



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102476/2017

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**Held in Glasgow on 17, 18 and 25 September; 29 and 30 October 2018 and 7
January 2019 (Members' Meeting)**

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**Employment Judge: Mary Kearns
Members: Mrs J Ward
Mr A McFarlane**

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Mr M Blackie

**Claimant
In Person**

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**Chief Constable of the Police
Service of Scotland**

**Respondent
Represented by:
Dr A Gibson -
Solicitor-Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal was to dismiss the claims.

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REASONS

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1. The claimant who is 44 years of age was employed by the respondent as a police constable from 5 January 2004 until 2 April 2017 when he resigned. Having complied with the early conciliation requirements, he presented an application to the Employment Tribunal on 22 August 2017 in which he claimed constructive unfair dismissal and direct sex discrimination contrary to section 13 Equality Act 2010 ("EqA") or, in the alternative, indirect sex discrimination contrary to section 19.

Claim for Constructive Unfair Dismissal

E.T. Z4 (WR)

2. Dr Gibson raised the claimant's claim for constructive unfair dismissal as a preliminary issue. He referred us to section 200 of the Employment Rights Act 1996 ("ERA") which is concerned specifically with police officers and provides that (with the exception of dismissal for a health and safety or whistleblowing reason), Part X of the Act does not apply to police officers. Part X is the part of the Act that confers the right not to be unfairly dismissed. It follows that police officers do not have the right not to be unfairly dismissed and that the Tribunal has no jurisdiction to hear such a claim. Dr Gibson took no issue with the right of a police officer to raise a claim of sex discrimination under the Equality Act.

3. The claimant noted the terms of section 200 but referred us to two cases in which he argued that a police officer had been permitted to make such a claim. The Tribunal adjourned to obtain and provide to the parties copies of the cases cited by the claimant: Baillon v Gwent Police UKEAT/0354/14 and P (Appellant) v Commissioner of Police of the Metropolis [2017] UKSC 65. Having thereafter heard submissions from the claimant and from Dr Gibson, the Tribunal delivered an oral judgment dismissing the claim for constructive unfair dismissal with the following reasons:

"The Employment Tribunal unanimously concludes on the basis of section 200 Employment Rights Act 1996, that it has no jurisdiction to hear the claimant's claim of constructive unfair dismissal. Section 200 specifically states that the standard unfair dismissal provisions in Part X of that Act 'do not apply to employment under a contract of employment in police service or to persons engaged in such employment'.

The claimant referred us to Baillon v Gwent Police UKEAT/0354/14, a case in which one of the exceptions in section 200 applied. In Baillon the claimant had succeeded in a claim of automatically unfair dismissal under section 103A (whistleblowing). Accordingly, the case does not assist us. The case of P (Appellant) similarly does not help because it is concerned with the rights of a police officer under the Equality Act 2010, not the Employment Rights Act. The respondent does not dispute that the claimant has Equality Act rights in

this case. Thus, the claim for unfair dismissal is dismissed. This does not preclude the claimant from leading any evidence he considers necessary as background to his claim for discrimination.”

Remaining Issues

5 4. We were grateful to the claimant and to Dr Gibson for their co-operation and able conduct of the case.

5. The issues for the Tribunal were:-

10 (1) Did the respondent discriminate against the claimant because of his sex by treating him less favourably than it treated or would treat others? or

15 (2) Did the respondent discriminate against the claimant by applying to him a provision, criterion or practice which was discriminatory in relation to his sex because:

- a) It also applied to women;
 - b) It put men at a particular disadvantage when compared with women;
 - c) It put the claimant at that disadvantage; and
 - d) The respondent cannot show it to be a proportionate means of achieving a legitimate aim?
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25 (3) Remedy if appropriate.

Evidence

6. The parties had prepared a joint bundle of documents (“J”) and referred to them by page number. The claimant gave evidence on his own behalf and called Superintendent Paul Rollo, his former Engine Room line manager; PC Grant McDowall, Secretary of the Scottish Police Federation, East Area Committee who had represented him at a capability procedure meeting; and PC Caroline McColl, his comparator, under citation. The respondent called

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the following witnesses: Deborah Lee Graham, Resource Deployment Adviser; Sergeant David Acheson, Response Sergeant at Stirling Police Office; Chief Inspector Alan Bowater, Service Delivery Chief Inspector for Forth Valley Division; Chief Inspector Lynn Ratcliff, Stirling Area Commander, Forth Valley Division; and Inspector Donna Bryans, a former line manager.

7. The parties had also helpfully prepared an agreed statement of facts. These are incorporated into the Tribunal's findings in fact below and are italicised for ease of reference.

Findings in Fact

8. The following facts were admitted or found to be proved:-

9. *"The claimant was employed by the respondent as a police constable from January 2004 to 2 April 2017.*

10. *Between 29 April 2013 and 23 October 2014 the claimant was based at Bannockburn Police Office with the 'Positive Changes Team'. This was a multi-agency youth focused initiative to divert children and young people from crime.*

11. *On 24 October 2014 the claimant was reported to the Procurator Fiscal at Alloa in relation to allegations of criminal conduct, including three allegations of assault, two allegations of breaching section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 and a breach of section 39(1) of the Criminal Justice and Licensing (Scotland) Act 2010.*

12. *Between 23 October 2014 and 23 May 2016 the claimant was subject to a restriction on duties order issued by Deputy Chief Constable Livingstone. This order prevented the claimant from having access to or interaction with the public; interacting or participating in policing that could potentially lead to involvement in the evidential chain or the criminal justice process; and having access to ICT systems.*

13. *Between 27 October 2014 and 23 May 2016 as a consequence of the restriction on duties the claimant worked within the Sub-divisional Support Team of Stirling Police Station. This was a non-operational, non-public-facing day shift role.*

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14. *The claimant was off sick from work from 28 October 2014 to 5 January 2015.*

The claimant returned to work at Stirling Police Office in January 2015 and in May 2015 he was given a supernumerary position in Stirling Command and Control (known as 'the Engine Room'). The post was created temporarily to accommodate the claimant for the duration of his restricted duties. Whilst working there the claimant worked under the supervision of Area Commander Paul Rollo and alongside PC Caroline McColl who held a permanent post in the Engine Room. PC McColl's post had come about shortly before the claimant was moved to the Engine Room when AC Rollo had secured funding for one permanent post to support him in his AC role. PC McColl's post was the only permanent position for a PC in the Engine Room. PC McColl had previously worked on the Public Assistance Desk ("PAD") in Command and Control, but the PAD shut down at the end of January 2015 and 11 or 12 staff including PC McColl were redeployed. On her last day at the PAD on Friday 30 January 2015 PC McColl was told to report to AC Rollo on Monday 2 February 2015 to be given her duties. As she was suitable for the Engine Room role and, when asked by AC Rollo on Monday 2 February 2015 expressed an interest in it, she was permanently redeployed into that post with immediate effect. The claimant's work in his supernumerary post in the Engine Room was very good, as was PC McColl's. Their duties were similar. PC McColl is married to another police officer. They have three children who were then aged between 6 and 10. At the point when PC McColl was redeployed, her husband's shift pattern had just changed and she had requested either to work Monday to Friday dayshift or for her husband to be moved to a different shift pattern to complement hers.

