EMPLOYMENT TRIBUNALS

claimant: Mrs C Bradley

respondent: The Chief Constable of Nottinghamshire Police

FINAL HEARING

Heard at: Nottingham **On:** 10 to 14 June 2019

Before: Employment Judge Camp Members: Mrs F French
Ms S Scott

Appearances
For the claimant: Mr O Thorne, counsel
For the respondent: Mr A Roberts, counsel

RESERVED JUDGMENT

The claimant's claim fails and is dismissed.

REASONS

Introduction

1. The claimant was a Police Constable with the respondent police force from 1998 until she was ill-health/medically retired with effect on 20 February 2018, her twenty-year service anniversary. She was medically retired pursuant to the Police Pensions Regulations 1987 (the "Regulations").

2. This claim concerns the ending of the claimant's service with the Police, and only that. She is and was at all relevant times a disabled person under the Equality Act 2010 ("EQA") because of anxiety and depression, and the respondent concedes this. Hers is a disability discrimination claim, consisting of a single complaint of breach of the duty to make reasonable adjustments and complaints of unfavourable treatment under EQA section 15 ("section 15").

Issues & the law

3. We shall set out the issues later in these Reasons, as and when we deal with them. We shall also be making our findings of fact along the way, rather than strictly separating our findings from our decision on the issues.

4. In terms of the law, we refer, first and foremost, to the wording of the relevant sections of the EQA, particularly sections 15 and 20. The case law has been helpfully summarised for us in paragraphs 8 and 9 of respondent's counsel's skeleton argument. We have directed ourselves in accordance with paragraphs 15 to 29, 41 to 47, 57 to 68, 73, and 79 to 80 of the Court of Appeal's decision in Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265.

5. We shall address a handful of specific legal issues separately, as and when they arise.

The facts

6. Essentially, this claim is about the fact that, although the claimant began the process of ill-health retirement herself (with the assistance of the Police Federation – the "Federation"), she changed her mind towards the end of the process, and was, ultimately, medically retired against her will.

7. The cast list we were presented with at the outset and respondent's counsel's chronology should be deemed to be incorporated into these Reasons.

8. We had before us quite a lot of evidence about what could broadly be called historical matters. That evidence included witness as well as documentary evidence. Although it was helpful to understand the background to the claimant applying for ill-health retirement, that evidence was not, strictly, relevant to the issues that were before us. Much of it is in dispute, and we do not intend to resolve those factual disputes.

9. We quite understand that the background is very important to the claimant. In particular, her case is that her difficulties at work and, to a significant extent, her disability stem from bullying by a particular Sergeant. She also wishes to emphasise that a significant part of her reasons for starting the medical retirement process was being issued with a written improvement notice ("WIN") – the first step in a process that could have ended in dismissal for incapability – and that she thinks it was unfair, and potentially discriminatory, for her to be issued with that WIN at that time. Medical retirement was mentioned by an HR consultant of the respondent to the claimant during a meeting with her relating to the WIN. The claimant tells us that at the time she felt there was no way out for her, and that she was fearful as to where the capability process might end up, and that she saw ill-health retirement as a potential way out.

10. One of the respondent's points during these proceedings has been that it was the claimant who instigated the ill-health retirement process. That is undeniably true. However, we should like to make clear, and we think the respondent also wishes to make clear, that no one is suggesting the claimant did anything wrong by instigating that process, nor by pursuing it, nor by changing her mind as to whether or not she wanted medical retirement towards the end of the process. It is no part of this case that the claimant has ever done anything wrong or blameworthy in any respect. Whether or not it was appropriate to medically retire the claimant is something to be judged almost entirely by reference to the state of her health, as assessed by various doctors. To the extent something else is relevant to that judgment, the 'something else' is the respondent's acts and omissions and not what the claimant herself did or did not do.

11. The ill-health retirement process started with an email from the claimant of 16 March 2016 stating, "*After consultation with Malcolm Spencer of the Federation in relation to my ongoing ill-health I have been advised to contact you with regards to the consideration of ill-health retirement, could you please look into this for me and begin the process on my behalf*".

12. The claimant was seen on 19 July 2016 by Dr A Booth, Force Occupational Physician. At the time, the claimant was working in the Missing from Home Team (MISPER). This was a recuperative role. In Dr Booth's words, in the doctor's Memorandum dated 20 July 2016, the claimant had been deployed to MISPER, "*due to being unable to achieve operational fitness at present*". Essentially, Dr Booth authorised the medical retirement process to continue, the next step being a referral to the Selected Medical Practitioner ("SMP"), the SMP having a designated role in the Regulations.

13. The claimant obtained a report from a Consultant Psychiatrist, Dr Ian Medley. The date of his report was 31 August 2016. Dr Medley's conclusions were that, "*In the right post, she could continue to deliver good service*". The claimant's case then passed to the SMP, who at that stage was a Dr Barbara Kneale. The conclusions in her report, dated 24 October 2016, were that, "*PC Bradley is currently unfit for the role of an operational police officer. She is fit to attend work on her contracted part-time basis in an office based role… In my medical opinion although PC Bradley remains unfit for the role of operational officer due to her depression. There are still outstanding treatment options that could render her fit for the full operational duties of a police officer and so in my view it is premature to consider permanency at this stage*".

14. In November 2016, through her Federation representative, the claimant indicated that she wished to appeal Dr Kneale's assessment. In order to pursue that appeal, the claimant had to get some supportive medical evidence. She finally obtained that evidence in April 2017, in a report dated 30 April 2017 from Dr Medley. Dr Medley's report included the following: "*There has not been full recovery and at this stage I think this is unlikely. She is able to cope with her existing post, but any return to frontline response duties, making critical time pressured* [sic] *would trigger a significant relapse of depressive and anxiety symptoms. … I would thus regard her now as permanently incapable of undertaking frontline response duties, although able to cope with her existing role, or similar, within the Police service*".

15. Although in her witness evidence the claimant tells us that by this stage she did not really want to proceed with medical retirement, she appears not to have communicated this to the respondent at the time. Her appeal against Dr Kneale's decision continued, although it was no longer an appeal as such but was, instead, effectively a whole new application – or, at least, was being treated as one. She saw the new SMP, Dr Bose Adejoro, Occupational Health Physician, on 14 July 2017. Dr Adejoro produced her report on the same date.

