



EMPLOYMENT TRIBUNALS

Claimant: Mrs. K. Newbould

Respondent: The Commissioner of Police for the Metropolis

Heard at: London Central

On: 1- 5 July 2019

Before: Employment Judge Goodman
Mr. S. Williams
Mr M. Reuby

Representation

Claimant: Mr. A. Watson, counsel

Respondent: Mr. P. Martin, counsel

JUDGMENT

1. The harassment claims fail.
2. The constructive dismissal claims fail.
3. The remedy hearing listed for 28 and 29 October will not take place.

REASONS

1. This is a claim by a former police constable for harassment related to sex and religion, and for constructive dismissal because of sex and religion. As a serving police officer she can rely on the protection of the Equality Act 2010, but not the employment rights protection (including an unfair dismissal claim) of the 1996 Act.
2. She withdrew claims for direct discrimination because of sex, religion and disability, after exchange of witness statements in February 2019.
3. The harassment claims, as clarified at a preliminary hearing on 29 October 2018, concern four episodes:
 - 3.1 On 3 October 2016 Pete Walsh under the direction of DCI McPherson, asked the claimant a question, while discussing her flexible working application, about whether she had thought about looking for an alternative place of worship. This was unwanted conduct related to her religious belief

- 3.2 On 6 October 2016 in a conversation in which the claimant was complaining to DCI McPherson about the nature of the questions asked of her, he told her she took the questioning the wrong way and was probably upset about it due to her menopausal state. This was unwanted conduct related to her sex.
- 3.3 On 19 March 2018 DS Thomas told the claimant that she had a duty to make herself fit for work and therefore she must go on hormone replacement therapy. DS Thomas told the claimant it worked for her so it must work for the claimant. She said to the claimant: "we're police officers, we're meant to be robust!" This was unwanted conduct related to sex.
- 3.4 On or before 26 March 2018 DS Thomas wrote on her OH referral that she had suggested the claimant go on HRT. The sharing of this information with OH was unwanted conduct related to the claimant's sex.
4. The dismissal claim is about whether the claimant "resigned in response (to the extent legally required) to discriminatory acts by the respondent which amounted to a repudiatory breach of contract. The conduct relied on is the conduct said to be harassment, whether individually (the 19 March 2018 episode) or cumulatively. The claimant says an email of 6 April 2018 she received from D.S.Thomas was a last straw causing her to resign".
5. The respondent says the first two harassment claims are made out of time. The claimant says they are not, as they are part of a continuing course of conduct, but if out of time, that it is just and equitable to extend time.

Evidence

6. To decide the claims the tribunal heard evidence from:

Karen Newbould, the claimant. A large amount of material was excised from her statement by agreement before cross examination: paragraphs 5, 40-41, 44, 47-89, 91-118, 123-126, so as to confine her evidence to what remained in issue following withdrawal of the direct discrimination claims.

Adam Newbould, her husband

David Larsen, formerly Acting Detective Inspector, on her relationships within the team, her objections to Performance Review in November 2017, and a grievance raised against her.

Chief Inspector **James McPherson**, on the handling of the September 2016 flexible working request.

Mark Stapley, the claimant's Police Federation representative.

Sergeant **Sue Thomas**, the claimant's line manager when the claimant resigned.

7. The claimant had on 19 June sought to adduce a statement from **Peter**

Walsh, who conducted the interview on 3 October complained of as harassment. Employment Judge Tayler had refused permission, for reasons given on 26 June, and we did not read it. Summarising his reasons, witness statements had been exchanged on 7 February ready for a hearing on 7 March which did not go ahead for want of tribunal resources; late service was unexplained and put the respondent at a disadvantage.

8. There was a core bundle of 574 pages, extracted from the much larger four volume bundle prepared for the March hearing. We are grateful to the parties for having taken the trouble to do this.
9. Evidence concluded after three days. On the morning of the fourth day, the claimant applied to adduce an email from her to her representative Mr Stapley, which she had found two nights before; it was said to be corroborative of one of the harassment allegations and contemporary with it. Having heard from both parties we decided not to admit the email to evidence. Our reasons were given and recorded in tribunal; written reasons will be given on request made within 14 days of this judgment being sent to the parties.
10. After reading and hearing submissions judgment was reserved. A contingent date for a remedy hearing was set for 28 and 29 October 2019.