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15. *On 10 November 2015 the claimant was acquitted of assault and breaching section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010. A*

verdict of not proven was handed down in relation to the allegation of a breach of section 39(1) of the Criminal Justice and Licensing (Scotland) Act 2010.

- 5 16. *On 12 November 2015 the respondent pursued internal misconduct proceedings.*
17. *In February or March 2016 AC Paul Rollo moved to a promoted post and was succeeded by CI Lynn Ratcliff.*
- 10 18. *On 20 May 2016 the claimant received a warning from Deputy Chief Constable Livingstone under Regulation 11(7) of the Police Service of Scotland (Conduct) Regulations 2013, regarding the allegation that on or between 1 January 2013 and 31 March 2013, at an unknown location(s) you did behave in an improper manner towards Kim McIntosh, c/o Police Scotland, Bo'ness Road, Grangemouth and did send, perceived threatening and/or abusive text messages to her and fail to desist when requested to do so, whereby your actions did cause distress to said Kim McIntosh, and your conduct in so doing was such as was likely to bring discredit on Police Scotland.*
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- 20 19. *The claimant's restriction of duties order was lifted on 23 May 2016.*
20. *As a result of the claimant's restriction of duties order being lifted the claimant was able to return to a Group 2, Response at Stirling on a Variable Shift Arrangement ("VSA").*
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21. *However, between 23 May 2016 and 22 August 2016 the claimant remained in the Sub-divisional Support Team of Stirling Police Station. This was because the claimant had advised the respondent at a meeting with CI Lynn Ratcliff in or about May 2016 that he had only recently, and with the assistance of solicitors, agreed the access and care arrangements for his children over the course of the school holidays. As he had been unaware that the restrictions would be lifted, these arrangements had been based around his Monday to Friday dayshift working pattern and his ex-partner's shift patterns.*
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- 35 *The claimant was concerned at the prospect of having to*

rearrange/renege these arrangements at short notice. Following discussions with the Senior Management Team it was agreed that under the circumstances the claimant could remain in the Sub-divisional Support Team of Stirling Police Station for the duration of the school summer holidays in order that the arrangements made about childcare and access could stand and that following this, he would return to his base post which was Group 2, Response at Stirling on a VSA.

22. On or around 25 July 2016 the claimant was given the required 28 days' notice that he would be returning to his base post at Group 2, Response at Stirling on a VSA with effect from 22 August 2017. The claimant believed that when it was obvious that he had childcare issues at the point when his restrictions were lifted the respondent ought to have given consideration to moving his Engine Room colleague, PC McColl and giving him her substantive post. The respondent did not consider this because PC McColl was the incumbent in her post and they did not think this would be fair.
23. In or about July 2016 the claimant applied for a post in the Public Protection Unit. He was unsuccessful in that application, but he received a call from the recruiting Inspector suggesting that he should speak to Inspector Jim Young and ask for possible secondment to that department as this would strengthen areas of weakness in his application. The claimant did not do so.
24. The respondent has a Flexible Working Standard Operating Procedure ("FWSOP") (J208A). This provides that all flexible working applications ("FWAs") will be considered regardless of the individual's reason for applying or their length of service. It does not guarantee that all requests will be accommodated. All applications are considered on their merits. The FWSOP states at paragraph 3.1(a) "It should be highlighted that operational policing is core to the organisation and must never be compromised or put at risk." Paragraph 3.3 sets out key timescales and states that any application for flexible working should be submitted at least eight weeks prior to the applicant's preferred start date. Paragraph 3.6 states: "(a) SPA [civilian support]/PSoS [Police Service of Scotland] will endeavour to accommodate

mutually agreeable flexible working patterns wherever possible as long as operational needs are met. (b) Applications will not be rejected out of hand and line managers will ensure that all relevant information is gathered and that the application is fully considered.”

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25. Over the period between 23 May and 22 August 2016 the claimant had several discussions with his senior managers CI Lynn Ratcliff and Inspector Donna Bryans about his circumstances and childcare difficulties in relation to the VSA in the Response post. In those discussions, he said that he would find the night shifts problematic, but he did not raise problems with the other shifts. Over several conversations in June and July 2016 the claimant explained to CI Ratcliff and/or Inspector Bryans that he had full custody of his 11 year old son who was at school. He told them his role in the Engine Room enabled him to get his son up in the morning and take him to his mother’s house before school. After school, his son would go back to his mother’s and he would pick him up from there. The claimant told CI Ratcliff that he had support up to 9pm or later but that he did not want his son up too late because he was in a routine he was used to and was already having to get up slightly earlier. He also explained the contact arrangements for his two younger children who lived with their mother 50 miles away. Midweek access was ruled out because of the distance so contact had to take place at the weekends. CI Ratcliff’s advice to the claimant was accordingly to sit down with one of his Group 2 Response line managers and look at what shifts he would be able to work along the Group 2 work pattern and to come up with a proposed flexible working pattern that incorporated day shifts, late shifts and some weekend working, using childcare to support it and to submit an FWA along those lines. However, as the weeks went on and no FWA was submitted, the claimant’s focus shifted to an insistence on weekday dayshifts only and he submitted the FWA in those terms.

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26. Response policing involves responding and reacting to certain grades of calls. Response officers are first responders to 999 and 101 calls from the public. Their role is to attend in response to the calls and deal with them as the

circumstances dictate. For example, if someone has a break-in in their home and calls the police a Response Unit will attend. Forth Valley Division has five groups of Response policing teams, each arranged according to a variable shift arrangement (“VSA”). The VSA is a five-week rotating shift pattern. Officers work a maximum of three or four days per week, rotating round early, late and night shifts. Early shift is normally 7 am – 4pm or 8am – 5 pm; late shift is 2 or 3 pm to 1 am; and night shift is 10 pm – 7am. The VSA shift pattern allows for 24-hour cover for day shift, back shift, night shift and rest days. In week 1 the officer might work Monday, Tuesday and Wednesday day shifts; have Thursday and Friday as rest days, then go onto back shift Saturday and Sunday. Weeks 2, 3, 4 and 5 would each be a different pattern but over the 5-week block the officer would cover all the various different shifts. The same five-week shift pattern would be worked in rotation nine times over the course of a year so that officers would know in advance which shifts they would be working and when. The demand for deployable officers is highest during late shift, night shift and at weekends. Peak response times are Thursday, Friday and Saturday nights. More officers are deployed at peak times. The vast majority of police constables, sergeants and inspectors in Stirling Area Command work a variable shift pattern.