16. There were three parts to Dr Adejoro's report.

17. The first part was the report itself, which was 2½ pages long and incorporated a summary of Dr Medley's opinion and Dr Adejoro's own opinion.

18. After the report itself, there was a document described as a "*General Work Capability assessment checklist*", which we'll refer to as the "checklist". The checklist had columns for particular capabilities and "*function*"s, such as "*Daily Living basics*" and "*Lifting and carrying*", followed by four columns with "*Y/N*" in each of them, headed "*Capable*", "*Capable w.* [with] *adjustments*", "*Disabled for regular employment*", and "*Permanently disabled for regular employment*". That checklist was for the doctor to summarise the respects in which the person applying for medical retirement, in this case the claimant, was capable, or incapable, or capable with adjustments (etc.), of carrying out the functions.

19. The relevant parts of the checklist that Dr Adejoro completed in relation to the claimant were: against "*Concentration*", in relation to "*Applying procedures*", the claimant was deemed capable with adjustments; from that point downwards on the checklist, no "*Y*"s or "*N*"s had been circled; in relation to everything from "*Concentration*" downwards (including "*Concentration*" itself) Dr Adejoro had written by hand, in relation to all of the capabilities, "*Waxes and wanes affected/impaired by mental symptoms*". The capabilities covered by that other than "*Concentration*", were: in relation to "*Gathering and handling information*", "*Evaluating information*" and "*Recording details*"; in relation to "*Decision making*", "*Decision making*" and "*Relaying oral and written information*".

20. The third part of Dr Adejoro's report was, headed "*Part 2*[:] *Capability for Further Police Service*", a standard form to be completed. We shall return to what that form said and the significance of it later in these Reasons.

21. Returning to the body of the report itself, the most relevant parts of it were:

> *According to Dr Medley, Consultant Psychiatrist: …*
>
> - *While there has been some progress, her health remains fragile with continuing underlying symptoms of low mood and anxiety that are easily triggered by untoward stress. …*
> - *PC Bradley is able to cope with her existing post but any return to frontline response duties and making critical time pressured decisions would trigger the significant relapse of depressive and anxiety symptoms. ...*
> - *There might be some further improvement but not to a level that would enable her to return to frontline response duties. …*
>
> ***SMP Opinion***
>
> *Following my assessment and after reviewing the information made available to me it is my opinion that:*
>
> *1. PC Bradley is disabled by anxiety and depression.*
>
> *2. This would affect her ability to cope with the ordinary duties of a Police Officer, as the demands of such work are likely to aggravate her underlying symptoms.*
>
> *3. While some improvement might be possible, this would not be to a degree that would enable her to return to the full range of the ordinary duties of a Police Officer.*
>
> *4. All treatment options have been explored and do not appear to have provided significant benefit.*

> *5. On the balance of probabilities, her anxiety and depression meets the criteria for permanent disablement as defined by the Police Pension Regulations 1987.*

22. It is not clear from the evidence we have how, when, and in what circumstances Dr Adejoro's report found its way to the respondent's Human Resources team. The only documentary evidence we have dating from August or September 2017 is an email from a Ms Ghattoara, an HR consultant, to the claimant's Sergeant, Mr Birkin, stating that she was working on the claimant's medical retirement report and asking for an update on various things to do with how well the claimant was performing her existing role. Sergeant Birkin was rather negative in this respect. We note that he was much more positive about the claimant later.

23. The standard process at the time being followed by the respondent in relation to decisions about medical retirement was that the SMP's report would be passed to HR, that HR would prepare a report containing its recommendations in light of the SMP's report, and that that report would then be passed to the Deputy Chief Constable (DCC Barber) who would herself make the final decision. This is the process that was followed in the claimant's case.

24. Unfortunately, we do not have all of the paperwork that we should have. In particular, we do not have the paperwork that must have passed internally within HR to do with this case, at least not all of it. Be that as it may, nothing turns on this, so far as we can tell.

25. A draft report was prepared by Ms Ghattoara. That draft was then passed to a Mr Woodthorpe (at the time HR Partner – Workforce Relations) who, presumably, made some changes to it. He then forwarded the final draft to Mrs Denise Hill (one of the respondent's main witnesses before us), whose job title at the time was "Head of Human Resources and Organisational Development".

26. Mrs Hill produced her report with a recommendation for medical retirement. A copy was sent to the claimant under cover of a letter from Ms Ghattoara of 23 October 2017. That covering letter included the following: "*You are now invited to make any comments you may wish regarding the report prior to its submission for final decision by DCC Rachel Barber, your comments should be returned to me within 28 days of receipt of this letter. Please forward any comments to myself by post or via email*".

27. Prior to that, on 6 October 2017, Dr Adejoro's report had been sent to the claimant. The covering letter included the following: "*In Dr Adejoro's report dated 14 July 2017 he has provided his medical opinion* [Dr Adejoro is a woman, but "he" was the pronoun used] *that you have a permanent disability that prevents you from performing the general duties of a police officer and he considers you to be permanently unfit for the role of an operational police officer. Could you please review and confirm for me, if you still wish to proceed with an ill-health retirement request? Could I ask that you respond to me in writing by 13 October 2017?*".

28. The claimant asks us to note, and we do note, that that letter says nothing about appealing Dr Adejoro's decision, which it should do. We suspect, although we do not know, that the reason it did not do so is that at that stage the respondent had no reason to think that the claimant did not want medical retirement. Particularly

given that the claimant had previously appealed a decision to the effect that she was not permanently disabled, Ms Ghattoara almost certainly assumed that the claimant would have no desire to challenge Dr Adejoro's decision that she was.

