the meantime. We did not need to determine whether or not this was in fact the case.

71. On 19 February 2017, the FRU e-mailed officers within the Target Team to notify them of a shift change planned for 3 March 2017. The claimant amongst others was required to begin his shift at 7.00am in order to join a search team as part of "Operation Guyon". On or around this date, the claimant was also notified of an early shift scheduled for 2 March 2017 (the day before Operation Guyon).

72. 22 February 2017 proved to be the claimant's last day of work before a long period of sick leave which is still ongoing. On that day the claimant e-mailed Chief Inspector Garvey-Jones and Sergeant Laycock, stating that he would be unable to carry out the two duties that had been notified to him. At some point during the course of that afternoon, the claimant found himself in a room with Sergeant Laycock and another supervisor, Sergeant Williams. (There is a stark clash of evidence about what happened at that time, but, for the time being, we stay with the common ground.) At 1.46pm, Chief Inspector Garvey-Jones intervened in an attempt to persuade the FRU to release the claimant from the duties. She followed up her e-mail at 2.11pm. At 2.42pm, in answer to a query raised by Chief Inspector Garvey-Jones, FRU confirmed that the claimant had not previously been required to change his shifts. At some point during the afternoon, the claimant handed Sergeant Laycock a completed "Form 104", requesting a change in role. The rationale he gave for his request was, essentially, that he did not believe that the Target Team was compatible with his PER50 shift pattern. He did not mention any bullying behaviour or criticise Sergeant Laycock in any way. The form was addressed to Chief Inspector Garvey-Jones. The claimant and Sergeant Laycock agreed that there should be a referral to Occupational Health. Sergeant Laycock completed the form with the wording being largely supplied by the claimant. Under the heading "Reason for referral", the claimant described the impact of the proposed shift change on him. The form recorded the claimant's belief that a woman would not have been placed in the Target Team role "from day one". There was no mention about how

he had been treated whilst at Huyton Police Station. Seeing that the claimant was showing signs of stress, Sergeant Laycock provided the claimant with details of the Blue Light programme to support police officers' mental health.

73. Later than evening, Sergeant Laycock continued to make representations to the FRU with regard to the proposed shift changes. He acknowledged that one of the shift changes was inevitable because the claimant was the only available carrier driver. He pressed the case, however, for the claimant being released from the other duty because of the impact of back-to-back early starts on the claimant's wellbeing. Sergeant Laycock took extensive contemporaneous notes of his interactions with the claimant during the course of the day.

74. On 23 February 2017, the claimant went to see his general practitioner and obtained a fit note declaring him unfit to work because of "stress/anxiety/low mood". The GP briefly summarised the history that the claimant gave. It referred to the claimant's changeable shifts, his "not appropriate placement" and that his managers were "unhelpful", but the GP did not record anything to indicate that the claimant felt he had been harassed or bullied the day before.

75. On receipt of the claimant's fit note, Sergeant Laycock telephoned the claimant later on 23 February 2017 and made arrangements to visit him on 27 February 2017. Together, the claimant and Sergeant Laycock completed a stress questionnaire document going into some detail as to the causes of the claimant's stress. In summary, the claimant told Sergeant Laycock that he believed his role was incompatible with his shift pattern, age and fitness. He also thought it did not suit his skills. He did not mention anything about the way in which he had allegedly been treated by his supervisors.

76. Following this visit, Sergeant Laycock continued with a series of home visits without any objection from the claimant. These continued until Sergeant Laycock moved from the Target Team to a role within the Traffic Department. At that point he handed the management of the claimant's absence to Sergeant McKenzie.

77. We must now return to the afternoon of 22 February 2017 and try to place ourselves back in the room with the claimant, Sergeant Laycock and Sergeant Williams. There is much dispute as to what happened at that time and we found it difficult to find the facts. There were some inconsistencies between the versions given by Sergeant Laycock and Sergeant Williams. We also take account of the fact that the claimant might have been able to give a more reliable version of events had he had access to his S-Notes diary. All the contemporaneous evidence that we have seen points to Sergeant Laycock having dealt appropriately and supportively with the claimant. It is true to say that something must have pushed the claimant into going to see his GP and describing symptoms of stress and anxiety, but that fact by itself does not necessarily mean that Sergeant Laycock or Sergeant Williams mistreated the claimant in any way. It is quite clear from the claimant's perception of earlier events at Huyton Police Station (such as the Implementation Team meeting and the fuel tank incident) and the acute tension between the claimant's desired shift pattern and the operational requirements of the Target Team that the claimant was already experiencing a high degree of stress, quite apart from anything that might have happened on 22 February 2017. If pushed to make a finding about the behaviour of Sergeant Williams during that afternoon, we would lean towards the view that she had not "grilled" the claimant for 45 minutes or at all, and had not made the comments the claimant attributes to her. We are more comfortable,

however, simply to record that we found the exercise of establishing precisely what happened to be a difficult one and that the passage of several months before the claimant complained about it, together with the delay in presenting the claim, made that task considerably more difficult.

78. On 27 March 2017, the claimant had an Occupational Health assessment carried out by a psychotherapist who then began a course of Cognitive Behavioural Therapy ("CBT"). The psychotherapist was neither a registered doctor nor a registered nurse, but was nevertheless, in Mrs Gibson's words, "the most highly qualified therapist in the Force". The CBT sessions took place between 5 April 2017 and 30 June 2017, the final session due to be held on 4 August 2017. Unfortunately, the therapist reported sick for the final session, which had to be cancelled.

79. On 30 June 2017, the claimant was sent a standard letter warning him that, from 25 August 2017, his pay would be reduced to half pay because of his sickness absence. The letter informed him that there would be a Chief Constable's meeting at which a discretionary decision would be made about whether or not to maintain the claimant on full pay.

80. On 3 July 2017, the claimant attended a further Occupational Health appointment, this time with Ms Karin Taylor, an Occupational Health nurse. Ms Taylor noted that the claimant would be unlikely to return to work until his stressors had resolved. It was noted that the final CBT session had yet to take place. Ms Taylor did not consider that the claimant was sufficiently unwell to warrant an onward referral to an Occupational Health physician. For his part, the claimant did not ask for such a referral. Ms Taylor therefore discharged him from Occupational Health without setting a review date.

81. On 24 July 2017, Sergeant McKenzie visited the claimant at home. They discussed the sources of the claimant's stress. The claimant told Sergeant McKenzie that his stress was partly caused by uncertainty about where he would be placed when he returned to work. He said that he would not be able to cope with a Target Team or similar role. His remark prompted a discussion about roles into which the claimant would be interested in returning. The claimant was potentially interested in the FRU, FCU or Serious Incident Response Team ("SIRT"). They explored the possibility of somebody from those departments doing a home visit to tell the claimant what type of work he could do for them once he was ready to start phasing himself back into work.

82. Sergeant McKenzie reported back on his visit by e-mail to Inspector Creer and Chief Inspector Garvey-Jones three days later. It is clear from Chief Inspector Garvey-Jones' reply that, up to that point, she had not done any home visits herself. The claimant's evidence that she had visited him on 4 June 2017 cannot be right. Later in the e-mail conversation, Sergeant McKenzie made a constructive suggestion Sergeant Trubshaw might visit the claimant as she had previously worked in the SIRT and the claimant had reacted positively to a suggestion that Sergeant Trubshaw might visit him at home. A further home visit was arranged to take place on 31 July 2017, this time by Chief Inspector Garvey-Jones and Inspector Creer.

83. In advance of the meeting, and acting on the instructions of Chief Inspector Garvey-Jones, Sergeant McKenzie prepared a document headed "Return to Work Attendance Support Programme". The document was more generally

known as a “return to work plan” or “RTW plan”. The template form of the RTW plan had been devised in consultation with the Police Federation. It took the form of a draft agreement, setting out the expectations of the Force in relation to an officer and what the officer could expect from the Force. Actions to be agreed by the officer were expressed in the form, “you will…”. An example being, “You will keep to all medical appointments…”. Likewise, if the parties agreed to the return to work plan, it would create obligations for the line manager. These were expressed in the form, “Your line manager will…” By way of example, paragraph 6 stated, “Your line manager will complete any risk assessments relevant to your role…”. The template left space for both the officer and issuing officer to indicate their agreement by signing the bottom of the form. The actual form populated by Sergeant McKenzie stated, at paragraph 3, “You will return to work on 01/09/17 at the conclusion of your fit note”.

84. On 31 July 2017, Inspector Creer and Chief Inspector Garvey-Jones visited the claimant's home as arranged. This visit cannot have happened on 6 August 2017 as alleged in the claimant's grievance. Chief Inspector Garvey-Jones was on holiday on that date. During the course of the visit, Chief Inspector Garvey-Jones explained the procedure for the Chief Constable’s meeting about remaining on full pay. Part of the procedure involved the Human Resources Department sending an e-mail to the Command Team. In response to that e-mail, the Command Team would then make a written statement, commenting on the merits of the application for full pay. Those comments would then be taken into account by the Chief Constable when making his decision. Chief Inspector Garvey-Jones was shocked at how grey and gaunt the claimant looked. She could clearly see that he was unwell. She told the claimant that she could see his upset was genuine and that she would do all she could to support him.

85. Pausing here, there is a dispute as to whether, at this point, Chief Inspector Garvey-Jones told the claimant specifically that she would write a report in the claimant's favour to be laid before the Chief Constable. We find that it is unlikely that Chief Inspector Garvey-Jones made this promise. She knew that she was about to go on holiday and that she would be unlikely to be at work when the e-mail request came in from Human Resources. When she spoke of doing all she could to support the claimant, what she meant was that she would de-brief Superintendent Levick, her line manager, so that he would then have sufficient material to prepare a report when the request arrived. In coming to this view, we have taken account of the fact that the claimant's recollection appears to have faded as evidenced by his inability to remember what happened on which days.