27. *On or about 17 August 2016 the claimant submitted a flexible working [application] (FWA) (J14) to work Monday – Friday 0800 hours to 1600 hours (or 0900 hours to 1700 hours) in Group 2, Response at Stirling.* The claimant’s preferred start date for the FWA was 22 August 2016 and the application did not give the necessary eight weeks’ notice, but instead gave less than one week’s notice. Stirling is in Forth Valley Division of Police Scotland. In the section of the application where the claimant was asked to outline how he thought the changes could be accommodated the claimant wrote: “I am unaware of any impact that will affect Group 2 at Stirling. I am under the impression that I will be an additional resource on this group.” The claimant’s impression that he was an ‘additional resource’ was not correct. The claimant’s FWA was not supported by his line managers. His immediate line manager Sergeant Robert Russell completed his comment section on the

application form explaining that while the proposed pattern submitted by the claimant would be suitable for his then role in the Sub-divisional Support Team at Stirling Police Office, he was due to change to a Response role on 22 August 2016 and would then be on a variable shift arrangement (“VSA”).
5 Sergeant Russell explained that he was therefore not able to say whether the pattern would be suitable for the claimant’s new role.

28. Once PS Russell had completed his section, he emailed the claimant’s application to Inspector Donna Bryans at 15:48 hours on 17 August 2016. The claimant was copied in. At 16:02 hours on the same date Inspector Bryans
10 emailed the claimant in the following terms: “Mark, I am not prepared to submit this application to the RDU as your application is not in line with the VSA shift pattern you will be working on Group 2. You are fully aware that the group work the VSA shift pattern not an 8am – 4pm shift pattern and under no
15 circumstances can an 8am – 4pm shift pattern be accommodated as you have proposed. You are moving to fill a vacant post on the group and are not an additional member of staff as you suggest in your application. Please provide a revised FWP which fits in line with the Group 2 shift pattern and resubmit, you may want to seek advice from the Group 2 line managers and the RDU
20 in relation to any proposal as your shifts may impact on other members of the group who are part time, etc. Donna Bryans Insp.”

29. *On 22 August 2016 the claimant was posted to his Group 2, Response at Stirling on a VSA. He was allowed to work a Monday to Friday 0800 to 1600
25 hours shift pattern for two weeks to enable him to resubmit a more suitable flexible working application. He did not submit a further flexible working plan.*

30. The claimant did not respond to Inspector Bryans’ email of 17 August 2016 asking him to revise the FWA and resubmit it. However, on or about 25 August
30 2016 the claimant sent the same unrevised FWA to PS Matheson, his new Group 2 line manager. PS Matheson responded to the claimant by email sent at 01:07 on 26 August 2016 (J143). He told the claimant that any FWA would require to ensure that operational needs were met and that having reviewed his proposed FWA he was of the opinion that it did not meet the needs of the

organisation. He stated: "When in the role of an operational officer, a degree of shift work is required to deliver police services to the public and the application submitted currently would not do this." PS Matheson said that he was happy to discuss further to help the claimant develop something that may potentially meet both his own needs and those of the organisation.

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31. At 07:18 on 26 August 2016 Inspector Bryans emailed the claimant (J142) in the following terms: "PC Blackie, This is the identical Flexible Working Plan which you submitted to PC Russell and myself and the comments I sent back to you were very clear as below. However you then seem to think it appropriate to submit that identical application to PS Matheson despite my clear instruction that the application was not suitable and had to be revised. Please explain to me as your line manager why you clearly ignored this very clear instruction. Insp Bryans." At 08:52 on 26 August 2016 the claimant responded: "Inspector, I had a meeting with PS Matheson yesterday afternoon in the canteen where my situation was discussed including my personal circumstances and reasons. No options/alternative flexible working hours were discussed. PS Matheson asked if I could forward my application to him as he hadn't seen it hence the reason for sending what I have. Mark".

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32. On 30 August 2016 Inspector Bryans emailed the claimant as follows: "Mark, I am bemused that you have not discussed your FWP with your new line managers as you start nightshift on Monday 4/9. You must ensure your proposed plan is in and should have been by now as there is a process to follow before any agreement is in place. This was the reason the Supt gave you a further 2 weeks to have the FWP approved and in place. Please do this as a matter of urgency." The claimant responded to say that he would be meeting with PS Matheson to discuss it and hoped that after discussions something could be sorted out.

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33. On 2 September 2016 Inspector Bryans sent the claimant by email a reminder in respect of her unanswered email of 17 August, noting that he had not sent her a revised FWA and asking him to confirm that he wished his original application to be considered (J150). The claimant responded five minutes

later: "Inspector, I have had a further meeting with PS Matheson in relation to my flexible working application however we have been unable to find a resolution given my ongoing childcare issues. Please forward my original application for consideration. Thanks, Mark." Inspector Bryans then sent the original application to Debbie Lee Graham at the Resource Deployment Unit under cover of an email in which she stated: "this application was submitted however was returned by myself following our previous discussion as the proposed shift pattern does not fit with the Group 2 VSA pattern in any way. PC Blackie was advised to speak to his new line managers re an alternative shift pattern however no alternative can be found and PC Blackie wishes this application to be considered for his new post on Group 2."

34. *On 5 September 2016, the day he was due to start on the VSA the claimant went off sick with work related stress. He did not return to work prior to his last day of service of 2 April 2017.*

35. In accordance with the FWSOP, the claimant's flexible working application was reviewed by Deborah Lee Graham, Resource Deployment Adviser. Ms Graham's role involves looking at operational policing and patrol planning and maximising the effective deployment of resources for Fife and Forth Valley Divisions. Ms Graham uses the 'Scope' management system for this purpose. Scope is a duty roster system which determines how many officers should be on duty at any given time. When Ms Graham receives a flexible working application, she looks at the feasibility of the pattern requested to see whether it would meet the requirements of the role and the organisation and whether it complies with working time regulations and the current workforce agreement. Ms Graham then puts her comments in the appropriate section of the application form. In relation to the claimant's application, Ms Graham noted that the claimant's proposed pattern of five shifts with his team on day shift only for all five weeks would not cover any periods of peak demand within the VSA shift pattern. Her comments were added to the claimant's application on 19 September 2016. So far as relevant they were as follows: "PC Blackie is proposing to work Monday to Friday dayshift as part of Group 2 Response.

PC Blackie will only work 5 shifts with his team over a 5 week/35-day period, PC Blackie [will] not have regular contact with his line manager and will not be aligned with a specific team. The propose[d] pattern is not suitable for Response Policing.” Ms Graham’s comments on the claimant’s application were not in any way whatsoever influenced by his sex. She would have made the same comments in respect of an application by a female officer with the same material circumstances.