29. Mrs Hill's report included the following: "*For the past 12 months PC Bradley has been accommodated on non-operational desk-based duties within Missing Persons. … PC Bradley has been working fewer than the 26.6 hours per week she is contracted to do. … The SMP, Dr Adejoro, opinion is that PC Bradley is disabled by anxiety and depression. This would affect her ability to cope with the ordinary duties of a Police Officer as the demands of such work are likely to aggravate her underlying symptoms. Dr Adejoro states that whilst some improvements might be possible, this would not be to a degree that would enable her to return to the full range of the ordinary duties of a Police Officer. … Given the comments made by Dr Adejoro in relation to PC Bradley's future attendance at work and expectation and likelihood of relapses (and associated impact on PC Bradley's capability as a Police Officer), no roles have been identified as part of this process which could be considered suitable for PC Bradley. … Considering the range of duties that PC Bradley is permanently disabled from performing and the lack of suitable roles to accommodate any reasonable adjustments, I recommend ill-health retirement.*"

30. The report also incorporated a table purporting to set out the claimant's sickness absence record for the previous 5 years. It stated, accurately, that sickness absence in the previous 5 years totalled 396 days for 14 occasions of absence. However, within the table, there are two periods of sickness absence, totalling 130 days between them, that are stated to be by reason of "*psychological disorder*". In fact, only one of these periods of absence, and that only in part, was caused by the claimant's psychological disorder.

31. The last period of sickness absence the claimant had because of a psychological disorder was that from 4 September 2015 to early October 2015. From then until the end of that period of sickness absence, on 2 December 2015, the claimant was off work because of an operation and its aftermath. Similarly, a period of sickness absence from 20 April 2016 to 29 May 2016, down in the table as by reason of "*psychological disorder*", was in fact related to another operation.

32. The claimant tells us that she did respond by email to Ms Ghattoara's letter of 6 October 2017, but we do not have that email, if it was sent, in the documents before us. It is, however, in light of their oral evidence, common ground between the claimant and Mrs Hill that the claimant telephoned her on receipt of Mrs Hill's report to tell Mrs Hill that she no longer wanted medical retirement, and that this was the first time Mrs Hill was aware of that fact.

33. On 13 November 2017, the claimant wrote what she described as a "*Report*", which we shall refer to as a letter, setting out her position in more detail. Most of that letter, which was sent to DCC Barber, dealt with the reasons why the claimant found herself applying for ill-health retirement in the first place. It covers similar ground to the ground covered by the first part of the claimant's witness statement in these proceedings.

34. The potentially relevant parts of the letter are towards the end. On the second last page, the claimant details difficulties she had had and was having within

MISPER. Only on the final page, in three paragraphs, does she address the recommendation to ill-health retire her directly:

> *From reading HR's report, they believe there is no post available to me to continue servicing as a Police Officer and recommend ill health retirement. I understand they look at the financial implications on the force if I were to take a lot more time off sick.*
>
> *But if possible, Ma'am I would like you to consider allowing me to remain with the force, I might not be able to fulfil the role of the response officer, however I am an able bodied person with a lot to give, I'm sure I can still provide Nottinghamshire Police with a good level of service in another capacity, I am open to suggestions.*
>
> *If however you do decide that you no longer require my service could you please consider allowing me to serve until I have completed my 20 years' service on 19 February 2018 and collect my medal at a future awards ceremony. This milestone means a great deal to me.*

35. Also on 13 November 2017, the claimant emailed Ms Ghattoara with a much shorter email which consisted, essentially, of the contents of those three paragraphs from the letter to DCC Barber that we have just quoted.

36. In light of the claimant's letter, DCC Barber asked HR to look into whether, notwithstanding the contents of Dr Adejoro's and Mrs Hill's reports, something could be done for the claimant, but it was quickly concluded that nothing could, beyond permitting the claimant to continue in service until 19 February 2018 as she had requested. The decision to medically retire the claimant was formally confirmed in a letter from DCC Barber to the claimant of 22 January 2018.

37. The claimant had her exit interview on 12 February 2018 and there was at this time some further email correspondence between her and DCC Bradley, internally within HR, and between DCC Bradley and HR, none of which changed anything significantly. The claimant was duly medically retired on 19 February 2018.

Decision – Dr Adejoro's report

38. By the end of the case it was clear to us, and we think to the parties, that the claimant's claim stands and falls on how Dr Adejoro's report was to be read and treated. There are, it seems to us, no relevant factual disputes and we start our decision on the issues with the two questions that are central. The first of those questions is: was the respondent's interpretation of the report a reasonable one?

39. The respondent's interpretation of the report was that the claimant was deemed by Dr Adejoro to be permanently incapable, at least at times, of performing particular capabilities. The capabilities in question were those, labelled (b), (c), (d) and (g), that had been circled under question 2 ("*Which capabilities are permanently affected?*") in Part 2 of the report. They were, "*The ability to make decisions and report situations to others*", "*The ability to evaluate information and to record details*", "*The ability to understand, retain and explain facts and procedures*", and "*The ability to undertake a full range of shifts (earlies, lates and nights)*". We shall ignore the last of these, because it is not relevant. Had the only difficulty been the claimant's ability to undertake a full range of shifts, this was something that the respondent could readily have accommodated.

40. The final important part of the respondent's interpretation of the report was that, in it, Dr Adejoro was expressing the view that no adjustments would improve the position, in terms of what the claimant was incapable of doing, within the following 3 years.

41. When deciding whether the respondent's interpretation of the report was a reasonable one, our starting point is what we make of the report. If we broadly agree with the respondent's assessment of it, then it must necessarily have been a reasonable assessment; if we do not, it may or may not have been a reasonable one.

42. The report arose in a particular context. That context was the Regulations. Dr Adejoro's assessment, in terms, is that the claimant's condition meets the criteria for permanent disablement. What does permanent disablement mean? In the Regulations, disablement means the inability to perform the ordinary duties of a member of the force. The word used is "*inability*". This is not a question of degree; it is not the same as particular abilities being "*affected*". This is hardly surprising, given that this is the definition by reference to which the Police decide whether or not somebody should be ill-health retired, with all the financial benefits to the person being ill-health retired that that attracts, and the corresponding financial costs to the force. If someone is not permanently unable to perform the ordinary duties of a Police Officer, but merely has difficulties in performing those duties – difficulties that could be alleviated by making adjustments – there would be no good reason to ill-health retire them.

43. Dr Adejoro assessed the claimant as meeting the criteria. This means that she had assessed the claimant as unable to perform the ordinary duties of a Police Officer in particular respects. Questions 1 and 2 in Part 2 of the report contain a list of the ordinary duties of a Police Officer. They ask the doctor to say which of them the person the report is about is able or (completely) unable to do.