86. During the course of the same visit, Inspector Creer told the claimant about the RTW plan that Sergeant McKenzie had drafted. At this point, Inspector Creer still had the draft RTW plan with him in a sealed envelope. They did not go through the document, nor indeed did Inspector Creer physically hand it to him. Rather, Inspector Creer left the envelope on the table for the claimant to open in his own time. The claimant only noticed it after they had gone. On his way home from the meeting, Inspector Creer had second thoughts about the RTW plan. In view of the claimant's obvious state of ill health, he believed that the document could be interpreted as “ordering” the claimant to return to work. He telephoned the claimant from his car and told him to ignore the letter as he did not want him to misinterpret it or become upset by it. It is not clear to us whether the claimant opened the letter before or after he had received Inspector Creer’s telephone call. What is relatively clear to us, however, is that the claimant’s immediate

response to the document was one of confusion. He felt unsure as to whether Inspector Creer wanted to issue the return to work letter or had made a decision that the claimant was not fit to return to work. We make this finding based on the claimant's own description of his thoughts in his subsequent grievance against Inspector Creer. At that time the claimant did not think that the RTW plan, coupled with Inspector Creer's reassurance, created any kind of intimidating, offensive, or otherwise objectionable environment for him.

87. On 4 August 2017, the Payroll Department wrote to the claimant setting out the criteria to be applied by the Chief Constable in deciding whether to make a discretionary award of full pay. The letter invited the claimant to make representations, which the claimant did by e-mail on 9 August 2017. The main thrust of the claimant's representations was that he had an "unblemished" record of attendance over 13 years, and that his poor health had been caused as a direct consequence of discrimination, victimisation and harassment on the ground of his PER50 applications.

88. On 15 August 2017, Ms Coates, Wellbeing Manager, e-mailed Sergeant McKenzie suggesting that he "develop a return to work plan" and go through a stress questionnaire with the claimant. Sergeant McKenzie had not previously had to carry out a stress risk assessment for an absent employee and sought advice from Employee Relations.

89. 15 August 2017 was also the day of the sick pay review meeting. Present in the room with the Chief Constable were Mrs Gibson, representing Human Resources, and a Police Federation representative. In preparation for the meeting, Payroll Department had prepared template forms for each police officer on sick leave. The forms contained factual information about the dates of sickness absence and sickness history. A space on the template was set aside for the Command Team's comments and recommendation. This was the space which ought to have been populated by the observations from the Command Team in response to the Human Resources e-mail. On the claimant's form those sections were left blank. Unfortunately, Mrs Gibson had not read the forms in detail prior to the meeting and only realised during the meeting itself that there was no Command Team input into the claimant's case. The Chief Constable was unhappy with the lack of information from the Command Team and asked Mrs Gibson for an explanation. She checked with the Payroll Department but was unable to give any satisfactory answer other than that the Payroll Department had chased Superintendent Levick for the required information. She was able, however, to advise that the information set out in the claimant's own representations would not bring him within the criteria for discretionary full pay. The Chief Constable agreed. He decided not to award full pay to the claimant, but required Mrs Gibson to provide the Command Team's views for the next meeting.

90. Following the meeting on 15 August 2017, Mrs Gibson telephoned Superintendent Levick. She was aware that Superintendent Levick had himself been absent from work because of a very serious health condition. She explained the full pay criteria to Superintendent Levick who agreed that, on the information available to the Command Team, the claimant did not satisfy those criteria. Mrs Gibson relayed Superintendent Levick's opinion to the Chief Constable at the next pay review meeting.

91. We are unsure as to why exactly Superintendent Levick did not submit his written observations to Human Resources in time for the first Chief Constable's meeting on 15 August 2017. What is clear is that Chief Inspector Garvey-Jones did not prepare a report, nor was she in a position to do so because she was on holiday at the time the request arrived.

92. The claimant was informed by a letter dated 16 August 2017 that his pay had been reduced. The decision left the claimant feeling extremely anxious about his own financial circumstances. He also felt betrayed by Chief Inspector Garvey-Jones who he (mistakenly) believed had promised to write a report backing his claim for full pay. From that time onwards, the claimant made and pursued numerous requests for information with a view to bringing a claim to the employment tribunal.

93. Meanwhile, during the summer of 2017, Sergeant McKenzie and others continued to maintain regular contact with the claimant. Sergeant McKenzie telephoned the claimant on 4 August 2017 and visited him at home on 7 August and 4 September 2017. The claimant had an additional conversation with Sergeant Trubshaw on 10 August 2017 and was visited by a Police Federation representative on 14 August 2017.

94. The claimant began to feel that he needed more assistance from Occupational Health. During August and September 2017, he made "a couple of phone calls" to the Occupational Health Unit. He left messages but no formal referral was made. On 1 September 2017, the claimant submitted a further GP fit note declaring him unfit to work until 31 October 2017

95. Following the home visit on 4 September 2017, Sergeant McKenzie e-mailed Occupational Health to enquire about the possibility of a phased return starting with one day per week for two hours. Ms Taylor replied on 5 September 2017 expressing her doubts: if he could only work two hours per week, should he be returning to work at all? Her e-mail was copied to Human Resources. An Employee Relations Sergeant joined in the conversation, suggesting that a further Occupational Health referral should be made. The referral was finally made on 17 September 2017.

96. In parallel with Sergeant McKenzie's contact with the claimant, he also conversed with Human Resources with a view to putting the claimant's absence management on a more formal footing. On 3 October 2017, Sergeant McKenzie carried out another home visit at which he and the claimant completed a written wellness action plan. The template was clearly aimed at officers who were currently in work, it was nevertheless a useful tool to facilitate discussion of how the claimant could be encouraged to return to work in the least stressful way possible.

97. On 24 October 2017, Ms Coates e-mailed Sergeant McKenzie again asking for an update in relation to the claimant. Based on the information she had to hand, she favoured "progressing this case down a more formal route". She asked about the progress of the Occupational Health referral. Sergeant McKenzie replied the following day. He related the contents of the wellness action plan and indicated that the claimant was unlikely to have an Occupational Health appointment until November. Later on 25 October 2017, Superintendent Levick expressed his agreement that as the claimant had "failed to return on 1 September 2017 as per his return to work plan" that the claimant should be

placed on an Unsatisfactory Performance Procedure ["UPP"] as soon as possible. It is clear from this exchange of e-mails that both Ms Coates and Superintendent Levick were under the impression that the RTW plan handed to the claimant on 31 July 2017 was an instruction to return to work on 1 September 2017. They did not see it as a starting point for a discussion. Nor did they share Inspector Creer's view that the claimant could simply ignore it if he wished.

98. Having received this instruction, Sergeant McKenzie liaised with Human Resources to draft a letter formally beginning the UPP process. This letter was never in fact sent. What Sergeant McKenzie did send was an e-mail to the claimant dated 26 October 2017. The first two paragraphs of the e-mail dealt appropriately with the claimant's wish for representations to be made about the half pay issue and with the claimant's requests for further information. It is the third paragraph of the e-mail that has attracted the most criticism, and it is necessary to set it out almost in full. The bold type is ours.

> "I have been in touch with Helen Coates from Wellbeing and also the Command Team here at Knowsley. The view is that **you were served with a return to work notice in September and therefore should have returned to work**. I have been tasked with completing a fresh return to work plan which you will be provided with tomorrow by [another Sergeant] – this will **instruct you to return to work** after your most recent fit note has expired; this being 31 October – therefore you would be required to return to work on 1 November 2017. It will state that you will have a four week phased return at either Huyton or Belle Vale Police Station (your choice) on four hour days, building up to eight hour days by the fourth week. You will of course be offered plenty of help and support during this period**. I must stress that if you don't return to work on 1 November 2017 then I have been instructed to instigate UPP procedures** which will basically involve a formal meeting and the possibility of more formalised action being taken. Obviously this isn't something that anyone wants to see happen if it can be avoided so I would definitely encourage you to reflect on this, talk it over with friends and family and anyone else you feel appropriate and consider if you can return to work on 1 November. I imagine you may well have questions or concerns and I'd definitely be happy to talk to you about these either via e-mail or phone – whichever suits you…"

99. The rest of the paragraph dealt, in a supportive manner, with contact details and availability for a face-to-face meeting.

100. When the claimant received this e-mail, he saw it as the "beginning of the end of my employment".

101. On 27 October 2017, the claimant was at home when he was visited by two sergeants who were relatively unknown to him. One of them gave him a written RTW plan and asked him to sign the sergeant's pocket notebook in order to acknowledge receipt. There was no attempt to discuss the contents of the RTW plan with him during that visit. The RTW plan followed the same format as the previous version that had been left for him on 31 July 2017. Its introductory paragraph read:

> "The purpose of this return to work plan is to facilitate a return to work for individuals who are off sick and/or to support an individual's return to full duties."

102. The first four paragraphs began with the words "You will" or "You must". These included paragraph 3, which read:

> "You will return to work on 1 November 2017 at the conclusion of your fit note."

103. Paragraph 9 began:

> "You will return to work at Huyton Police Station or Belle Vale Police Station (you may decide which) with a phased return for a period of four weeks."

104. At the foot of the document was a blank space next to the words "date issued" and two further spaces for the claimant and the "Issuing Officer" to sign.

105. Both Sergeant McKenzie's e-mail and the return to work plan considerably upset the claimant. In an e-mail sent on 20 November 2017, the claimant described his reaction as "severe distress".

106. On 30 October 2017, the claimant obtained a further GP fit note declaring him unfit to work until 18 December 2017 because of depression.

107. On 3 November 2017, the claimant attended an Occupational Health appointment with Dr Sujay Roy. In the opinion of Dr Roy, the claimant was "too unwell to resume work". Summarising what was no doubt a much more detailed discussion, Dr Roy observed:

> "He remains very angry and upset over the issues caused by his PER50 not being enforced and feels that no consideration has been given as to his home difficulties and personal circumstances across the last several years and the difficulties that maintaining a varied shift pattern was having upon his ability to balance his home and work commitments."

108. Dr Roy recommended onward referral to a Consultant Psychiatrist.

109. In late 2017, Mrs Gibson, who was continuing to correspond with the claimant in relation to a number of issues, saw an opportunity to help the claimant improve his mental health. The respondent had recently engaged a specialist external provider of Mental Health Support Services. Their intervention with other police officers had had very positive results. Seeing that the claimant was a suitable candidate, she made arrangements for the claimant to undergo a programme of therapy with that provider. Sessions began on 24 January 2018 and, as at 28 November 2018, the claimant had attended 22 further sessions. The claimant found them beneficial.