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36. Patrol plans are done on an hour by hour basis with more officers deployed at peak hours on later shifts and early night shifts. Having an officer in a response team or group allocated only to Monday to Friday day shifts would result in the officer not covering any peak demand periods within the VSA shift pattern. It would accordingly reduce the number of officers available to that team on all late and night shifts the team worked. Other officers on that team and other teams would have to have their shifts changed to cover more back and night shifts, otherwise there could be gaps in cover. Thus, it would be difficult to maintain staffing levels on late and night shifts and would not be a sustainable pattern within response policing. Furthermore, response policing officers can become detained on duty dealing with an emergency which cannot be left part way through. They are sometimes also subject to cancellation of leave or sudden shift changes.

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37. When she had added her comments on behalf of the Resource Deployment Unit Ms Graham sent the claimant’s FWA form back to Inspector Bryans for a line manager decision. Inspector Bryans made a decision not to support it on or about 28 September 2016. She gave the following reasons: “This application is not supported as it in no way fits in with the current VSA shift pattern of Group 2 at Stirling. PC Blackie states he is an additional resource to the group in this application however, this is clearly not the case as he is moving to a vacant post on the group due to staff changes. I asked PC Blackie if he could provide another suitable shift pattern more in line with his new group shift pattern however he states he is unable to do this. I cannot support this application as it does not fit with the organisational and operational needs

of Police Scotland. There are clear issues in that this officer would not be working with a set line manager or team and there is not a role on his shift that would support 8am – 4pm shift pattern.” Thus it was that *in the summer of 2016 the claimant was informed that his flexible working plan could not be supported as it in no way fitted with the Group 2, Response at Stirling on a VSA and was not operationally feasible.*

38. On 28 September 2016 Inspector Bryans also emailed Chief Inspector Lynn Ratcliff, Stirling Local Area Commander, attaching the claimant’s flexible working application and stating: “I have not supported the application neither have the RDU as it does not take into consideration any of his Group 2 shift pattern and does not fit the organisational or operational needs of Police Scotland.” The application was also considered by Chief Inspector Alan Bowater, Service Delivery Chief Inspector for Forth Valley Division. His remit included HR and finance functions for that Division. He noted that the claimant’s Group 2 Response post involved rotating early, late and night shifts on a five week rota and that his application was in effect asking to do the job on dayshift only, Monday to Friday. CI Bowater took the view that such an application was never going to be approved because it took no account of the demand profile. The demand profile in response policing was heavily weighted for weekend working, late shifts and night shifts. He concluded that the effect of granting such an application against that demand profile would be that effectively every night shift and late shift the team would be short. Working day shift only as a response officer was impossible and a flexible working application requesting this was simply untenable. He also thought the claimant’s proposal would have meant he had minimal contact with line management. CI Bowater thought a better solution would be for the claimant to apply for a day shift post. The decision not to grant the claimant’s flexible working application was not because of his sex but because granting the application would have been unworkable in that it would have taken away a base post from a response shift, leaving them short at the busiest periods over a five week cycle. The same application by female single mother in the same material circumstances would also have been refused. The respondent

employs numerous single mothers on VSAs. The relevant statistics were not requested or produced.

5 39. On 30 September 2016 CI Bowater emailed HR Shared Services (J155) attaching the claimant's flexible working application and stating: "This application is not acceptable as it does not suit the needs of the organisation in respect of his present posting on a response shift. In line with the SOP we are duty bound to consider alternative positions which may be suitable and I require to include you in these discussions. Can you view the attached application and if you have any suggestions which could lead to a mutually agreeable solution please let me know."

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15 40. During the whole of the claimant's deployment to Group 2, Response, Stirling from 5 September 2016 the claimant was off sick. Once the claimant moved to Group 2 his first line manager changed to the Group 2 Sergeants; initially PS Matheson and from 7 October 2016 PS David Acheson. Both kept in regular contact with him. On 7 September 2016 PS Matheson logged a telephone conversation he had had with the claimant as follows (J122): "PC Blackie informed PS Matheson that he had signed himself off work with work related stress. He advised the stress was due to him not being able to arrange child care overnight Monday 05/09/16. PS Matheson asked if he had contacted his GP for assistance and he advised he had not as yet., however if the situation did not improve, he would contact his GP. PS Matheson asked if the reason for contacting his GP would be as he was unable to self certify for more than a week and he stated that it would be a factor. He was offered the assistance of the Employee Assistance Programme which he declined. He advised he was not in need of counselling/assistance. He advised that he would continue to make efforts to arrange child care, however when due to carry out nightshift he would be unable to attend work due to childcare issues."

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30 A further entry by PS Matheson that day stated: "I have spoken to PC Blackie on the phone, he advised that he is feeling fine although his situation has not changed, he is still not able to come to work due to child care issues, therefore his self-certifying sickness is due to work related stress. ... He advised he will

consider seeing his doctor next week and the following week in order to obtain a sickness line...PC Blackie again advised that he is not depressed or struggling in any way he will call should he require assistance”.

- 5 41. On 7 October 2016 the claimant attended an Attendance Support Meeting with PS Acheson in relation to his absence from work with stress. From 7 October 2016 PS Acheson managed the claimant’s absence and kept in touch with him. PS Acheson sent the claimant a number of job vacancy advertisements for posts within the respondent which involved mainly Monday to Friday day shifts. On 7 October PS Acheson brought to the claimant’s attention the vacancies of Executive Support Officer and Managed Call Appointment System (“MCAS”) Officer, C Division. With regard to the Executive Support Officer post, the claimant would not have passed the vetting because of his live warning. However, he would have met the criteria and been eligible for the MCAS Officer post. The claimant did not apply for the MCAS post because he thought it might require some back or late shifts and weekend work. He did not consider applying and making an FWA to adjust the role.
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- 20 42. On 11 October 2016 CI Bowater emailed Debbie Graham (J153) regarding the application the claimant had made for the vacancy in the Public Protection Unit. He asked Ms Graham: “Debbie, there was a post which he applied for and was unsuccessful. We are looking at whether we should appoint him to that role as opposed to the successful candidate. Under the circumstances and looking at the SOP, that appears to be an option, but we have some research work to do before a final decision is reached.” The claimant was not ultimately appointed to the PPU post because the successful candidate had already been advised of his appointment and for that reason the Chief Superintendent refused to sanction it.
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- 30 43. On 17 October 2016 PS Acheson advised the claimant of a job vacancy managing sex offenders at National Visor. The claimant would have been eligible for this post, but he did not apply. On 19 October 2016 PS Acheson drew the claimant’s attention to a vacancy with the Productions Remodelling