44. Reading Dr Adejoro's answer to question 2 in conjunction with the checklist document, what it seems to us Dr Adejoro must have meant was that the claimant was permanently incapable, at times (hence "*waxes and wanes*"), in relation to capabilities (b), (c), (d) and (g). In other words, Dr Adejoro was not saying that the claimant was always incapable of sufficiently evaluating information, recording details, and so on. Instead, what she was saying was that, indefinitely into the future, there would be times when the claimant was unable to do those things.

45. Questions 1 or 2 refer to capabilities being "*permanently affected*", or not. The claimant, through counsel, has put considerable emphasis on the word "*affected*". Obviously, as a matter of ordinary language, a particular capability could be "*affected*" to a degree. However, we do not think that the report, including Part 2, should be read as if all Dr Adejoro meant was that those particular capabilities were to some unspecified extent affected. All questions 1 and 2 are asking is which of the capabilities, (a) to (g) (being the capabilities necessary for the performance of the ordinary duties of a member of the force), is the applicant for medical retirement incapable of doing, such that they satisfy the test of being permanently incapable of performing the ordinary duties of a member of the force.

46. Accordingly, we are in agreement with the respondent as to the correct interpretation of the first part of Part 2 of the report.

47. The bit of Part 2 of the report about which there is perhaps most disagreement between the parties is in relation to question 5. Question 5 is headed "*Future capability*". Question 5 (a) is: "*Where applicable, indicate which other activities the officer is medically likely to be able to carry out within the next 12 months, indicating where treatment (and what treatment) and adjustments (and what adjustments) could make the officer able to do these activities within this time scale*". Question 5 (b) is: "*Where applicable, indicate which further activities the officer is medically unable to carry out now, or within the next twelvemonths, but is likely to be able to carry out within the next three years, indicating the likely timescales and where adjustments (and what adjustments) could make the officer able to do these activities within the timescale*".

48. Claimant's counsel's submissions about this part of the report are to the effect that it is concerned purely with change. The submission, in other words, is that this part of the report has nothing to say about the claimant's condition as at the date of the report, and that a doctor completing this part of the report would only positively address 5 (a) and (b) if they were of the view that the state of the employee's health was likely to change within the next 12 months or 3 years.

49. We do not accept those submissions. Indeed, we think that had the respondent interpreted questions 5 (a) and (b) in that way it would have been acting unreasonably.

50. In Part 2, question 5 goes with questions 1 and 2. Question 1 asks, "*Of the key capabilities related to those ordinary duties* [the ordinary duties of a member of the force], *which are not permanently affected by the infirmity identified?*". Question 5 (a) then asks, essentially, whether there are other activities other than those which have been identified in answer to question 1 which the officer might be able to do within the following 12 months, in particular with adjustments. In the claimant's case Dr Adejoro has answered that question with a single word: "*None*". The only reasonable interpretation we have of her answer is that Dr Adejoro was apparently of the view that the only things that the claimant was or would be capable of doing, whatever adjustments were made from the date of the report and for 12 months following it, were the three things that she had highlighted in her answer to question 1, namely, "*The ability to sit for reasonable periods, to write, read, use the telephone and to use IT*", "*The ability to exercise reasonable physical force in restraint and retention into custody*", and, "*The ability to run, walk reasonable distances and stand for reasonable periods*".

51. Dr Adejoro had also answered question 5 (b) with, "*None*". By that answer, Dr Adejoro must mean, it seems to us, that, no matter what adjustments were made, the claimant would not within the next three years be able to do any of the four activities Dr Adejoro had indicated (in her answer to question 2) the claimant was at that time unable to do.

52. If Dr Adejoro had been of the view that, notwithstanding anything else in her report and the attachments to it, the claimant would be perfectly capable of carrying out a Police Officer's essential duties if adjustments were made, she

would surely have said as much in the body of her report and would certainly not have answered "*None*" to questions 5 (a) and (b).

53. Dr Adejoro's report, in summary, expressed the clear view that the claimant was permanently incapacitated in various respects, and that, no matter what adjustments might be made, she would not be enabled to do any of the activities that she could not (according to Dr Adejoro) do at the date of the report within the following three years.

54. In short, our interpretation of the report is broadly the same as the respondent's interpretation of it. It follows that the respondent's interpretation of the report was a reasonable one.

55. The only part of the report which could arguably be said to muddy the waters to any significant extent is the way in which Dr Adejoro has answered question 3 (c) in Part 2. Question 3 is concerned with attendance. Question 3 (c) is as follows: "*If the disablement will affect the officer's attendance… in what way could this be remedied or reduced? (If necessary add as appropriate here to the comments on suggested adjustments)*". Dr Adejoro gave this answer: "*Accommodation on part time (up to 20 hours) non-operational duties*".

56. Having considered Part 2 carefully, we think this answer does not change the way in which the report should be interpreted as a whole. Question 3 in Part 2 is concerned only with attendance. The message from the rest of the report is clear, especially what is said in response to Part 2, question 5. We think what Dr Adejoro must have meant is that although problems with attendance could be alleviated by accommodation on part-time hours of no more than 20 on average per week, the claimant's overall capabilities would not be ameliorated by that or any other adjustment.

57. Another part of the report which is much relied on by the claimant is a comment in a section of the report in which Dr Adejoro summarises Dr Medley's opinion as follows: "*PC Bradley is able to cope with her existing post but any return to frontline response duties and making critical time pressure decisions would trigger the significant relapse of depressive and anxiety symptoms*". The logic of the claimant's argument about this, as we understand it, is:

    57.1 in her view, her existing post was a police post and she would not be able to do it, any more than she would be able to do any other Police Officer role, were she incapable in the particular respects that (adopting the respondent's interpretation of Dr Adejoro's report) Dr Adejoro had identified;

    57.2 it must follow that Dr Adejoro either did not mean what the respondent thought she meant, or, at the very least, that the report was internally inconsistent and/or ambiguous and needed some clarification.

58. Again, we are afraid we do not accept the claimant's argument. This part of the report is Dr Adejoro's summary of Dr Medley's views, not an expression of her own views. Her own views are crystal clear to us, and we have already explained what we think they are and why we think that is what they are.