110. On 4 December 2017 the claimant began early conciliation with ACAS. He obtained his certificate on 18 December 2017. On 26 January 2018 the claimant submitted a formal grievance against the DAU relating to the respondent's handling of his requests for various forms of personal data. We will return to these requests in some more detail. The claimant presented his claim to the

tribunal on 6 February 2018. Twelve days later, he raised 11 formal grievances against various officers and departments. Notably he did not complain about the behaviour of Constable Rylands. With one exception it is not necessary for us to set out how the grievances were investigated or what the outcome was. The exception relates to the grievance against the DAU to which we will return.

111. On 2 March 2018, as a result of Dr Roy's referral, the claimant saw a consultant psychiatrist called Dr Trevor Friedman. They had a wide-ranging discussion, which included his upbringing, family circumstances, home life and current state of health. At this stage it is not necessary to record all that the claimant told Dr Friedman about his health at that time. It is sufficient to note that, later that day, Dr Friedman contacted the claimant's General Practitioner and asked for him to be referred to the Psychiatric Crisis Team the same day. One aspect of the claimant's health that was very much in evidence was his lack of trust in the Police Force as a whole. He had initially been concerned about seeing even Dr Friedman without a witness or recording the consultation.

112. The claimant and Dr Friedman discussed the events at work that had led to him taking his extended period of sick leave. The claimant mentioned the difficulties he encountered in obtaining changes to his working hours so that he could care for his mother and father. He mentioned that he had been offered a job with fixed hours, but that "this was immediately rescinded". He told Dr Friedman that he felt that this had led to him leaving work. There was some discussion of events during the claimant's sick leave. Dr Friedman's report did not make any mention of the RTW plans or being threatened with UPP procedures. Our finding is that, if the claimant told Dr Friedman about these events at all, it cannot have been in such a way as to make Dr Friedman think that it was a significant cause of his deterioration in health.

113. In Dr Friedman's opinion, it was unlikely that the claimant would ever return to work as a police officer.

114. On 8 February 2018, the Chief Constable decided that the claimant's pay should, in line with normal policy, be reduced to zero with effect from 24 February 2018.

115. We must rewind the clock to deal with the claimant's allegation of victimisation. The sole surviving complaint concerns the respondent's handling of the claimant's requests for information. Being the Head of a Public Authority, the respondent is subject to the requirements of the Freedom of Information Act 2000. We can see from printed material provided by the claimant that in recent years the respondent has dealt with literally hundreds of requests under that Act. The respondent is also a data controller. It holds vast amounts of personal data, much of it belonging to the thousands of police officers and civilians employed by the Force. Data subjects, including police officers, have a statutory right of access to their personal data which, until May 2018, was to be found in section 7 of the Data Protection Act 1998. Because of the volume and administrative demands of dealing with SARs, the respondent has its own Data Access Unit ("DAU") to whom witnesses often referred as the "Data Protection Unit". Within the DAU is a team of Data Analysts.

116. Between August 2017 and an unknown date in 2018, one of the Data Analysts was a man to whom we will refer as "Mr J". At all relevant times, his line manager was Mrs Vivien Jaymes, Disclosure Manager. In turn, Mrs Jaymes reported to the PNC and Data Access Manager. Certain of the actions of this manager are criticised by the majority of this tribunal. He was not called to give evidence and answer those criticisms. In the circumstances we thought it preferable to refer to him simply as "Mr D". None of these individuals had met or interacted with the claimant until he started making requests for information. There is no evidence that they had had any dealings with anyone who is alleged as part of this claim to have discriminated against the claimant.

117. The DAU has a policy of being "applicant-blind". This means that all SARs are given equal priority, regardless of the identity of the applicant or the purpose for which they require their personal data.

118. Also established within the respondent's organisation is the Anti-Corruption Unit ("ACU"). Beside what we could infer from the ACU's name, we had little evidence about what the ACU actually does. We were not told, for example, what role if any the ACU takes in the active investigation of suspected corruption. Nor were we told what access to police officers' personal data the ACU requires in order to carry out such investigations. We do not know whether it has the authority or the capability to undertake pro-active monitoring of police officers' e-mails, or whether it simply preserves e-mail evidence in tamper-proof form. The purpose of the server might, for example, be to check whether an e-mail subsequently produced by a police officer was genuine or not.

119. One of the ACU's functions is undoubtedly to store archived e-mail data. E-mails sent within the Force are stored on the ACU's server and accessible for a period of 7 years. Police officers are free to delete e-mails from their own Force e-mail accounts, but, if they do, the ACU server copy of the e-mail will be left untouched. The ACU has a means of searching for and retrieving e-mails held on its server. The only evidence before us about how that system works comes from Mrs Jaymes, based on what the superintendent in charge of the ACU told her.

120. Prior to June 2018, Mrs Jaymes was told that there was no system for searching the server for e-mails by keyword. According to the ACU superintendent (as relayed to Mrs Jaymes) e-mail could only be retrieved automatically if the searcher was able to enter accurate data into all of the following fields:

120.1. The name of the sender;

120.2. The name of the recipient;

120.3. The time and date of the e-mail; and

120.4. The subject line.

121. If incomplete information was entered, the ACU would have to resort to a "manual" search. Despite its name, a manual search was done electronically, but it would involve the searcher examining e-mails, one after another, on the

computer screen until he or she found an e-mail containing personal data. It was not entirely clear whether the searcher could make the manual search easier by filtering the mass of e-mails by reference to periods of time, or the sender's or recipient's identity. One thing that Mrs Jaymes clearly understood was that there was a particular problem in retrieving e-mails concerning the claimant where the claimant was neither the sender nor the recipient.

122. On 10 August 2017, the claimant sent an e-mail, apparently to somebody within the Payroll Department, asking for advice about who could help him obtain various categories of information. Amongst the information he sought was copies of his shifts and shift changes between 2002 and 2017. He also indicted his wish to obtain all his pocket notebooks for the same 15-year period. A Payroll and Pensions Liaison Officer answered the e-mail, giving him advice to seek the information from his line management or Human Resources.

123. On 17 August 2017, some PNBs arrived with the administration at Huyton Police Station. We do not know how many notebooks were delivered at that time. There is no direct evidence of the reason for the PNBs being transferred between police stations, but the timing strongly suggests that it was done as a response to the claimant's request made the previous week.

124. The claimant made a written request for information on 17 August 2017. It will be remembered that, at that time, the claimant had just been informed that his pay had been cut in half. His request was for "e-mail traffic within Merseyside Police with a connection to me, between 2002 and 2017. All information held with my name/number on it". Although the request itself was not available to us, the parties all agree that, within this request, the claimant indicated that he needed the information in connection with "an employment issue". Whatever the claimant thought was the appropriate label to attach to this request, it was rightly treated by the respondent as a SAR. (We refer to this request as "SAR1".) The statutory timescale for responding was 40 days, which would have expired on 26 September 2018.

125. Mr J was the Data Analyst assigned to deal with the claimant's request. It is common ground that Mr J took little or no action within the 40-day time limit. On 28 September 2017, two days after the time limit expired, he made a request to the Human Resources Department for all the claimant's personal information. On the same date, he made a request with the ACU for all e-mail data to be supplied.

126. We do not know exactly when or how ACU responded to Mr J following his initial referral, but on 30 October 2017, Mr J informed the claimant by e-mail that his request was too wide and would need the parameters shortening. In particular, Mr J asked the claimant to provide the names of the senders and recipients of the e-mails that he was seeking.

127. On 3 November 2017, the claimant provided Mr J with a list of 12 names together with the dates over which he required an e-mail search. One of the officers named on the list was "Sergeant PF", a Police Federation representative.

128. Early the following week, the claimant spoke to Mr J about the progress of his request. By this time, SAR1 had been escalated to Mrs Jaymes. Mr J told the claimant that Mrs Jaymes had made a suggestion as to how to make progress

with the claimant's request for e-mails. Her idea was that, instead of relying on the ACU to retrieve e-mails from its database, the DAU could e-mail each officer on the claimant's list of names and ask them to search their own computers for the e-mails that the claimant was seeking. When Mr J told the claimant of this proposal, the claimant made his objection clear. Nevertheless, on 7 November 2017, Mr J sent an e-mail to 14 individual officers asking them to check their e-mail accounts. The format of the e-mail was such that each officer named could see who all the other officers were. In a subsequent conversation with the claimant Mr J informed him that Mrs Jaymes had instructed him to send the e-mail.

129. On 9 November 2017, he e-mailed Sergeant McKenzie to ask for his pocket notebooks (PNBs) and his Pronto tablet. The reason why the claimant was particularly keen to gain access to the Pronto device was because it contained a platform called “S-Notes” on which he had compiled a narrative diary of some of the key events during his time at work. Documents held within S-Notes were stored on the device itself but not backed up centrally onto the respondent’s server.

130. The following day, 10 November 2017 he made the second of his four SARs (“SAR2”). His written request was for “HR data relating to historic shift data/changes etc”. The claimant also e-mailed Mrs Jaymes that day to complain that she had gone against his express wishes in relation to SAR1 by instructing Mr J to approach individual officers for e-mails. His e-mail reiterated that his request concerned “an employment issue that may involve those individuals”.

131. On 15 November 2017, Mr J made a request by e-mail to the Work Schedule Unit for historic shift patterns and changes. The same day, the ACU e-mailed the DAU with the outcome of its e-mail searches pursuant to SAR1.

132. On 8 December 2017, Mrs Jaymes e-mailed the claimant to explain that Mr J was on leave and that an update would be given when he returned to work three days later. The claimant asked for an update on 12 December 2017, causing Mrs Jaymes to ask Mr J to update the claimant urgently. The same day, Mr J e-mailed the claimant to indicate that the requested data would be sent once it had been redacted. The claimant sent numerous chasing e-mails during December 2017. Mrs Jaymes responded to his e-mails from time to time, apologising and providing information about how the claimant could make a further complaint. A batch of e-mails was provided to the claimant on 20 December 2017.

133. On 20 December 2017, the Work Scheduling Unit provided information about the claimant's shift patterns (SAR2) to the DAU. Unfortunately, Mr J then failed to forward that information onto the claimant. At some point (we do not know precisely when) the error was discovered by Mrs Jaymes. On 1 February 2018, the claimant was informed by e-mail that the shift data was available on the respondent’s Egress computer system. He was given the information necessary to gain access to Egress.