Project, a post which would have been ideal for the claimant's circumstances and for which he would have been eligible. There were very few applications for this post. The claimant did not make enquiries about the post and did not apply. On 4 November 2016 PS Acheson sent the claimant a job advert for Firearms Licensing, C Division. The claimant's live warning may have been a problem in applying for this post. He did not, in any event apply. On 21 November 2016 PS Acheson sent the claimant an advert for a role with Civic Liquor Licensing C Division. The claimant would have met the criteria for this post, but he did not apply. On 4 December 2016 PS Acheson sent the claimant an advert for the role of Schools-based Officer, C Division. This would have been another ideal position for the claimant. He did not apply. On 9 December PS Acheson sent the claimant two adverts, one for PSYV Co-ordinator and the other for Football Intell, C Division. The PSYV Co-ordinator post would have been a good post for the claimant. He did not apply. His warning may have been an issue in applying for the Football Intell role. He did not, in any event apply for the role because it involved early and late shifts and attending football matches on Saturdays. On 19 December PS Acheson sent the claimant a job advert for a Probationer Trainer at Tulliallan Police College. This would have been another good fit for the claimant's skill-set. He did not apply because it was outwith his home division and he thought there would be no guarantee about where he could be moved to after that. On 21 December 2016 PS Acheson sent the claimant a further two job adverts, one for a post in Business Resilience and Acquisitive Crime at the Scottish Business Resilience Centre (SBRC) and the other for another Business Resilience post also at the SBRC. The claimant's live warning was an issue in these roles. The claimant did apply for one of the roles in the SBRC (J70) but he did not apply for the other. In all, PS Acheson sent the claimant at least 7 roles he was eligible to apply for. Most of them were weekday dayshift roles or could have been adjusted with an FWA.

44. On 10 November 2016 a second attendance support meeting was held. The meeting was attended by Inspector Rutland, PS Acheson and the claimant. At that meeting the claimant requested an update on the status of his flexible working application. Inspector Rutland explained that the RDU review of the

application had not been supportive and neither had line management comments in the context of the practicality of the application to run alongside a response shift pattern. Inspector Rutland said that the application had been passed to CI Bowater who had advised that he did not consider the application to be a flexible working application but a request to work Monday to Friday day shift. Inspector Rutland explained that in fairness to the claimant CI Bowater had decided not to progress his application under the FWSOP because if it was refused, he would not be able to submit another application until 12 months had elapsed. Inspector Rutland said that CI Bowater was consulting with HR, Resource Planning and Divisional Management to try and find a post that would suit his situation but there may not be a quick solution. He told the claimant that CI Bowater was available to discuss the matter directly with the claimant if he wished.

45. On 28 December a third attendance support meeting was held. The meeting was attended by Chief Inspector Ratcliff, PS Acheson and the claimant. CI Ratcliff asked the claimant if he had taken the opportunity to speak to AXA, the respondent's OH provider as arranged by his first line manager. The claimant said that he had not as on the three occasions they had telephoned him it had not been convenient for him to speak. The claimant confirmed that he was still of the view that the issues he was experiencing could be resolved by him securing a Monday to Friday day shift position. CI Ratcliff referred to the 12 job vacancies the claimant had been sent by PS Acheson, all of which related to Monday to Friday posts either within Forth Valley Division or Tulliallan. The claimant confirmed he had received these. CI Ratcliff asked the claimant why he had not applied for any of them. He replied that he considered it a waste of time and that he was unlikely to be successful. He said that the posts had a tenure of two to three years which caused him concern about where he would be posted at the conclusion of this. CI Ratcliff said that the respondent could not commit to providing a permanent Monday to Friday post for any officer in circumstances similar to his. The claimant accepted this but said he required a dayshift weekday post until his children were old enough to be self-sufficient or until his personal circumstances

changed to accommodate childcare. CI Ratcliff told the claimant that in her opinion his approach and expectations were unreasonable and that if he was genuine in his desire to return to work she would expect him to apply for one of the several appropriate posts notified to him. It was agreed that PS Acheson would help the claimant with the applications. CI Ratcliff advised the claimant that he would have to evidence a commitment to returning to work in his base post or in another role by 20 January 2017, otherwise the respondent would move to the capability procedure.

46. In early January 2017, following the third attendance support meeting on 28 December, PS Acheson met with the claimant to support him with the completion of some job applications. As a result, on *11 January 2017 the claimant submitted an internal application for the post within the Scottish Resilience Centre – Serious Organised Crime and Counter Terrorism Unit based in Stirling*. Because the application had been submitted ten minutes before the deadline, CI Ratcliff intervened with the recruiting department to ensure the application would still be considered even though she had not been able in the time remaining to endorse her support on it as is required. However, *on 17 January 2017 the respondent informed the claimant that they were unable to support this application due to the live written warning and that his application would not proceed further*.

47. On 6 February 2017 (J160) the claimant met with Inspector Jim Young to apply for some internal vacancies Mr Young had sent him the previous week. PS Acheson also attended.

48. On 23 February 2017 the claimant attended a meeting with PS Acheson under the respondent's Capability Procedure. He was accompanied by PC Grant McDowall of the Police Federation. The claimant was not a member of the Police Federation. However, PC McDowall agreed to accompany him nevertheless, so long as it did not incur any charges. At the meeting the claimant outlined his reasons for not attending work. He said it was due to his childcare issues and his contact arrangement with his younger children. He said that if he could find a role that suited his childcare issues as a single

parent and carer he would return to work on full hours immediately as he had previously stated. The claimant's Police Federation representative PC McDowall argued that the claimant should not be issued with a Capability Regulations Stage 1 Notice on the basis that he was a lone parent and a Stage 1 Notice would put him under additional pressure. (It is PC McDowall's practice as a representative always to challenge the issue to an officer of a Stage 1 Notice because if someone goes to Stage 2 they are one step away from dismissal.) After taking advice from HR, PS Acheson issued the Stage 1 Notice. At the end of the meeting, PC McDowall asked: "*Would Mark have been treated differently if he had not been male?*" PC McDowall posed this question because he was trying to keep the claimant in a job and not because he believed that the claimant had been treated less favourably than a woman would have been treated in the circumstances. From his experience as the Secretary of the Police Federation East Area, which encompasses Lothian and Borders, Fife and Central Scotland, PC McDowall was aware of both males and females being assisted into day shift roles in circumstances similar to the claimant's where those roles were available. PC McDowall regularly met with and spoke to divisional commanders on behalf of members who were seeking day shift roles for various reasons, including health or childcare. At that time, Forth Valley had 9% of its officers on restricted duties. Some other areas, for example, Edinburgh, only had 1% of officers on restricted duties. Accordingly, in an area like Edinburgh it was easier for the divisional commander to accommodate an officer looking for a day shift role than somewhere like Forth Valley. Forth Valley also had higher sickness absence levels, which made fulfilling shift duties difficult.