59. A further thing relied on by the claimant is the fact that "*Y*" (for "yes") is circled in the "*Capable with adjustments*" column and the "*Concentration*" row in the

"*checklist*" part of the report. It seems to be being suggested that that might undermine or contradict or render unclear what is said about adjustments in Part 2. We disagree. "*Concentration*" is not by itself one of the capabilities referred to in Part 2. The fact that the claimant might be assisted in relation to concentration by some adjustments being made does not mean that those adjustments would be sufficient to give her capabilities which she would not otherwise have. Dr Adejoro has clearly answered the question about whether reasonable adjustments would make any material difference to the claimant's situation by answering "*None*" to both parts of question 5 in Part 2.

60. As was accepted on the claimant's behalf in submissions (and realistically so), if the respondent's interpretation of Dr Adejoro's report is the right interpretation – and we have decided it is – then the claim has difficulties. It seems to us that the only way in which the claimant could in practice surmount these difficulties would be if the respondent should in some relevant way have gone behind Dr Adejoro's report. This leads us to the next preliminary question which we have asked ourselves: ought the respondent, reasonably, to have gone behind the report in some way?

61. We refer once again to the context within which this report has been prepared, in particular the legislative context. Under the Regulations, the question that is referred to the SMP is whether the officer is disabled and whether the disablement is likely to be permanent. We have already explained that, in this context, disablement means incapability in particular respects, rather than something else; and that it does not mean merely that somebody is disabled in accordance with the EQA. The test under the EQA is a relatively low threshold one; the threshold for permanent disablement in the Regulations is much higher. Again, this is exactly as one would expect. One would not expect the Regulations to be encouraging, or at least permitting, the Police to medically retire people purely because they are disabled people under the EQA. That would be regressive, to say the least.

62. The argument advanced in submissions on the claimant's behalf seems to be that she did not dispute the assessment that she was permanently disabled, because she agreed that her capabilities were permanently affected to some extent. That may have been what she thought, but, as we have already explained, Dr Adejoro's report does not mean that. It is a fundamental part of Dr Adejoro's assessment that the claimant was permanently incapable – at times – in the various respects identified in Part 2 of the report, whatever adjustments were made. The claimant disagreed and disagrees with that assessment, but she did not challenge it at the time. The Regulations (regulation H1(5)) state that the SMP decision on questions of disablement and permanence are final, subject to the claimant's right to appeal; and the claimant did not appeal.

63. Pausing there, we should make clear that we are not criticising the claimant for not appealing. However, her failure to appeal does have consequences, in accordance with the Regulations.

64. The claimant relies on the fact that she was not told, as she should have been, of her right to appeal, but we note that she had previously appealed and that at all times she had access to, and took advantage to some extent of, Federation advice. If she chose not to take advice from the Federation, or was misadvised by the Federation, then that is very unfortunate, but is not the respondent's fault.

In any event, the respondent could not ignore the Regulations, any more than we can.

65. Further, although the claimant made clear that she did not want to be medically retired, in addition to not appealing, at no stage did she, formally or informally, challenge Dr Adejoro's conclusions in any other way. Her position was clear from what she wrote to DCC Barber, which was simply to the effect that, although she did not take issue with anything in particular in Mrs Hill's report, she wanted to remain in the force and felt she was an "*able-bodied person*", and was open to suggestions.

66. We are not sure this is part of the claimant's case, but if she is suggesting that when she spoke to Mrs Hill after receiving Mrs Hill's report, and/or when she responded by email to Ms Ghattoara's letter of 23 October 2017 (as she thinks she did), she said or wrote anything materially different from what she wrote to DCC Barber, we do not accept that suggestion. The claimant's own oral evidence, taken as a whole, did not support such a suggestion. Mrs Hill's evidence was very clear in this respect. And given that her letter to DCC Barber was written after she had spoken to Mrs Hill, and after she had responded to Ms Ghattoara, we think it is probable that she put her fullest case forward in that letter to DCC Barber.

The issues – reasonable adjustments

67. We are about to move on to the issues. But before we do so, we should like to make a general point: our decision in the respondent's favour should not be taken as meaning we think the respondent did nothing wrong. If the claimant were able to and had brought an unfair dismissal case, it is likely she would have succeeded, at least on grounds of procedural fairness. However, the only claim that is before us is one of disability discrimination, and that means the only issues we are looking at are the issues relevant to that claim.

68. At an early stage in these proceedings, the claimant provided a list of issues. It is not an agreed list of issues – it is the claimant's list. At the start of the hearing, in light of criticisms of the list of issues that had been made, in general terms, by respondent's counsel, we asked claimant's counsel whether the claimant wanted to amend the list of issues in any way. He confirmed that she did not.

69. The list of issues starts with the reasonable adjustments claim and the PCP (*"provision, criterion or practice"* under EQA section 20(3)). In the list of issues, the PCP is identified in the following way: "*It is accepted that the respondent operated a PCP, under the provisions of Regulation A20 of the Police Pension Regulations 1987, where a Selected Medical Practitioner (SMP) deems that an officer is disabled from performing the ordinary duties of a member of the Police Force and that disablement is likely to be permanent, that officer can be medically retired from the Force.*"

70. During closing submissions, we discussed the PCP again. The Employment Judge made the point that as a matter of language, one cannot have a PCP consisting of an ability to do something; and that a PCP must involve actually doing something or having a tendency to do something – something of that kind.

71. We looked at what was said about the PCP in the original claim form, but this was not particularly helpful. The claim form identifies "*the Police Pension*

Regulations 1987" as the PCP. Self-evidently, an entire set of regulations cannot be a PCP.

72. Claimant's counsel accepted the following slight redrafting of the PCP as set out in the list of issues, which was suggested by the Employment Judge: "*The PCP is a practice, under the provisions of Regulation A20 of the Police Pension Regulations 1987, where a selected medical practitioner (SMP) deems that an officer is disabled from performing the ordinary duties of a member of the Police Force and that disablement is likely to be permanent, of medically retiring that officer from the Force.*"

73. We also discussed potentially adding the words "*considering*" between "*of*" and "*medically retiring*" in that PCP.