134. On 25 January 2018 Mr D (the PNC and Data Access Manager) e-mailed the claimant to apologise for the delay in providing information to him under SAR1. He informed the claimant that Mr J’s performance in processing the claimant's application would be addressed internally. Mr D’s e-mail went on to assure the

claimant that the ACU had "run a report" and that Mr D had instructed them to apply any necessary redactions to the newly discovered e-mails the same day. The SAR1 e-mails were placed on the Egress system the same day

135. The next day, 26 January 2018, the claimant raised a formal grievance against the DAU. He complained about the delay in providing a response to his request for e-mails and that some of the e-mails that he had been requesting were still missing. He also raised a specific complaint about the way officers had been approached as a group to search their own e-mail accounts. His grievance indicated that, as a result of the delay, he was out of time to bring a claim to an employment tribunal. The claimant's grievance was passed to Mr D to investigate. Mr D found that the information in the report prepared by the ACU (which had ultimately been available to the claimant on 25 January 2018) had in fact been sent to the DAU by the ACU on 15 November 2017. He found that the delay until 25 January 2018 had been caused by Mr J's failure to act on the ACU's response. In a report dated 5 February 2018, Mr D outlined the failings that he had discovered and apologised to the claimant "for the lack of professionalism and totally unnecessary delays in providing you with this information which you believe may have implications for submission of a case under employment law".

136. The claimant replied to Mr D's grievance outcome report, reiterating that he needed the information for a "serious employment issue". Amongst the many points that the claimant made in his reply, the claimant informed Mr D that the information that had been on the Egress system had now "dropped off" and was no longer available to be inspected.

137. Meanwhile the claimant encountered difficulties in obtaining the PNBs that he had requested. On 11 November 2017, Sergeant McKenzie e-mailed the claimant to inform him that his PNBs could be examined. The claimant visited Green Lane Police Station to look at the PNBs. When he arrived, he discovered that the only PNBs that had been made available were those from the period 2012-2015. The claimant pointed out this fact on 17 November 2017 in an e-mail to Sergeant McKenzie. Their e-mail conversation over the next few days did not resolve the matter and Inspector Creer had to intervene. He informed the claimant that PNBs were generally kept for between seven and ten years and then destroyed. On 26 November 2017, Inspector Creer informed the claimant that further PNBs had been found without explaining how they had initially gone missing. He invited the claimant to review them at Green Lane Police Station. The same e-mail indicated that Inspector Creer had asked for the claimant's Pronto tablet to be dropped off.

138. The claimant collected his Pronto a short time later. When the claimant switched it on, he received an alert stating that the device needed to be updated. The tablet would not allow him to proceed without first agreeing to the update, so the claimant reluctantly tapped his screen to agree. To his horror, once the update had been completed, he found that he could not get access to the S-Notes.

139. On 6 December 2017, Inspector Creer provided the claimant with an update. He had been informed that two further PNBs had been found that had been due for destruction and that these two further PNBs were also available for inspection.

The issue of the PNBs then appeared to go quiet for several months until the claimant raised it again in July 2018.

140. By 27 March 2018 the claimant had still not been provided with a means of access to his S-Notes. He made a formal request ("SAR3") seeking "all information from Pronto device". SAR3 was received by the DAU on 11 April 2018.

141. The claimant appealed against the outcome of his grievance against the DAU. The appeal was considered by Mrs Susan McTaggart, Head of Criminal Justice Reform and Support. She provided her written outcome on 28 March 2018. Like Mr D, she acknowledged the failure to deal with SAR1 within the statutory deadline. Consistently with Mr D's approach, she stated that she had been reassured that the claimant had been sent all the e-mail information that had been retrieved. She noted that Mr D had not dealt with the third aspect of the claimant's grievance, namely his complaint about the 7 November 2017 group e-mail. Mrs McTaggart accepted that the intention had been to speed up the claimant's request "due to the initial issues in retrieving the data going back so far". Nevertheless, in Mrs McTaggart's view, the e-mail was "not good practice". She recommended that the DAU be informed that "this procedure is not acceptable".

142. On 23 April 2018 the claimant e-mailed Sergeant McKenzie to ask for his PNBs for 2016. He stated that he needed the information for "an Employment Tribunal matter".

143. At around this time, a decision was taken that Mr J should no longer work within the DAU. Investigation into the claimant's complaints had revealed him to have acted incompetently by failing to treat SARs with the required urgency. Mrs Jaymes' finding was that he had demonstrated a lack of competence in relation to SARs made by other data subjects and not just the claimant. Mr J remains employed by the respondent in some other capacity.

144. On 26 April 2018 the claimant sent an e-mail to Mr D. He made a further complaint about the delay and informing him that the information on the Egress system had been incomplete and had now expired. This affected his ability to gain access to the information that had been made available to him in response to SAR1 and SAR2. Mr D replied the same day. He pointed out that the information had been provided to him and that the reason why the claimant had lost access to Egress was that his login details had expired before he had opened his secure e-mail. The claimant asked Mr D to provide the shift pattern information in hard copy form.

145. The Data Analyst assigned to SAR3 was a civilian employee to whom we will refer as "Mr F". On 2 May 2018, still within the 40-day time limit, Mr F provided the claimant with all the documents and information from the Pronto device with the exception of the S-Notes. When the claimant pointed out that he still required the S-Notes, Mr F sent an e-mail to the claimant's then line manager asking for further data to be searched. That request was followed up by a request to the ACU for them to search their own database. In reply, the ACU confirmed that they could not retrieve the S-Notes. On 21 May 2018, Mr F separately e-mailed

the claimant to inform him that the IT Department had confirmed that no further data could be retrieved.

146. Correspondence between the claimant and Mr F continued. The claimant asked to be "signposted" on how to obtain the information from the device itself. Mr F replied that they could provide no further information on how to obtain the data. The claimant then asked for the device to be checked by an external IT specialist. This request was refused. The respondent did not want Police computer devices to be examined by third parties because of security issues. We find that this was genuinely Mr F's reason for refusing the request. It was not motivated by any consideration of the purpose for which the claimant required the S-Notes.

147. On 21 May 2018 the claimant e-mailed Mr D to further his quest for the missing e-mails under SAR1. By the time of sending this e-mail the claimant had been informed by Sergeant PF that he had not consented to providing any e-mails from his own Outlook account in response to the request that Mr J had made in November 2017. The claimant pointed out this fact in his e-mail and highlighted that he still believed that the e-mail data provided was incomplete. He reiterated his request for hard copy shift patterns.

148. Taking stock at this point, it appears that Mr D did nothing to investigate the claimant's specific criticism about missing e-mails between 26 January 2018 and his e-mail of 25 May 2018. Until late March 2018, the matter was in the hands of Mrs McTaggart who was dealing with the grievance appeal. For his part, the claimant left SAR1 alone between the grievance appeal outcome in March 2018 and his e-mail of 26 April 2018.

149. On 25 May 2018, the General Data Protection Regulation (GDPR) came into force and was largely replicated in the Data Protection Act 2018. Amongst its many changes to the law, the statutory deadline for complying with SARs was reduced to 30 calendar days. It also altered the requirements for the storage and retrieval of personal data.

150. In order to comply with the new data protection regime, the ACU upgraded its software relating to the retrieval of e-mails from its database. The upgrade allowed for the possibility of e-mails to be found which could previously be retrieved. Rather than require the claimant to submit a fresh SAR, it was agreed within the DAU that it should ask the ACU to perform a further search for e-mails using the new software.

151. On 25 May 2018, Mr D e-mailed the claimant to ask him for further information about the specific e-mails that the claimant was seeking so as to enable a further search to be carried out. He also invited the claimant to attend Force Headquarters on 11 June 2018 to collect the hard copy shift patterns that he had requested. On 11 June 2018 claimant went to Force Headquarters to collect the papers. On his arrival, he was dismayed to be handed a copy of the personnel file which he already had, and no shift patterns. Whilst this experience was undoubtedly infuriating to the claimant, we are satisfied that it was the result of a genuine administrative error by a Data Analyst. Two days after the claimant complained, he was provided with the hard copy shift patterns.

152. The claimant complained to Mr D by e-mail later than day. Mr D immediately apologised. For a time thereafter, Mr D was absent from the department. In the meantime, the claimant sent numerous chasing e-mails. On 12 July 2018, Mr D apologised again.

153. On 17 July 2018 the claimant sent a chasing e-mail to another Sergeant ("Sergeant M"), chasing his PNBs for 2016. The following day, Sergeant M replied forwarding an e-mail from a clerical officer. That e-mail indicated that the 2016 PNBs still had not been traced, but that a member of staff in Records Management had been asked to do a more detailed search of the system.

154. Mr D reminded the claimant of the request he had made on 25 May 2018 for further details of the e-mails that he was seeking. In response, the claimant e-mailed Mr D on 20 July 2018 with specific examples of e-mails which he would have expected the ACU searches to reveal. Mr D acknowledged the claimant's further details and then replied more substantively on 7 August 2018. Mr D informed the claimant of a further obstacle to obtaining the e-mails that he had been requesting. In his e-mail he explained that the system utilised by the ACU for retrieving e-mails prior to 2017 was "experiencing issues". His e-mail went on to explain that the ACU system was "an audit tool and not a relevant filing system and cannot be relied upon to retrieve all data against search parameters". For that reason, the ACU was not in a position to facilitate any further enquiries regarding the claimant's request.

155. On 10 August 2018, the claimant complained to the Information Commissioners Office (ICO). It appears that this complaint was a follow up from previous correspondence that the claimant and the ICO had had. The essence of the claimant's complaint was threefold. First, the delay; second, Mr J's e-mail to the individual officers; and third, the fact that the information so far provided was still incomplete. After having sought the respondent's version of events, the ICO wrote to the claimant on 16 August 2018 to indicate its provisional view about whether or not the respondent had complied with the Data Protection Act. The provisional view was that the respondent had not breached the Act in relation to the e-mail from Mr J to the individual officers, but it was likely to have breached the statutory timescales for compliance with SAR1 and also unlikely to have complied with the requirement to provide the claimant with all his personal data, especially bearing in mind that it appeared that some as yet undisclosed data was now retrievable.