49. One or two days after the meeting on 23 February 2017 PC McDowall telephoned CI Lynn Ratcliff on the claimant's behalf to ask whether there were any day shift roles he could be given. CI Ratcliff told PC McDowall that the claimant had been sent 12 or more job vacancies and had only applied for one of them. She also confirmed that 9% of Forth Valley officers were on restricted duties at that time and for that reason, there were no other suitable roles that could be provided. She did say that that could change.

50. *The claimant resigned with notice on 6 March 2017.* This was the point at which he would have moved from full sick pay to half pay. He sent an email to PS Acheson on that date (J117) in which he stated inter alia: “I was in a day shift role which suited my needs as a single parent however a decision was made to put me on to response group 2 at Stirling. I discussed this with the Chief Inspector and made her fully aware of my circumstances and the difficulties this created for me. I was granted a two week extension to allow me to obtain overnight childcare, which I explained was not possible. During my period of notice of transfer I submitted a flexible working application which was point blank refused by Inspector Donna Bryan, with no discussion between ourselves and completely against the guidance of the SOP...” The claimant stated that Inspector Bryans’ tone in emails was “very oppressive and totally unprofessional”. He also complained that Chief Inspector Ratcliff had told him he would have to apply for internal vacancies and could not just be ‘given’ a job. He said he was “fully aware of numerous other posts that have been given to other members of staff without being advertised”.

Observations on the Evidence

51. Most of the relevant evidence in this case was not in dispute and, indeed, much of it was agreed. However, one area in which there was a conflict was in relation to whether Inspector Donna Bryans’ treatment of the claimant changed and if so, why. This is discussed below.

Applicable Law

52. Section 13 Equality Act 2010 provides as follows:

“13 Direct Discrimination

(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.”*

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53. Section 19 Equality Act 2010 provides as follows:

“19 Indirect discrimination

5 (1) *A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*

10 (2) *For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

15 *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*

(c) it puts, or would put, B at that disadvantage, and

20 *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

54. Section 136 Equality Act 2010 deals with the burden of proof as follows:

“Burden of proof

25 (1) This section applies to any proceedings relating to a contravention of this Act.

30 (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

Discussion and Decision

Direct Discrimination

55. We considered whether the respondent directly discriminated against the claimant contrary to section 13 Equality Act 2010. This depended upon whether the claimant was treated less favourably than other employees of the respondent were or would have been treated because of his sex. The claimant's case was framed in his further and better particulars of 4 January 2018 (which he lodged in response to an order for specification of his case) as follows: *"I will be pursuing a claim of direct sexual discrimination. As I have documented I am a single parent with a residency order in place in respect of my 12 year old. As a result I am required to care for him on my own. I requested a day shift role to help with my childcare needs which was refused. I am aware of PC Amina McPherson being in a similar position previously and her request was accommodated. In addition I was working in an office with PC Caroline McColl doing exactly the same job. PC McColl has children and her husband also works for Police Scotland. PC McColl has approximately 20 years Police Service and is fit for duty. PC McColl could have been moved on to Group 2 at Stirling in place of myself allowing me to continue in a suitable day shift role until such time as I was able to secure another suitable role. I have been discriminated against as I am in a fairly unique position of being a male single parent. My examples above confirm this. Females are more commonly in the position of being single parents and Police Scotland appear more focused on catering for their requirements as parents. Another example is a male officer and a female officer, both with a similar medical complaint however both treated differently. The female officer was given an office job whereas the male officer had to work as a community officer. This further confirms male and female officers are treated differently."* It is important to record here that although the claimant did call PC McColl as a witness under citation and did lead evidence in relation to her, he did not lead any evidence in support of his averments regarding either PC Amina McPherson or in relation to the final three sentences of his further and better particulars in

which he referred to a male and female officer with a similar medical complaint. Thus, no findings in fact are made concerning those averments.

56. Addressing the claimant's claims in his further and better particulars to the extent that they were covered by evidence, the first claim he put forward was that the respondent's refusal to move PC McColl from her permanent post in the Engine Room to Group 2 Response and to give the claimant her job was less favourable treatment because of his sex for the purposes of the Act. We did not find this head of claim to have been established. The EqA provides at section 23(1) that: "*On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.*" The material difference between PC McColl's circumstances and the claimant's was that she was the incumbent in a permanent post, whereas he had had a post created to accommodate him for the duration of his restricted duties. We did not find that the failure by the respondent to give the claimant her post amounted to direct discrimination.

57. A second claim made by the claimant related to his flexible working application. He referred to it having been rejected by Inspector Bryans out of hand within 14 minutes. We did not find that the claimant had established less favourable treatment in relation to this. It was not entirely correct to say that the request was rejected at that stage. It would be fairer to say that it was not supported by Inspector Bryans and was unlikely to succeed in the form in which the claimant had presented it. Inspector Bryans asked the claimant to revise it and resubmit it. When he did not do so, she submitted it at his request. The final decision not to progress the claimant's FWA further was taken by CI Bowater who did not consider the application to be a flexible working application but a request to work Monday to Friday day shift. In fairness to the claimant CI Bowater decided not to progress his FWA under the FWSOP because if it was refused, he would not be able to submit another application until 12 months had elapsed.

58. With regard to the claimant's FWA, it was clear from the preponderance of the evidence, especially that of CI Bowater, that it was effectively refused

because it was not possible to accommodate it in a VSA shift pattern. The decision was not because of the claimant's sex but because granting the application would have been unworkable in that it would have taken away a base post from a response shift, leaving them short at the busiest periods over a five-week cycle. The specific way in which the request was effectively refused by not being progressed further was not because of the claimant's sex but to preserve for him the option of putting in a further FWA without having to wait 12 months. As Dr Gibson submitted, if a single mother with exactly the same caring responsibilities as the claimant had put in the same FWA it would have been refused. No less favourable treatment was established.

59. A third claim put forward by the claimant both in his further and better particulars and in his submissions was that the respondent treated him less favourably than it treated or would treat a female officer when it refused his request for a day shift role to help with his childcare needs. The facts suggest that, as discussed in paragraph 57, it was CI Bowater, who suggested that the claimant should apply for dayshift roles and ultimately decided to treat his FWA as a request for such. The respondent not only sent the claimant a number of vacancies for dayshift or mainly dayshift roles but supported and assisted him in making applications when he failed to do so. At the submissions stage of his case before us the claimant's position appeared to have moved from the alleged refusal of a request for a dayshift role in his further particulars back to the position stated in his ET1 of asserting that he ought to have been 'given' a role instead of having to apply. Again, his comparator was said to be PC McColl, who, he said had been given two day shift roles without applying for them, whereas he had been told he had to apply and could not just be 'given' a role. Dr Gibson objected to the claimant framing his submission of less favourable treatment in this way and said that his understanding from the claimant's further and better particulars had been that the claimant viewed the less favourable treatment as the refusal to move PC McColl and give the claimant her post. He said he would have gone into much more detail about the application process for PC McColl's posts if he