74. The PCP is, then, the practice of medically retiring people who satisfy particular criteria in the Regulations. We could add the words "*tending to*" in place of the word "*considering*" without materially altering the meaning of the PCP; in fact, it occurred to us when deliberating that adding those words potentially got us closer to the original formulation in the list of issues.

75. We accept without hesitation that the respondent did indeed have just such a PCP.

76. The respondent has argued that an alleged PCP which consists of applying a regulation is not a valid PCP for the purposes of EQA section 20 because that section requires the PCP to be "*of*" the respondent's and the Regulations are not the respondent's but the creation of the legislature. Although we can envisage cases where an argument along those lines might succeed, this is not such a case. The fact that this PCP may stem from regulations does not stop it being the respondent's PCP under section 20(3) of the EQA. A PCP of the respondent's within that section simply means, we think, a PCP that is being applied by the respondent, whatever its source.

77. The next issue, as set out in the claimant's list of issues, is as follows: "*The PCP puts disabled officers at a substantial disadvantage compared to a person who does not have a disability because they are more likely to fall within the requirements of the Regulations and therefore more likely to be at risk of medical retirement.*"

78. Manifestly, a disabled person is more likely to be medically retired than a non-disabled person. Indeed, it is difficult for us to see how any non-disabled person could meet the medical retirement criteria within the Regulations.

79. A much harder question to answer is whether that is to their "*substantial disadvantage*". The respondent's argument is that it is not, because medical retirement is, objectively, a considerable benefit. Williams v Trustees of Swansea University Pension Assurance Scheme [2018] UKSC 65 was referred to in support of this argument. In addition, the respondent argues that one has, in any given case, to examine what the other options were, and to compare what actually happened to the claimant with what might otherwise have happened to her, in order to see whether there was "*disadvantage*" (or unfavourable treatment under section 15).

80. Respondent's counsel also, in his written submissions, refers to Royal Bank of Scotland v Ashton [2011] ICR 632 and to the fact that, in that case, it was held that the Tribunal: "*Must be satisfied that there is a provision, criterion or practice which has placed the disabled person concerned not merely at some disadvantage viewed generally, but at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled*".

81. If we do have to do anything like the kind of comparison exercise we have been urged to do, and we do not think we do in the particular circumstances of this case, we think the correct comparison would be between the claimant's position when the PCP is applied to her and what her position would have been had it not been applied to her. If we undertook that comparison exercise, her position (at least in the short to medium term) would have been that she would have remained a Police Constable rather than not. But the comparison exercise we do have to do in this case is between a disabled person and a non-disabled person.

82. A non-disabled person would never have had this PCP applied to them in the first place. What this means is the claimant's case is to the effect that having any chance at all of being medically retired – having access to medical retirement under regulation A20 at all – is a substantial disadvantage. We are not, then, in relation to this reasonable adjustments complaint, asking ourselves whether, subjectively, the claimant thought it was to her disadvantage to be medically retired, nor whether, generally, having one's employment ended is to one's substantial disadvantage. It seems to us that having access to medical retirement is a positive benefit – a substantial advantage – that disabled people have, which is not open to non-disabled people. We therefore agree with the respondent that this PCP did not put the claimant to a substantial disadvantage in comparison with persons who are not disabled in accordance with EQA section 20(3). It follows that the duty to make reasonable adjustments did not arise in this case.

83. We shall now consider what the position would be if we are wrong and the duty to make reasonable adjustments did arise.

84. In the list of issues, the next issue to be dealt with is as follows: "*5. If so, did the respondent make any reasonable adjustments to avoid the disadvantage? In particular: (a) Did the respondent properly assess what adjustments would have assisted the claimant to remain as a serving officer? (b) Did the respondent exhaust alternatives to dismissal? (c) Did the respondent properly consider all reasonable alternative roles available within the Force? (d) Did the respondent consider creating a role for the claimant? 6. Did the respondent make any reasonable adjustment that would have assisted the claimant to remain at work and avoid being medically retired?*"

85. We think the issue to do with what adjustments, if any, should be made is better put in the following way:

    85.1 were there steps that could have been taken that would have avoided the disadvantage?

    85.2 if there were, would it have been reasonable for the respondent to have had to have taken those steps?

86. Dealing with the first of those two issues, we have to consider whether there was something the respondent could have done which could well have alleviated the disadvantage identified, the disadvantage being medical retirement.

87. Although it is not necessarily for the claimant herself to come up with relevant, potential reasonable adjustments, if we are to find that the duty to make reasonable adjustments has not been complied with, we have to identify particular adjustments and do so based on evidence that is before us. In practice, in most cases, that means the claimant has to suggest something.

88. The claimant's issues (a) and (b) set out above boil down to an allegation that the respondent should have considered making adjustments of some kind or another. It is settled law that the duty to make reasonable adjustments is not breached by a failure to consider making reasonable adjustments. There has to be something concrete which was not done and which would, in and of itself, have avoided the disadvantage in question.

89. The only thing that might potentially have avoided the disadvantage, in the sense of maybe keeping the claimant in her job, would have been providing a role for the claimant to do within the respondent force. In reality, that is what the claimant's entire case has been about. It is clear to us that there were many jobs that the claimant could, in theory at least, have done within the respondent force, including the role that she was in at the time of her medical retirement and roles mentioned in documents during the medical retirement process, such as postings within what was referred to as PHT, PIO and the CRIM.

90. The live issue is therefore whether or not it would have been reasonable for the respondent to have to take the step of offering the claimant those roles.

91. The starting point is Dr Adejoro's report. We have already explained what we made of it, which is, essentially, what the respondent (reasonably) made of it. We have also mentioned the fact that the SMP's decision was final, subject to an appeal which was not made. The respondent took the view that there were no Police roles that did not involve the capabilities in relation to which Dr Adejoro had assessed the claimant as incapable, and in her oral evidence the claimant agreed that this was the case (her point being that she was actually not incapable, merely that those capabilities were affected, a point we have already dealt with).