156. It is unclear what information the ICO had at the time of expressing this provisional view. In particular, we do not know whether the ICO had been informed about the ACU's search capabilities either prior to or after GDPR.

157. The claimant e-mailed Mr D once again on 26 August 2018. His e-mail went back over some of the history of SAR1 and the way it was dealt with in November and December 2017. It also pointed out that he had since provided further detail about the e-mails that he wanted and still no further e-mails had been provided. Like previous e-mails, this e-mail pointed out that he required the information for "an Employment Tribunal matter".

158. In reply, Mr D referred the claimant back to his e-mail of 7 August 2018. He reiterated the ACU's stance at that time and added, "This being the case, there is

nothing further I can do to assist in this matter". His e-mail contained an unfortunate typographical error (the words "your arrest" appeared instead of "your request"), but we are satisfied that it was nothing more than a typing mistake.

159. Pausing here, we are all of the view that, by this time, Mr D was beginning to let his frustration show. There was actually something that the ACU could have done to take the claimant's request further forward. They could have tried to resolve the "issues" that were preventing retrieval of the pre 2017 e-mails. We do not know whether Mr D had any influence over that process, but he could have chosen to use a less abrupt tone in his own e-mails to the claimant.

160. The claimant was not prepared to take no for an answer. He asked Mr D to provide him with the contact details for the officer at the ACU who had been liaising with the DAU. Whether it was in response to this e-mail or some other stimulus, Mr D e-mailed the claimant on 12 September 2018 to inform him that he had spoken again with the ACU and had been informed that the software issues concerning the system used for retrieving e-mails had since been rectified. The ACU had agreed to run checks against the names that the claimant had provided on 20 July 2018. Mr D informed the claimant that once these results were received by the DAU and had been examined he would contact him to provide him with the results. His expectation was that this would happen in the following week.

161. On 20 September 2018 Mr D e-mailed the claimant to inform him that further material had been received from the ACU and was being examined by his staff. This information was subsequently provided to the claimant on 8 October 2018. The claimant complained to Mr D on 28 October 2018 that some information was still missing. In particular, the claimant still required "transactional e-mails provided between officers/departments containing my details". In other words, the claimant wanted disclosure of e-mails that were neither sent by him nor received by him but which contained information about him. Mr D replied the following day to say that the ACU had now run their checks through their database and if the information did not exist there then it could not be provided. The claimant continued to correspond with the ICO, who took the position that, in the light of the respondent's assurance that all relevant data had been provided, they would take no further action.

162. On 19 November 2018 the claimant e-mailed Mr D again itemising certain categories of e-mails which he still believed were missing. This appears to have been the last e-mail passing between the claimant and the DAU on this subject.

163. In September 2018, the claimant was informed that two further PNBs had been found in a desk drawer. The claimant found this information suspicious, because his recollection was that all his PNBs had been bound together in a single elastic band. He made a further request ("SAR4") on 20 September 2018. The wording of his request was "Audit trail of my PNBs up to 22.09.2018 I require printouts and/or screenshots of transactional history of my PNBs." We note in passing that this was not a request to the DAU for the PNBs themselves. Rather, he was asking for personal data about what had happened to the PNBs.

164. SAR4 was received by the DAU on 26 September 2018. One week later – well within the new 30-day deadline - the claimant was provided with the transactional history.

Relevant Law

Harassment

165. Section 26 of EqA relevantly provides:

> (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 … effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (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.

166. Subsection (5) names disability among the relevant protected characteristics.

167. In deciding whether conduct had the proscribed effect, tribunals should consider the context, including whether or not the perpetrator intended to cause offence. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct related to other protected characteristics), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase: *Richmond Pharmacology Ltd v. Dhaliwal* [2009] IRLR 336.

168. In *Pemberton v. Inwood* [2018] EWCA Civ 564, Underhill LJ gave the following guidance in relation to section 26:

> "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))."

Direct discrimination

169. Section 13(1) of EqA provides:

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

170. Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it because of the protected characteristic? That will call for an examination of all the facts of the case. Or was it for some other reason? If it was the latter, the claim fails. These words are taken from paragraph 11 of the opinion of Lord Nicholls in *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, updated to reflect the language of EqA.

171. Less favourable treatment is "because" of the protected characteristic if either it is inherently discriminatory (the classic example being the facts of *James v. Eastleigh Borough Council,* where free swimming was offered for women over the age of 60) or if the characteristic significantly influenced the mental processes of the decision-maker. It does not have to be the sole or principal reason. Nor does it have to have been consciously in the decision-maker's mind: *Nagarajan v London Regional Transport* [1999] IRLR 572*.*

172. Tribunals dealing with complaints of direct discrimination must be careful to identify the person or persons ("the decision-makers") who decided upon the less favourable treatment. If another person influenced the decision by supplying information to the decision-makers with improper motivation, the decision itself will not be held to be discriminatory if the decision-makers were innocent. If the claimant wishes to allege that that other person supplied the information for a discriminatory reason, the claimant must make a separate allegation against the person who provided the information: *CLFIS (UK) Ltd v. Reynolds* [2015] EWCA Civ 439.

Victimisation

173. Section 27(1) EqA defines victimisation. Relevantly the definition reads:

> "A person (A) victimises another person (B) if A subjects B to a detriment because **–**
>
> (a) B does a protected act; or
>
> (b) A believes that B has done, or may do, a protected act."

174. Subjecting a person to a detriment means putting them under a disadvantage: *Ministry of Defence v. Jeremiah* [1980 ICR 13, CA, per Brandon LJ. A person is subjected to a detriment if she could reasonably understand that that she has been detrimentally treated. A detriment can occur even if it has no physical or economic consequence. An unjustified sense of grievance, however, is not a detriment: *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11.

175. As in direct discrimination cases, tribunals hearing victimisation complaints are encouraged to adopt the "reason why" test (*Chief Constable of West Yorkshire Police v. Khan* [2001] ICR 1065. Victimisation may occur sub-consciously as well as consciously.

176. The need to identify the correct person's motivation is equally important in victimisation cases as in those of direct discrimination.

Time limits

177. Section 123 of EqA provides, so far as is relevant:

> (1) proceedings on a complaint [of discrimination or harassment in the field of work] may not be brought after the end of—
>
> > (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> >
> > (b) such other period as the employment tribunal thinks just and equitable.
>
> …
>
> (3) For the purposes of this section—
>
> > (a) conduct extending over a period is to be treated as done at the end of the period;
> >
> > (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> > (a) when P does an act inconsistent with doing it, or
> >
> > (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

178. In *Commissioner of Police of the Metropolis v Hendricks* [2002] EWCA Civ 1686; [2003] ICR 530, a police officer alleged racial and sexual discrimination Mummery LJ, with whom May LJ and Judge LJ agreed, gave guidance on the correct approach to "an act of extending over a period".

> 48. [the claimant] is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an 'act extending over a period'…
>
> 52. ... The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would be given to run from the date when each specific act was committed"

179. A one-off act with continuing consequences is not the same as an act extending over a period: *Sougrin v Haringey Health Authority* [1992] IRLR 416, [1992] ICR 650*, CA.*

180. The "just and equitable" extension of time involves the exercise of discretion by the tribunal. It is for the claimant to persuade the tribunal to exercise its discretion in his favour: *Robertson v. Bexley Community Centre* [2003] EWCA Civ 576. There is, however, no rule of law as to how generously or sparingly that discretion should be exercised: *Chief Constable of Lincolnshire Police v. Caston* [2009] EWCA Civ 1298. The discretion to extend time is "broad and unfettered": *Abertawe Bro Morgannwg University v. Morgan* [2018] EWCA Civ 640.

181. Tribunals considering an extension of the time limit may find it helpful to refer to the factors set out in section 33 of the Limitation Act 1980 (extension of the limitation period in personal injury cases): *British Coal Corpn v. Keeble* [1997] IRLR 336. These factors include:

181.1. the length of and reasons for the delay;

181.2. the effect of the delay on the cogency of the evidence;

181.3. the steps which the claimant took to obtain legal advice;

181.4. how promptly the claimant acted once he knew of the facts giving rise to the claim; and

181.5. the extent to which the respondent has complied with requests for further information.

Burden of proof

182. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

183. In *Igen v. Wong* [2005] EWCA Civ 142, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in legislation preceding EqA. They warned that the guidance was no substitute for the statutory language:

> (1) … it is for the claimant who complains of … discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination ... These are referred to below as "such facts".
>
> (2) If the claimant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of … discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
>
> (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
>
> (5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

> (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
>
> (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a [statutory questionnaire].
>
> (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts…This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
>
> (9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
>
> (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
>
> (11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.
>
> (12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
>
> (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

184. The initial burden of proof is on the claimant: *Ayodele v. Citylink Ltd* [2017] EWCA Civ 1913, *Royal Mail Group Ltd v. Efobi* [2019] EWCA Civ 18.

185. It is good practice to follow the two-stage approach to the burden of proof, in accordance with the guidance in *Igen v. Wong,* but a tribunal will not fall into error if, in an appropriate case, it proceeds directly to the second stage. Tribunals proceeding in this manner must be careful not to overlook the possibility of subconscious motivation: *Geller v. Yeshrun Hebrew Congregation* [2016] UKEAT 0190/15.

186. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

187. The burden of proof provisions apply equally to victimisation as to discrimination. With regards both, the Court of Appeal in *Greater Manchester Police v Bailey* [2017] EWCA Civ 425 held that 'It is trite law that the burden of proof is not shifted simply by showing that the claimant has suffered a detriment and that he has a protected characteristic or has done a protected act: see *Madarassy*, [2007] ICR 867 per Mummery LJ at paras. 54-56 (pp. 878-9)'

Right of access to personal data

188. Until 25 May 2018, section 7 of the Data Protection Act 1998 (DPA) relevantly provided:

> (1)Subject to the following provisions of this section and to sections 8, 9 and 9A, an individual is entitled—
>
> > (a) to be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller,
> >
> > … and
> >
> > (c) to have communicated to him in an intelligible form—
> >
> > > (i) the information constituting any personal data of which that individual is the data subject, and
> > >
> > > (ii) any information available to the data controller as to the source of those data…
>
> (2) A data controller is not obliged to supply any information under subsection (1) unless he has received— (a) a request in writing…
>
> (3) Where a data controller –
>
> (a) reasonably requires further information in order … to locate the information which that person seeks, and
>
> (b) has informed him of that requirement,
>
> the data controller is not obliged to comply with the request unless he is supplied with that further information.
>
> (7) An individual making a request under this section may, in such cases as may be prescribed, specify that his request is limited to personal data of any prescribed description.
>
> (8) … a data controller shall comply with a request under this section promptly and in any event before the end of the prescribed period beginning with the relevant day.