had had fair notice that this was going to be the claimant's submission. We did not accept Dr Gibson's objection in relation to the specific issue of having to apply for posts instead of being 'given' them in relation to PC McColl's Engine Room post because this is referred to in the ET1. Furthermore, PC McColl's detailed evidence on the issue of her appointment to the Engine Room post was led without objection and was not, in any event, prejudicial to the respondent. However, we agreed that PC McColl's evidence in relation to her current 2018 post had not been foreshadowed in the claimant's pleadings and we concluded that Dr Gibson's fair notice point was correct on that matter and that we should not make findings in fact about her current post. (Even if we are wrong to uphold Dr Gibson's objection in relation to PC McColl's current job, we would not have found the point of assistance. The claimant did not suggest in his evidence that he had identified a particular available role and asked to be considered for it in the manner described by PC McColl. He did make two or three internal applications for vacancies but otherwise he simply stipulated that he was only prepared to work weekday dayshift hours.)

60. With regard to the Engine Room post, PC McColl testified that she had reported to AC Rollo at 7am on Monday 2 February 2016 and had been redeployed into the post effectively without notice, due to the cessation of her substantive post on the closure of the PAD. Superintendent Rollo's evidence on the point was that PC McColl had expressed an interest in the post. In light of PC McColl's detailed evidence about her redeployment we interpreted Supt Rollo as having meant that he had asked her if she would be interested in the post at 7am on Monday 2 February 2016 and she had said 'yes' and been immediately deployed into it. Although she testified and we accepted that at the point when she was redeployed, her husband's shift pattern changed and she requested either to work Monday to Friday day shift or for her husband to be moved to a different shift pattern to complement hers it seemed to us that her material circumstances were not sufficiently similar to the claimant's to enable a fair comparison to be made. The difference between her circumstances and his was that she was undergoing instant redeployment and there was a suitable post available. The claimant, by contrast, was given

three months' notice that his restrictions were being lifted and that he would be put into a response role. The claimant accordingly had three months during which he could identify available posts, apply for vacancies he considered preferable to the group 2 response post or make a more realistic FWA.

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61. The claimant testified that Inspector Bryans behaviour towards him had changed after his restrictions were lifted on 23 May 2016 and he had discussed his childcare issues with CI Ratcliff and Inspector Bryans. He said that Inspector Bryans calls everyone 'Honey', 'Doll' and 'Darling' and that he had initially been no exception to this but her behaviour towards him changed and that she had hardly spoken to him face to face after 23 May 2016. He said that if she came into the Engine Room to get milk from the fridge, she would chat to PC McColl but not to him and that this had also been noticed by PC McColl. The claimant's evidence on this point was, on the whole not corroborated by PC McColl, although she did testify that she had had the impression that the claimant and Inspector Bryans did not like each other or get on. However, she did not recall a specific change in Inspector Bryans' attitude. The email correspondence between Inspector Bryans and the claimant about the FWA (set out in the findings in fact above) was certainly formal, though entirely professional on both sides. However, the claimant's own handling of the FWA matter was, in our view unreasonably intransigent and liable to cause frustration. Whilst it did appear to us from the oral and documentary evidence that relations between the claimant and Inspector Bryans were cool or even frosty, and that, in that respect she treated the claimant less favourably than PC McColl, there was nothing from which we could conclude that this was because of the claimant's sex. This was not, in any event one of the acts complained of in the originating application (as clarified by the further particulars) and it is mentioned for completeness, having been referred to by the claimant in his submissions.

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62. The claimant's submission was that he considered that he was treated less favourably on account of his sex because his senior officers were female. He submitted that they had not been prepared to create a position for him to

remain in the Engine Room, whereas Supt Paul Rollo's evidence was that had he still been in the Stirling AC role managing the Engine Room at the time he probably would have considered doing so. Supt Rollo was asked about this by the claimant in examination in chief. He responded that it was a hypothetical question and that to have created a post for the claimant would have required negotiation with his line management and the securing of funding. He said when he was Stirling AC he had been working on a particular initiative in relation to drugs enforcement. He testified that both the claimant and PC McColl had given good service in support of that initiative and that more drug dealers had been jailed in Stirling than ever before as a result of the claimant's work acting on the drug intelligence. He said he would probably have considered trying to negotiate keeping the claimant in the post had he still been in charge. The claimant also pointed to the efforts made by CI Bowater who had been looking for a post for him. He submitted that, in contrast, his female managers had been less proactive. The Tribunal did not conclude that there was anything significant about the fact that Inspector Bryans and CI Ratcliff were female. It was clear that the respondent made significant efforts to try and accommodate the claimant as far as possible standing the needs of the organisation. As CI Bowater put it: *"When we joined the police we knew there was shift work involved. It's not unfair to expect people to work shifts. The flexible work plan you put in was never going to work so we were trying to get you to apply for a day shift role."* PS Acheson sent the claimant at least 7 roles he was eligible to apply for. Most of them were weekday day shift roles or could have been adjusted mainly to that with an FWA. It is the acts complained of and the reasons for them that the Tribunal must consider.

63. In any event, on the facts it appeared that it was CI Bowater who was, (at least chronologically) finally responsible for the decisions taken about the claimant of which the claimant now complains since CI Bowater, in his role had the HR and finance overview and deployment knowledge. He could therefore see what was and was not possible in terms of finding the claimant a dayshift role. It was clear that CI Bowater (J153) did look into trying to find

the claimant such a role. In cross examination on the subject of finding a dayshift role the claimant asked him: *“Could there have been more support offered?”* CI Bowater replied: *“At that time we were carrying a lot of medically restricted officers. There were insufficient roles.”* The evidence of CI Ratcliff and PC McDowall, which we accepted was that in the specific period when the respondent was attempting to find the claimant a dayshift role, there were no roles available beyond those the claimant had been sent and had failed to apply for. PC McDowall testified that one or two days after the meeting on 23 February 2017 he had telephoned CI Lynn Ratcliff on the claimant’s behalf to ask whether there were any day shift roles he could be given. He said that CI Ratcliff had told him that the claimant had been sent 12 or more job vacancies and had only applied for one of them. He stated that she had also confirmed that 9% of Forth Valley officers were on restricted duties and for that reason, there were no other suitable roles that could be provided at that time, although she did say that that could change. However, as PC McDowall pointed out, with a measure of frustration, the claimant had resigned shortly thereafter and before PC McDowall could help him.