92. There is a further factor based on something in Dr Adejoro's report that the respondent relies on in support of its decision not to consider other Police roles, namely Dr Adejoro's response to question 3 (a) in Part 2. The question is: "*To what extent, if at all, do you consider that the disablement will affect the Officer's attendance, irrespective of the duties he or she is required to undertake?*" Dr Adejoro's answer is: "*High risk of relapses likely to impact on attendance.*"

93. The respondent looked at that, and read it together with a couple of points in the body of the report: one of the bullet points summarising Dr Medley's report – "*PC Bradley is able to cope with her existing post, but any return to frontline response duties, making critical time-pressured* [decisions] *would trigger a significant relapse of depressive and anxiety symptoms*"; a statement in the "*Opinion*" section that the claimant's disability, "*would affect her ability to cope with the ordinary duties of a Police Officer, as the demands of such work are*

likely to aggravate her underlying symptoms". The respondent took the collective meaning of these comments to be that if the claimant was given any policing role, rather than being medically retired, there was a likelihood of aggravation of her symptoms and of relapse – for which, potentially, the respondent could be blamed.

94. We think it was entirely reasonable for the respondent to take that view. If the claimant had been given a police role within the respondent and had then, say, suffered a relapse after a year, she would potentially have had a strong personal injury claim, on the basis that the respondent had ignored the clear warnings given by Dr Adejoro.

95. Given all of this, we think the only way the respondent might reasonably have offered the claimant any of the roles that she theoretically could have been offered would have been if Dr Adejoro's report could be bypassed or overturned.

96. We have already explained why we do not think the respondent, acting reasonably, would have gone behind the report. A specific suggestion put forward in submissions is that the respondent could and should have sought clarification of it. To us, however, as to the respondent, although the report is far from perfect, it is sufficiently clear and did not need clarifying in any relevant respect. Certainly, it would not have been reasonable for the respondent to have to take the step of seeking clarification of the report, in accordance with EQA section 20(3).

97. Regrettably, from the claimant's point of view, the position in relation to the reasonable adjustments claim is as follows: given the medical evidence that was before the respondent, there were no Police roles that it would have been reasonable for the respondent to offer to the claimant; therefore any job search, however thorough, was futile.

98. That was how the respondent approached the claimant's case, at least initially. This is confirmed in paragraph 20 of Mrs Hill's witness statement: "*Other than the suggestion of working part-time hours on non-operational duties, there were no other activities recommended by Dr Adejoro that would be suitable for Clare as all roles required the skills she could no longer perform or having the risk of aggravating her condition. With this in mind, and that the medical retirement process had been initiated by Clare the Force did not actively search to locate a suitable role in the attempt to retain Clare as an officer as it was self-evident from the contents of the report that no roles would be identified*".

99. After the claimant wrote to DCC Barber, some attempt was made to identify suitable roles, but that attempt was always bound to fail, given the restrictions that, according to Dr Adejoro, the claimant had. The evidence before us does not suggest that that attempt was particularly rigorous or lengthy, but that is hardly surprising in the circumstances. In another case – for example, in an unfair dismissal case – it would not have been adequate, but in relation to the claim that is before us, we are not assessing the adequacy of the job search, but whether there were jobs available that it would have been reasonable for the respondent to have to offer to the claimant. There were no such jobs.

100. In summary, in relation to the reasonable adjustments claim: there was a relevant PCP, but it did not cause relevant substantial disadvantage; if we are

wrong about it not causing relevant substantial disadvantage, there were steps that could have been taken to avoid that disadvantage, but it would not have been reasonable for the respondent to have to take them. Accordingly, the reasonable adjustments claim fails.

Section 15

101. We turn to the section 15 complaint.

102. In the list of issues, there are three separate allegations of unfavourable treatment:

    102.1 issue 7 is, "*Did the respondent treat the claimant unfavourably in its decision to medically retire her on 20 February 2018?*";

    102.2 issue 8 is, "*Did the respondent treat the claimant unfavourably in its decision not to allow her to continue to work within the Missing from Home Team?*";

    102.3 issue 9 is, "*Did the respondent treat the claimant unfavourably in its decision not to consider the claimant for any alternative posts within the force?*".

103. These three complaints are all essentially about the same thing: the ending of the claimant's service. The first question for us is: was that unfavourable treatment?

104. The decision to medically retire the claimant, given that she did not want to be medically retired and given that that meant being forced to leave a job which was a vocation, which she loved, and which she had done for 20 years, was self-evidently unfavourable, in our view. This part of her claim does not have the same technical difficulties that her reasonable adjustments claim faces. The reasonable adjustments claim specifically concerns the medical retirement process, whereas the section 15 claim is about the fact that the claimant's service was ended against her wishes. In other words, the alleged "*substantial disadvantage*" is medical retirement specifically, whereas the unfavourable treatment under section 15 is the forced ending of her service.

105. If issue 8 in the list of issues is about something separate and distinct from the ending of service, i.e. from issue 7, then we are not satisfied that there was any unfavourable treatment here. The claimant did not want to stay in MISPER. Her letter to DCC Barber makes that obvious. What she wanted was a role within the Police that was not the response role she had formerly been doing, because she knew she was not able to do that role at that time, but was also not the MISPER role, which she was very dissatisfied with.

106. So far as concerns issue 9, it is not factually correct to say that the respondent did not consider the claimant for other roles. It did, albeit it quickly decided that those other roles were not suitable for her. We note that there is no complaint under section 15 about a failure to offer her any specific role or roles.

107. It follows that the section 15 complaint, or at least the potentially valid part of it, concerns the ending of the claimant's service and only that.

108. Returning to the list of issues, issue 10 is: "*If so, did the decision not to retain the officer in an alternative or any role arise in consequence of the claimant's disability?*". We think that is an error, in that it conflates the "*something*" that arises in consequence of disability and the unfavourable treatment which is (allegedly) "*because of"* that "*something*" in accordance with section 15.

109. The list of issues, in fact, fails to identify what the "*something*" is. However, this is not a particular problem for the claimant, because we know what she is alleging it is. At least, the gist of what she is alleging in this respect is clear enough. The alleged something is that she was deemed permanently incapable of performing the ordinary duties of a Police Officer. In paragraph 11 of claimant's counsel's written submission, this is put in the following way: "*Her disability under the Police Pension Regulations 1987*".

110. There can be no doubt that that something arose in consequence of disability and that the claimant was medically retired because of that something. Accordingly, the real issue in the section 15 claim is justification: whether ending her service by medically retiring her was a proportionate means of achieving a legitimate aim.