189. Subsections (10) and (11) made provision for dates to be prescribed. The prescribed period for compliance was 40 days.

190. The data controller was required to provide a copy of the personal data described in section 7(1)(c)(i) in a permanent form, but not if to do so was not possible or would involve disproportionate effort: section 8(2)(a) DPA.

191. Section 51 created the statutory basis for the ICO's *Subject Access Code of Practice,* which had effect under the pre-2018 statutory regime. We were not referred to the Code by either of the parties, but we nevertheless thought it would be relevant.

192. Amongst the relevant passages of the Code is this guidance on the validity of SARs:

> "If a request does not mention the DPA specifically or even say that it is a subject access request, it is nevertheless valid and should be treated as such if it is clear that the individual is asking for their own personal data."

193. Under the heading, "Deleted Information", the Code read:

> "Information is 'deleted' when you try to permanently discard it and you have no intention of ever trying to access it again. The Information Commissioner's view is that, if you delete personal data held in electronic form by removing it (as far as possible) from your computer systems, the fact that expensive technical expertise might enable it to be recreated does not mean you must go to such efforts to respond to a SAR. The Commissioner would not seek to take enforcement action against an organisation that has failed to use extreme measures to recreate previously 'deleted' personal data held in electronic form. The Commissioner does not require organisations to expend time and effort reconstituting information that they have deleted as part of their general records management.
>
> In coming to this view, the Information Commissioner has considered that the purpose of subject access is to enable individuals to find out what information is held about them, to check its accuracy and ensure it is up to date and, where information is incorrect, to request correction of the information or compensation if inaccuracies have caused them damage or distress. However, if you have deleted the information, you can no longer use it to make decisions affecting the individual. So any inaccuracies can have no effect as the information will no longer be accessed by you or anyone else."

194. The Code had this to say on SARs for information contained in e-mails:

> "The contents of e-mails stored on your computer systems are, of course, a form of electronic record to which the general principles above apply. For the avoidance of doubt, the contents of an e-mail should not be regarded as deleted merely because it has been moved to a user's 'Deleted items' folder.
>
> It may be particularly difficult to find information to which a SAR relates if it is contained in e-mails that have been archived and removed from your 'live' systems. Nevertheless, the right of subject access is not limited to the personal data which it would be easy for you to provide, and the disproportionate effort exception (see Chapter 8 for more detail) cannot be used to justify a blanket refusal of a SAR, as it requires you to do whatever is proportionate in the circumstances. You may, of course, ask the requester to give you some context that would help you find what they want."

Conclusions

Direct Sex Discrimination

195. We start by reminding ourselves of the agreed position that this complaint was presented after the expiry of the statutory time limit. Our task is to decide whether it is just and equitable for that time limit to be extended. The issues of substance provide important context here. It is for the claimant to prove facts from which the tribunal could conclude that Superintendent Boyle's refusal of the claimant' s PER50 application was because the claimant is a man. In closing submissions, Mr Bheemah on the claimant's behalf listed the facts from which such a conclusion might be possible. In his submission, these facts were:

195.1. The fact that Constable G's circumstances were similar to those of the claimant and her PER50 request was granted;

195.2. The subsequent grant of a further PER50 request made by Constable G;

195.3. Superintendent Boyle not telling the truth about what had happened at the meeting, and in particular as to whether the claimant had provided any other reason for wanting the varied shift pattern other than his desire to put his children to bed. Linked to this fact was Superintendent Boyle having "skirted over" additional reasons that the claimant claims that he gave, such as the effect on his own health and his difficulties in looking after his disabled mother.

196. The contents of the claimant's and Constable G's PER50 applications were plain to see and we had little difficulty in finding facts about their similarities and differences. In our view there were material differences between the two officers' PER50 applications. In particular, Constable G was offering to work the same number of late shifts as in the core shift pattern, whereas the claimant was not. It also appeared from the two applications that Constable's G's need was greater than that of the claimant because Constable G was a single parent and the claimant was not.

197. Even if the two PER50 applications were comparable, that fact on its own would indicate no more than a difference in characteristic and a difference in treatment. Something more would be required. In order for the claimant to succeed, therefore, the tribunal would have to find the remaining primary facts in favour of the claimant.

198. For the reasons we have given in paragraph 57, the passage of time has made it very difficult for us to find exactly what was discussed during the claimant's meeting with Superintendent Boyle. Without being able to find those facts, it is impossible to make the contingent finding that he claimant seeks, namely that Superintendent Boyle either lied about or suppressed additional reasons given by the claimant for wanting a varied shift pattern.

199. The claimant has good reasons for much of the delay but not all of it. We sympathise with the position in which he found himself in the summer of 2016, facing a major restructure and uncertainty over whether he was going to be placed in a role that was compatible with his desired shift pattern. His priority was to look forward and to try and secure the shift pattern that he needed. We also have some sympathy with the claimant's position during the period August 2017 to February 2018. He was devoting very considerable time and energy to trying to

further his requests for information which were being frustrated through no fault of his own. His explanation for not bringing a claim between February and August 2017 is less convincing. He told us that he only considered bringing a claim when his health deteriorated to the point where he had to go to his doctor. That was in February 2017. Even making allowances for the fact that he was unwell, we did not understand why he could not have started to put the wheels in motion once his visit to the GP had prompted him to think about bringing an Employment tribunal claim.

200. Taking all the factors together, our view is that it would not be just and equitable to extend the time limit. The delay has adversely affected the cogency of the evidence in relation to a contentious factual issue which would need to be resolved in the claimant's favour in order for the claim to succeed.

Harassment 1 (Sex)

201. It is common ground that this complaint is approximately nine months out of time. Our view of the reason for the delay is the same as in relation to direct sex discrimination.

202. We have recorded our view at paragraph 65 that the delay and the absence of any grievance made it considerably more difficult for us to find important facts. These disputed facts go to the heart of the substantive issues in the claim. In particular, we could not find what the claimant himself thought was the effect that Constable Rylands' conduct was having on him. Moreover, unless we could resolve the clash of evidence about what Constable Rylands actually did, and how long it lasted, it was difficult for us to make any assessment of whether it would be reasonable for the claimant to regard his conduct as having that effect.

203. There was also a dispute about whether the conduct was related to the claimant's sex or not. We did not think that there was anything about Constable Rylands' admitted conduct that was related to the fact that the claimant is a man. Generally, 9-5 office hours is not a remarkable working pattern for a man to have. What stood out in Constable Rylands' mind was not that this pattern had been given to a man, but that it had been given to any officer working within the target team. That only left the claimant's argument that he would not have engaged in "banter" with a woman. This contention directly contradicted Constable Rylands' evidence which we have recorded at paragraph 64. We did not make a positive finding on this disputed question because, once again, the passage of time made it more difficult for us to assess the cogency of the evidence.

204. Because of the effect of the delay on the quality of the evidence, we decided that it would not be just and equitable to extend the time limit.

Harassment 2 (Sex)

205. This is another allegation that was presented approximately nine months too late. We do not need to repeat our conclusions in respect of the claimant's reason for the delay.

206. Once again, there is a clash of evidence in relation to the fundamental issues at the core of this complaint. As we have observed in paragraph 77, the delay

has made the exercise of finding those disputed facts considerably more difficult. For this reason, we do not think that an extension of time is just and equitable. If we were wrong in this conclusion, we would have found that this complaint failed on its merits. Paragraph 77 explains that, if we were pushed to make a finding, it would be that the alleged conduct did not happen.

Harassment 3 (Disability)

207. It is common ground that Chief Inspector Garvey-Jones did not write a report supporting the claimant's application for full pay. It is not suggested that merely by omitting to write the report Chief Inspector Garvey-Jones harassed the claimant; if it were, we would have no difficulty in rejecting that suggestion. She was on holiday at the time the request was received by the Command Team from Human Resources. If anything were capable of transforming Chief Inspector Garvey-Jones' inactivity into harassment, it would be the context of her alleged promise during the home visit. We have found at paragraph 85 that Chief Inspector Garvey-Jones did not make that promise. In the absence of such a promise, we cannot see how the lack of a report from Chief Inspector Garvey-Jones could reasonably have been perceived by the claimant as creating the environment described in section 26 of EqA. So far as we can say that Chief Inspector Garvey-Jones did engage in unwanted conduct, it did not have the proscribed effect and did not amount to harassment.

Harassment 4 (Disability)

208. As we have found at paragraph 86, the claimant did not perceive that Inspector Creer's conduct on 31 July 2017 had the effect of creating the environment described in section 26 of EqA. His conduct did not therefore amount to harassment. Because this allegation is of a similar nature to Harassment 5, we would add that the effect of the RTW plan would in all likelihood have been much different and much worse had Inspector Creer not immediately reassured him that he could ignore it.

Harassment 5 (Disability)

209. Sergeant McKenzie's conduct in sending the e-mail of 26 October 2017 was unwanted by the claimant. Whilst some parts of the e-mail were supportive, the e-mail as a whole was rightly seen by the claimant as intimidating. The paragraph that we have quoted in our paragraph 98 was clearly related to the claimant's disability: the claimant was unable to return to work because of his poor mental health. The effect on the claimant was compounded by being formally served with an RTW plan on 27 October 2017 and being required to sign to acknowledge receipt without any explanation. The effect of the e-mail coupled with the RTW plan was to make the claimant feel fearful for the future of his employment and severely distressed. In our view, that is another way of saying that the claimant perceived this conduct as creating an intimidating environment for him. We have to decide whether or not it was reasonable for the claimant to perceive the effect of Sergeant McKenzie's conduct in that way.