64. PC McDowall was an impressive witness. He testified that from his experience as Police Federation Secretary East Area, which encompasses Lothian and Borders, Fife and Central Scotland, he was aware of both males and females being assisted into day shift roles in circumstances similar to the claimant’s where those roles were available. He said he regularly met with and spoke to divisional commanders on behalf of members who were seeking day shift roles for various reasons, including health or childcare, but he confirmed that at that time, Forth Valley had 9% of its officers on restricted duties. He said that some other areas, for example, Edinburgh, only had 1% of officers on restricted duties. Accordingly, in an area like Edinburgh it was easier for the divisional commander to accommodate an officer looking for a day shift role than somewhere like Forth Valley.

65. The claimant could not remember why he had not applied for many of the job vacancies he had been sent. The reasons he did give the Tribunal were, on

the whole not convincing and from his evidence about the vacancies in cross examination we had the impression that he was not engaged with the process of trying to find a suitable dayshift role. His attitude appeared to us somewhat intransigent. He showed no flexibility or willingness to compromise whatsoever and as soon as his full sick pay period was over, he resigned and moved straight to another job.

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66. The claimant did allege that if he had been female more energetic steps might have been taken to find him a dayshift role, but that proposition would also require to be supported by cogent evidence and he did not establish facts from which the court could decide that the respondent discriminated. Put at its highest, the evidence upon which he relied in addition to his own belief that that was the case was as follows: (i) Grant McDowall, his representative at the Stage 1 Capability Hearing did ask the question: *“Would Mark have been treated differently if he had not been male?”* The claimant submitted that these were ‘strong words’ and that PC McDowall could not deny having said them. PC McDowall did not deny having said them but his evidence on the point was that he had asked this question because he was trying to keep the claimant in a job rather than because he believed it to be the case. (ii) The claimant also referred to the following exchange between Dr Gibson and PS Acheson in re-examination: *“Dr Gibson: Did you personally have any concerns that the claimant was treated differently than a woman would have been treated? D Acheson: [Long pause] It’s hard to escape the fact that PC McColl was a female officer doing the same job and she was allowed to stay.”*
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- We have explained above that there was a material difference between PC McColl’s circumstances and the claimant’s such that we did not consider this concern to be of significance. It does not, therefore assist the claimant’s case.
67. In summary, for the reasons given above we did not conclude that the respondent discriminated against the claimant directly contrary to section 13 EqA. The claim of direct discrimination does not succeed and is dismissed.
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Indirect Discrimination

68. Section 19 Equality Act provides that a person (A) discriminates against another (B) if he applies to him a provision, criterion or practice (“PCP”) which is discriminatory in relation to a relevant protected characteristic, here the claimant’s sex. The full provision is set out in the ‘Applicable Law’ section above. The IDS Handbook ‘Discrimination at Work’ (May 2012) at paragraph 16.45 summarises the first part of the application of section 19 helpfully as follows: *“Essentially the key is to identify a hurdle that has been placed in the way of the complainant and consider the range of persons affected by it. This will direct attention on the ‘pool for comparison’.... The next step ... is to consider whether those persons within the selected pool who share the relevant protected characteristic are more likely to fall at the hurdle than those who do not.”* With regard to the ‘pool for comparison’, the EHRC Code of Practice at paragraph 4.18 states: *“In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it either positively or negatively.”*

69. On the basis of the answers he gave to Dr Gibson in cross examination, the claimant’s case is that the PCP the respondent applied to him was the requirement that he work a variable shift arrangement (VSA) and we find that on the facts before us that PCP was applied. We further find that the PCP was and is applied to male and female officers alike and that some of those officers are single parents. On the claimant’s case, the group affected by the PCP are single parents because they require to find out of hours childcare if required to work a VSA. (The correct pool is probably the wider one of all officers affected positively or negatively by the VSA. However, it does not make any difference to the outcome in this case which pool is used.) The claimant’s case gets into difficulty when one considers whether those persons within the selected pool who share the relevant protected characteristic are more likely to fall at the VSA hurdle than those who do not. Put shortly, the claimant requires to show disadvantage, i.e. that the VSA puts male officers or male single parent officers at a particular disadvantage compared with female officers or female single parent officers.

70. The EHRC Code of Practice on Employment contains a helpful section on establishing disadvantage in indirect discrimination cases. Paragraph 4.11 puts it like this: *“In some situations, the link between the protected characteristic and the disadvantage might be obvious; for example, dress codes create a disadvantage for some workers with particular religious beliefs. In other situations it will be less obvious how people sharing a protected characteristic are put (or would be put) at a disadvantage, in which case statistics or personal testimony may help to demonstrate that a disadvantage exists.”* That section of the Code suggests various ways in which disadvantage may be established (e.g. by the use of statistics, expert evidence or personal testimony) in those cases in which the link is not obvious.
71. Tribunals have sometimes been prepared to accept as obvious or within judicial knowledge the proposition that women are more likely than men to be the carers of young children e.g. *London Underground v Edwards* (no 2) [1998] EWCA Civ 877. Indeed, the EHRC Code contains reference to this assumption at paragraph 4.8: **“Example:** *The contracts for senior buyers at a department store have a mobility clause requiring them to travel at short notice to any part of the world. A female senior buyer with young children considers that the mobility clause puts women at a disadvantage as they are more likely to be the carers of children and so less likely to be able to travel abroad at short notice. She may challenge the mobility clause even though she has not yet been asked to travel abroad at short notice.”* It is probably also within judicial knowledge that more females than males are lone parents with custody of children. Dr Gibson referred (for illustration only) to general statistical information he had found on the ‘Lone Parent Scotland’ website to the effect that single mothers make up 92% of lone parent families in Scotland with single fathers 8%. However, that does not assist the claimant because he is not in the disadvantaged group. Since, (because he is not in the disadvantaged group) the claimant cannot rely upon commonly known or accepted statistical information to establish obvious disadvantage, he must

lead evidence that the application of the PCP put or would put males at a particular disadvantage compared with females. The burden of proof is on the claimant to establish this.

5 72. As Dr Gibson rightly accepts, working life is difficult for single parents, but he submits that a single mother is going to have the same issues in having to arrange child care while working a VSA as a single father. Turning to the claimant's email of 4 January 2018 in which he articulated his claims, he stated in relation to his indirect discrimination claim: *"I have been*
10 *discriminated against because I am in a fairly unique position of being a male single parent. My examples above confirm this. Females are more commonly in the position of being single parents and Police Scotland appear more focused on catering for their requirements as parents."* The application of the VSA does not work in this case as an indirect discrimination claim because,
15 on his own case, the claimant is not in the disadvantaged group. He has not led any cogent evidence, whether statistical, expert, documentary or otherwise proving that males are disadvantaged by the application to all officers of the PCP and he fairly acknowledged in his submissions that he had failed to do so. The issue of justification does not arise. The claimant's claim
20 for indirect discrimination cannot succeed on the evidence before this Tribunal and is dismissed.

Employment Judge: Mary Kearns
Date of Judgment: 11 February 2019
Entered in register : 12 February 2019
25 **and copied to parties**