111. The alleged legitimate aims have been articulated most clearly in the respondent's skeleton argument: "*Applying the Regulation A20 process and affording the benefit of ill-health retirement to* [the claimant]"; and, "*Having officers who are capable of performing the ordinary duties of a Police Constable*".

112. As potentially legitimate aims, we have no problem with the second of these. No one, the claimant included, seems to doubt that it is a legitimate aim of the respondent for the force to seek to have, in general terms, officers who are capable of performing the ordinary duties of a Police Constable.

113. We have more difficulties with the first alleged legitimate aim, at least with the initial part of it: "*Applying the Regulation A20 process*". We struggle with the idea that a particular application of the regulation A20 process can be justified by an aim of applying that process. This strikes us as circular. We would not, for example, say that disciplining someone could be justified by the aim of applying the disciplinary process. However, the second part of the first alleged legitimate aim – "*affording the benefit of ill-health retirement to*" the claimant – is, potentially, a legitimate aim, or a component of one. This part of the claimant's case is (unlike the reasonable adjustments claim, as we have already emphasised) not about the medical retirement process but about, simply, ending service. We think it would be a legitimate aim of the respondent to afford the benefit of ill-health retirement to someone in the claimant's position, and that ending her service could potentially be justified by that legitimate aim.

114. We note that our decision on justification would be the same whether we were looking at both of these legitimate aims, or simply at the second one.

115. We turn, then, to whether there were "*proportionate means*". Whether something is proportionate is to be judged by whether it is no more than is reasonably necessary in order to meet the aim in question. Case law suggests we have to ask ourselves whether the means used actually met that aim and whether there

was a reasonably available alternative way of meeting that aim that would have had a lesser impact on the claimant.

116. In the particular circumstances of this case, the question of justification stands or falls with the reasonable adjustments claim. We note that the claimant, through counsel, does not appear to disagree with that analysis, in that counsel's written submissions suggest the respondent's case on justification, "*is undermined by their failure to properly consider the SMP's report and the resultant lack of a proper analysis of the police officer roles open to the claimant*". That is, we note, the same case as the claimant's case on reasonable adjustments.

117. Medically retiring the claimant clearly met both legitimate aims, and the question is whether there were less discriminatory or 'impactful' ways in which those aims could have been met.

118. We have already decided there were no alternatives to medical retirement that were reasonably open to the respondent in light of Dr Adejoro's report, other than dismissal for some other reason. It is not the claimant's case that she wanted to be kept on in a non-policing role, but we note that keeping her on in such a role – which conceivably is something the respondent could have done – would not have met the legitimate aim of having officers who are capable of performing the ordinary duties of a Police Constable. As the claimant was not, according to Dr Adejoro, capable of performing the ordinary duties of a Police Constable, whatever adjustments were made, that aim would not be met by keeping her in the force as a Police Constable. The only way of meeting it would be by not keeping her in the force as a Police Constable, i.e. by ending her service.

119. Any relevant unfavourable treatment was therefore not unlawful discrimination under section 15 of the EQA because it was a proportionate means of achieving a legitimate aim.

120. The claimant's disability discrimination claim therefore fails.

Polkey / Chagger

121. As there has been argument on it, and as both parties wanted us to make a decision about it, we shall now consider what our decision on the Polkey / Chagger issue would have been had we decided the case in the claimant's favour. That issue is: if the claimant wins, what reduction, if any, should be made to her compensation / damages to reflect the possibility that her service would have ended prematurely even without any discrimination, in accordance with Polkey v AE Dayton Services Ltd [1987] UKHL 8, paragraph 54 of the EAT's decision in Software 2000 Ltd v Andrews [2007] ICR 825, Chagger v Abbey National Plc & Anor [2009] EWCA Civ 1202, and Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604.

122. The respondent submits that any compensation should be discounted to reflect the possibility that the claimant's employment would have come to an end prior to 2028, when she says she would have voluntarily retired but for the respondent medically retiring her in 2018. There are, as the respondent submits, a number of possible ways in which this could have occurred. For example, the claimant could have been medically retired at a later date, perhaps following a relapse; she could have been dismissed through the capability route.

123. We also note the real possibility that if the respondent had done what the claimant was arguing it should have done, namely gone back to Dr Adejoro for clarification, Dr Adejoro would simply have confirmed that the respondent's interpretation of her report was correct, and nothing else would have been different.

124. The respondent notes, in particular:

    124.1 the contents of the various medical reports (including that from the claimant's own chosen Psychiatrist, Dr Medley);

    124.2 the dissatisfaction the claimant felt in her role in MISPER, which is evident from her letter to DCC Barber;

    124.3 the fact that that was a recuperative role (whether it was technically an 'operational' role or not);

    124.4 the fact that the claimant never worked her full contractual hours at any relevant time.

125. Further, Dr Adejoro raised the possibility of the claimant working up to 20 hours per week. As well as the alternatives of staying in or leaving the force, there is the possibility of the claimant staying, but working fewer hours, and being paid accordingly.

126. The claimant highlights: that the respondent has the burden of proof on this issue; that prior to her dismissal, she had not had any time off sick with mental health difficulties since October 2015; and that, after medical retirement, notwithstanding the psychological effect on her that the ending of her service had, she was able to obtain and hold down further employment for a significant period of time.

127. This issue is not one we can decide scientifically or with arithmetical precision. There are numerous possibilities. For example, the claimant might have worked for a further 2 or 5 or 10 years, or might have worked for a period doing her contractual hours, then a period doing fewer hours, and then have been ill-health retired. No particular scenario is likely on the balance of probabilities. We also note that the possibility of dismissal for incapability was real and cannot be discounted altogether, and that had the claimant been dismissed for incapability, she would have received none of the financial benefits of medical retirement.

128. Doing the best we can, we think that had the claimant won her claim, her compensation under EQA section 124 should, subject to any mitigation arguments, have been based on a sum equivalent to the difference between what she would have received in earnings and benefits and pension had she remained in service for a further period of 4 years before being ill-health retired, doing the hours and on the pay-scale she was on when her service in fact ended on 19 February 2018, and what she has received and will receive over that period.

06 July 2019
Employment Judge Camp

Sent to the parties on:

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For the Tribunal:

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