210. In our view the claimant's perception was a reasonable one. Here are our reasons:

210.1. Even taking the supportive content into account, Sergeant McKenzie's e-mail have the impression of wrongly accusing the claimant of failing to obey an instruction. Sergeant McKenzie was telling the claimant that he had been served with a return to work notice and therefore should have returned to work. This statement gave a completely misleading impression of what had occurred in July 2017. He had not been "served" with a "notice" to do anything. Inspector Creer had merely left with him a draft discussion document that would not require him to do anything until he agreed to it. Moreover, Sergeant McKenzie's e-mail omitted to acknowledge that the claimant had been assured that he could ignore the RTW plan in any event. The phrase "instruct you to return to work" again mischaracterised the purpose of the new RTW plan that was about to be given to him. The e-mail also gave the impression that the claimant was going to be given a fresh instruction without the claimant having any say in the matter.

210.2. On any reasonable view, it was premature to inform the claimant that if he failed to return to work in five days' time then he would face UPP procedures. The claimant was still awaiting his Occupational Health appointment which (as the claimant and Sergeant McKenzie both knew) would happen some time in November. It would only be once the respondent was appropriately informed by Occupational Health that they could decide whether instigating UPP procedures was appropriate at all.

210.3. There was no attempt, either in the e-mail on 26 October or the visit the following day, to explain to the claimant that the draft RTW plan was something to be discussed with a view to agreement. Rightly, in our view, the claimant felt that he was being given an ultimatum which was quite different from the actual purpose of an RTW plan.

210.4. In deciding what effect the claimant could reasonably perceive, we have had regard to what a reasonable observer must be taken to have known. It would be apparent to everybody, including the claimant, that the respondent could not simply let the claimant's ill health absence drift. By this time he had been absent for over eight months. The claimant ought to have known that at some point the respondent would have to place his absence management on a more formal footing. We have also borne in mind, however, that everyone including Sergeant McKenzie would have known that he claimant was in a state of poor mental health. What might not be taken as intimidating to a more robust individual would be more likely to have that effect with somebody who was suffering from anxiety and depression.

210.5. It is of course important for us to have regard to the context of the e-mail as a whole. That said, most people read e-mails from top to bottom. By the time a reasonable reader had got to the supportive paragraphs at the end, much of the damage would have been done.

211. The claimant's perception being reasonable, the unwanted conduct met the statutory definition of harassment and this part of the claim is therefore well founded.

<u>Harassment 6 (Disability)</u>

212. We start by reminding ourselves of the conduct that is alleged. It is said that the respondent the respondent "allowed the claimant to fall out of the system in July 2017". In a very narrow sense, that is what happened. The claimant was discharged from Occupational Health on the recommendation of Ms Taylor following his appointment on 3 July 2017. Ms Taylor's conduct had a connection to the claimant's disability, in that it was her opinion about the state of the claimant's mental health that led her to discharge him. That finding does not, however, fully address the claimant's allegation, because the statement, "allowed…to fall out of the system" implies that the respondent somehow ignored the claimant or forgot about him or otherwise demonstrated a lack of care for his wellbeing. If that is what is implied, we reject the implication. There is no reason to suppose that Ms Taylor's decision to discharge the claimant was based on anything other than her clinical opinion. The claimant had not asked for a referral to a physician at that stage. Ms Taylor was not to know that the final CBT session would not go ahead. She made recommendations for further support to eliminate stressors in the workplace. These recommendations were in fact implemented, for example, in the Wellness Action Plan. We cannot see how any reasonable person in the claimant's position could perceive the discharge from Occupational Health in July 2017 as creating the environment described in section 26.

Victimisation

213. Part of our decision on victimisation was unanimous. We were all agreed in relation to SAR2, SAR3 and SAR4 and we set these conclusions out first before returning to SAR1.

SAR2

214. The respondent subjected the claimant to a detriment by providing a late response to SAR2. The statutory deadline for compliance was 40 days. It took 56 days from receipt of SAR2 to the provision of the shift pattern information on Egress.

215. There was no other detriment in relation to SAR2. In our view, the respondent had complied with its statutory obligations so far as SAR2 was concerned when it placed the information on Egress and gave the claimant access to that system. It is not suggested that the shift patterns provided in February 2018 were incomplete. Everything that happened in relation to SAR2 from February 2018 onwards concerned the claimant's additional request for a hard copy. It might be said that the claimant had a section 8 right to a hard copy of the shift patterns as well as access to the information an online portal. That point was not put to Mrs Jaymes. Had Mrs Jaymes been cross-examined on that matter, we might have heard argument about whether the provision of hard copies would have entailed disproportionate effort.

216. As it is, all we are concerned with is the delay of 14 days. We must therefore look at the respondent's reason for that delay, concentrating on the motivation of the relevant decision-maker. The motivation could of course be sub-conscious and would only need to have exerted a material influence on the decision-maker: it would not need to be the sole reason.

217. We were all agreed that it was not open to us to find that Mrs Jaymes was motivated by the fact that the claimant had done a protected act. This is because

of the concession made on the claimant's behalf which we noted at paragraph 27.

218. There is nothing to suggest that Mr D had any involvement in the handling of SAR2 prior to 26 January 2018. His motivation is therefore irrelevant.

219. That leaves Mr J. For the complaint to succeed, we would have to find that Mr J's dragged his heels because the claimant had done the protected act of making SAR1 or SAR2 for "an employment issue", or because Mr J believed that the claimant might do a further protected act in the future (such as bringing a claim to a tribunal). We looked to see if there were any facts from which we could draw such a conclusion. In our view there were no such facts. The evidence pointed the other way. The DAU generally had an applicant-blind mentality. Mr J was a relatively junior employee who had had no involvement at all in the "employment issue" which the claimant had mentioned in his SARs. Until Mr J was assigned to SAR1 and SAR2, Mr J had no interaction with the claimant or with the officers who were alleged to have discriminated against him. Tellingly, Mr J had delayed his handling of other applicants' SARs and not just those of the claimant.

220. The detriment was therefore not because the claimant had done or might do a protected act and this part of the victimisation complaint must fail.

SAR3

221. The claimant was not subjected to any detriment in relation to SAR3. In order to explain why we reached this conclusion, it is worth restating our terms of reference. The claimant's formulation of his claim did not require us adjudicate on any delay prior to 11 April 2018 when SAR3 was received by the DAU. No matter how frustrating and preventable it was for the claimant to lose access to his S-Notes on the Pronto device in November 2017, it is not part of the claim.

222. The respondent complied with SAR3 promptly and within the statutory timescale. The provision of personal information was incomplete (in that the S-Notes were missing), but that did not mean that the claimant could reasonably understand that he had been put at a disadvantage. The DAU had done all that could reasonably have been expected of it. Although the S-Notes had not been technically "deleted" within the ICO's definition in the Code (as there is no evidence that anybody had deliberately deleted them), it is clear that the S-Notes were beyond all practical reach. They could not be recovered from the Pronto by the DAU or the IT Department or by the claimant himself. The sole basis upon which the claimant contended that they could be recovered was with the assistance of an external expert consultant. It is hard to imagine that the ICO would have taken enforcement action in those circumstances.

223. If we are wrong in our analysis, and the claimant was subjected to a detriment in relation to SAR3, we are unanimously satisfied that the detriment was not because the claimant had done any of the protected acts. There are no facts from which we could conclude that his protected acts were a motivating factor. Mr F was another relatively junior Data Analyst. He had no prior connection to the claimant and no connection with individuals involved in his claim. All Mr F's contemporaneous e-mails concentrated on the claimant's request on its technical merits. There is no reason to suppose that he was not following the DAU's applicant-blind policy. What is more, we have made a positive finding (at paragraph 146) that Mr F did not have the requisite motivation.

SAR4

224. We remind ourselves that the victimisation complaint, as formulated by the claimant, was not that there had been a delay in providing him with his PNBs or that the PNBs had gone missing. Requests for PNBs were not the responsibility of the DAU. His request to supervising sergeants for PNBs were not SARs or any other type of request with a "statutory deadline". The only alleged detriment that fits with the claimant's formulation of his claim is the handling of SAR4. We can deal with that allegation quickly. SAR4 was complied with well within the GDPR deadline of 30 calendar days and the requested information was provided in full. He could not reasonably have understood the handling of SAR4 to put him at a disadvantage.

SAR1 – unanimous conclusions

225. There was no doubt that the claimant had been subjected to detriments in the respondent's handling of SAR1. In order to understand how the tribunal reached its overall conclusion, however, it is necessary to separate out what those detriments were.

226. The tribunal universally found that the claimant had experienced the following detriments:

226.1. The respondent failed to provide him with any e-mails within the statutory deadline of 40 days. Mr J was entitled under section 7(3) to ask the claimant to narrow his search parameters, but left it until after the deadline had already expired before he made that request.

226.2. The claimant was subjected to a further detriment on 7 November 2017 by Mr J, on the instruction of Mrs Jaymes. In our view this detriment just about comes within the purview of the claim as formulated by the claimant. We accepted that Mrs Jaymes and Mr J acted with good intentions. Their approach to the individual officers was a *supplement* to their enquiries with the ACU, not a substitute for them. Had Mr J blind-copied the individual officers, or e-mailed them all separately, the claimant could have had no legitimate cause to complain. But by revealing to all the recipients of the e-mail the identity of all the officers in the group, Mr J was alerting those officers to the scale of the claimant's request and enabling them to detect a common theme. The list of individuals suggested it had to do with how the claimant had been managed and foreshadowed the possibility of a grievance or even a tribunal claim. That might incline the officers to a defensive attitude when searching for e-mails and deciding which ones to provide to the DAU. It created the risk that some of the claimant's personal information might not be provided to him. Whilst we all accepted that Mrs Jaymes had been genuinely trying to circumvent the difficulty in recovering archived e-mails from the ACU, the claimant could reasonably have understood Mrs Jaymes' instruction as being detrimental to him.

226.3. A further detriment occurred between November 2017 and 25 January 2018; the claimant had provided the more focused information asked of him, but he still had to wait an unacceptably long time before the information held by the ACU was provided.

227. As will be seen, our majority found that there were further detriments in relation to SAR1, to which we will return.

228. We have already recorded our finding that Mr J did not act with the prohibited motivation, either consciously or subconsciously, when dealing with SAR2. For the same reasons, we have reached the same unanimous view as regards SAR1. Just as with SAR2, it is not open to the claimant to impugn Mrs Jaymes' motivation in giving the instruction to send the 7 November 2017 e-mail. There is no evidence that Mr D was involved at all prior to 25 January 2018. With regard to the detriments that we unanimously found, our collective view was that the reason why the claimant was subjected to those detriments was not because he had done a protected act, or because he might have done so in the future.

SAR1 – conclusions of the majority

229. Further detriment 1 - Our majority considered that the respondent did not stop subjecting the claimant to detriments on 25 January 2018. The majority view was that a further detriment occurred on 25 January 2018 in that the e-mails placed onto the Egress system that day were incomplete. As we now know, the ACU actually had in its archive a number of e-mails that were subsequently provided to the claimant in October 2018. In the majority's view, the ACU ought to have found the e-mails by 25 January 2018 and made them available to the claimant at that time. The majority accepted Mrs Jaymes' evidence that the ACU Superintendent explained to her that it was only the software change following GDPR that allowed the ACU to retrieve those e-mails at a later date. As we have already recorded, however, the majority also found the Superintendent's explanation (as reported by Mrs Jaymes) to be incapable of belief either by the tribunal or indeed by Mrs Jaymes herself. The majority found as a fact, based on their understanding of what the ACU exists to do, that the ACU was able to retrieve the October 2018 e-mails in January 2018 and that Mrs Jaymes must have realised that fact. The claimant could therefore reasonably understand himself to have been put to a disadvantage when he viewed the e-mails on Egress and found fewer e-mails than he had been expecting.

230. Further detriment 2 - Whilst Mr D's grievance outcome found that the claimant had been provided with his requested data on 25 January 2018, the claimant appealed and informed Mr D by e-mail on 26 April 2018 that he still required further e-mails to be provided to him. By not looking for further SAR1 e-mails until May 2018, Mr D subjected the claimant to a further detriment.

231. Further detriment 3 - From the outset of Mr D's involvement, our majority considered that Mr D should have escalated SAR1 to an officer capable of exerting influence over the ACU. He subjected the claimant to a further detriment by failing to do so.

232. Further detriment 4 - Our majority considered the compliance with SAR1 to have been incomplete by the time Mr D sent his e-mails on 7 August and 30 August 2018. Those e-mails, which were dismissive in their tone, were part of the respondent's handling of SAR1 and therefore fell to be taken into account as a further detriment.

233. The majority then considered Mr D's motivation for treating the claimant detrimentally in these four ways. In their view, there were facts from which they could conclude that the reason why Mr D acted as he did was because the claimant had done protected acts. These facts were:

233.1. Mr D undoubtedly knew from the claimant's grievance against the DAU that he wanted the missing e-mails in connection with a proposed claim.

233.2. Mr D must have been aware of Mr J's group e-mail of 7 November 2017 and the risk that individual officers might not provide the DAU with all the information the claimant was asking for. That procedure had been found by Mrs McTaggart to be "unacceptable" during the grievance appeal.

233.3. Mr D must have known that the ACU's explanation lacked credibility. The respondent had not called the ACU as a witness. His failure to call that person gave rise to a legitimate inference that the ACU could actually have retrieved the missing e-mails much earlier than they did and that their explanation would not stand up to scrutiny.

233.4. The tone of the e-mails of 7 August and 30 August 2018 was dismissive.

233.5. In general terms Mr D was, (in the majority's opinion) blocking the claimant batting him away, and trying to wear him down.

233.6. The DAU was criticised by the ICO.

233.7. (In the view of one of the lay members), the DAU unjustifiably hid behind its applicant-blind policy. It was not enough for the DAU to treat the claimant in the same way as they would treat other SAR applicants. Mr D knew that the claimant had a more pressing need for his personal information than other applicants would have for theirs. These circumstances cried out for extra effort. The DAU's failure to give the claimant priority over other applicants was an indicator that they trying to obstruct not just his statutory SAR, but also his claim.

234. The burden of proof therefore shifted to the respondent to show that Mr D did not victimise the claimant. Mr D was not called as a witness. In those circumstances, our majority found that the respondent had not discharged the burden of proof. The victimisation complaint in relation to SAR1 therefore succeeded.

SAR1 – minority report

235. The employment judge disagreed with the views of the majority. The first area of disagreement was over whether the claimant had been subjected to the four further detriments that the majority had found. Dealing with each one:

235.1. Further detriment 1 - There was no evidential basis for finding that the ACU was able to retrieve the October 2018 e-mails by 25 January 2018. The only evidence about what the ACU could and could not find came from the ACU Superintendent's explanation, as relayed to us by Mrs Jaymes. The fact that the ACU were able to find further e-mails in October 2018 did not mean that the explanation was not credible. It was explained by the finding we unanimously made that the ACU had changed its software to comply with GDPR and that the change enabled searches to be made that had not been previously possible. The ICO's provisional view (that the claimant was provided with incomplete information) does not alter the analysis. We do not know what information the ICO had before it in order to make that provisional assessment. The claimant could not therefore reasonably have thought himself to have been put at a disadvantage by the extent of the information provided on 25 January 2018.

235.2. Further detriment 2 - In the judge's view, the impermissible finding in relation to Further detriment 1 also taints the finding of Further detriment 2.

Unless the tribunal can permissibly find that the respondent had retrievable e-mails to disclose in January 2018, the claimant had no further section 7 rights under SAR1. In April and May 2018, the DAU were entitled to regard SAR1 as complete and all the claimant had was an unjustified sense of grievance. If that view is wrong, and the respondent was still under an obligation to provide further e-mails at that time, the claimant could just about reasonably understand Mr D to have subjected him to a detriment by waiting until May 2018 to initiate the procedure for making further searches. It must be borne in mind, however, that it would have been quite reasonable of Mr D to let the grievance appeal run its course (until late March 2018) and view the matter as closed once Mrs McTaggart had concluded that the claimant had been provided with all the requested information. He replied to the claimant's e-mail of 26 April 2018, which was also about the loss of data from Egress. He did not specifically address the claimant's request for missing e-mails until 25 May 2018, but by that stage it was not easy to keep track of all the different requests that the claimant was making.

235.3. Further detriment 3 – The claimant could not have anything more than an unjustified sense of grievance in relation to Mr D failing to escalate SAR1 further. By the time SAR1 reached Mr D it had already been escalated twice. In any case, the matter was effectively escalated beyond Mr D when Mrs McTaggart heard the grievance appeal. She was satisfied, at that time, that there was no further SAR1 information to provide.

235.4. Further detriment 4 – In the employment judge's view, this only amounted to a detriment if the claimant could reasonably have viewed SAR1 as still outstanding in August 2018. For the reasons given in relation to Further detriment 1, this is not a finding that the tribunal can permissibly make.

236. The view of the employment judge was that, even if the claimant was subjected to these four further detriments, it was not because the claimant had done any protected acts. On the employment judge's understanding of the tribunal's findings, there were no facts from which this conclusion could be drawn. The starting point is that, in order to shift the burden to the respondent, there must be something more than the mere existence of a protected act and the finding of a detriment. Dealing with the facts identified by the majority:

236.1. Knowledge of the protected act, by itself, would not be a fact from which a tribunal could infer victimisation in this case.

236.2. The group e-mail of 7 November 2017 was sent on the instruction of Mrs Jaymes, who is not alleged to have acted with improper motivation. There is no evidential basis for any finding that Mr D knew about that instruction prior to the claimant's grievance on 26 January 2018. The fact that Mrs Jaymes' and Mr J's use of this procedure was later criticised by Mrs McTaggart cannot tell us anything about Mr D's motivation from 26 January 2018 onwards.

236.3. Paragraph 34 already sets out the tribunal's internal difference of opinion about whether it was appropriate to draw any adverse inferences from the lack of a witness from the ACU.

236.4. The tone of the e-mails of 7 August and 30 August 2018 expressed Mr D's frustration, which was understandable against the context of the

claimant's large number of e-mails. Whilst it lends support to the view that, by this stage, Mr D was not inclined to help the claimant any further, it does not shed any light on Mr D's *reason* for being unwilling to help.

236.5. The finding of "batting away" is expressed in very general terms and, if it is open to the tribunal, must be capable of being reached by stepping back and looking at the whole picture of what Mr D did and did not do. When one does that, the majority's finding is not supportable. At times Mr D went out of his way to help the claimant. He investigated the claimant's grievance and apologised for Mr J's lack of action. He proactively responded to the change in the ACU's software by inviting the claimant to provide further information that would enable a new search to be carried out.

236.6. The ICO unsurprisingly indicated a likely breach in failure to comply timeously, but that says nothing about Mr D's motivation because the deadline had already long expired by the time Mr D became involved. The other provisional finding of breach was that not all the claimant's personal information had been provided. To the extent that this helps determine whether there was a breach or not (which depends on the information provided to ICO at that stage), it still does not help the tribunal understand Mr D's *motivation* for persisting with any such breach.

236.7. It cannot be right to say that the respondent victimised the claimant by treating him the same as they would have treated anyone else. Section 27 of EqA does not impose any duty on employers to afford preferential treatment for people who do protected acts. Having unanimously found that the DAU followed its "applicant-blind" policy in relation to the claimant, it is hard for us to conclude that the claimant's protected act motivated any of the DAU, let alone Mr D, to subject the claimant to the alleged detriments.

237. The employment judge's conclusion was that the burden of proof had not shifted to the respondent to disprove victimisation in respect of Mr D's involvement in SAR1. The victimisation complaint should therefore have failed.

Next steps

238. If the parties cannot now settle their differences, there will need to be a hearing to determine the claimant's remedy. The remedy issues will not be straightforward, as the tribunal will need to try to disentangle the effect on the claimant's feelings of the harassment and victimisation from the effect of all those other things for which the respondent is not liable. The tribunal notes in particular that the matters preying on the claimant's mind at the time of seeing his GP, Dr Roy and Dr Friedman do not appear to have been the result of any breach of EqA on the respondent's part. The tribunal will also have to make a finding about whether or not the claimant would have returned to work if he had not been harassed or victimised.

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Employment Judge Horne

Date: 6 June 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

10 June 2019

FOR THE TRIBUNAL OFFICE

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