Findings of Fact

11. The respondent has a flexible working policy. The version relevant to this claim is dated 23 September 2015. It says that applications will be handled in a reasonable time and in any event no longer than 3 months between making the request and notifying the decision. Requests for a variation in shift pattern (VSP) must be made in writing to the line manager, stating the desired hours and working days, when it is to take effect, how long it is to last, and the effect the change would have on the team and proposals as to how any difficulties could be resolved.
12. Paragraph 1.5 says: “police officers can request flexible working under the regulations without specifying a particular reason wanting to work flexibly. However, if the request is made under the equality act and (for example as a reasonable adjustment as you are disabled, to be allowed time off to pray or attend worship or to vary your hours in accordance with childcare commitments), this should be stated”.
13. The policy document records that there is no right to work flexibly. There may be times when a refusal is justified; however only business reasons for refusal are permitted.
14. Line managers must deal with the request by discussing it at the Local Resource Planning Meeting and with the second line manager prior to meeting the applicant. In addition, a decision to grant or refuse an application may be scrutinised by a local panel whose role is to ensure consistent decision making and to support cover being maintained across teams. This is normally after the local manager has made a recommendation on the application.

15. Local managers are told not to inadvertently discriminate by refusing leave if the request relates to a protected characteristic (2.2). If the request is refused they should record reasons related to specific grounds. These include inability to reorganise work amongst existing staff and detrimental effect on ability to meet customer demand.
16. When an application is received, the line manager should meet the police officer. "This meeting is an opportunity for the line manager to explore exactly what changes are being sought and how these may be accommodated. The officer/member of staff can explain the reason why they are seeking changes if they choose to reveal this."
17. The claimant first joined the police in 1994, but had taken two breaks. In 2016 she was working in the joint forensic intelligence team (JFIT) in Empress State Building, in a team with a shift pattern of 6 days on (2 lates, 2 mid-shifts, 2 earlies), then 4 days off, which meant that an officer worked 6 weekends in 10.
18. On 14 September 2016 the claimant requested flexible working. She asked to work four 10 hour shifts a week, on Monday, Tuesday, Thursday and Friday. She gave as reasons:
 - "I am newly married and I now have two step children, one of whom is under 16, and I have parental responsibility for them both.
 - "My current shift pattern does not allow me to spend time with my husband especially when I am working weekends and he is travelling to Cheltenham to spend time with the children and I am therefore not seeing them either.
 - "I am a committed Christian too and I have not been able to attend church on a Sunday for months, which is causing me some distress".
19. The claimant had had some experience of handling flexible working requests from a period in Southwark some years earlier. She understood that the only relevant feature was whether the request could be accommodated, and that it was not necessary to probe the reasons for the request.
20. In September 2016 her first line manager was Jordan Ford. The second line manager was Chief Inspector Mc Pherson. Mr McPherson had joined JFIT a few months before. He had handled a number of flexible working requests in recent years. His evidence was that he started from the position that it should be granted if possible. He knew decisions would be scrutinised, and had experienced lengthy discussion on another case, and based on this experience he liked to be able to answer questions that might come up at the later meeting without having to go back to the applicant – he referred to his "Plan B", meaning he knew enough about the case to look at other options to meet the officer's need if there were questions. The LRPM only met once a month, he understood. He explained that weekend working did not lead to extra pay, was not always popular because of its impact on domestic life, and it could be important to endure adequate cover.

21. On 20 September Jordan Ford, away on leave, asked James McPherson if they could discuss it when he was back, as "I'm not familiar with the rules". In reply, Mr McPherson asked him to find out what Sundays the claimant currently worked, whether the children lived with them, whether there were other parents sharing responsibilities, as: "we need further detail before making any further decision." Mr Ford replied that typically she worked two weekends a month; he would pick up the rest on return.
22. The claimant met Mr McPherson on 26 September 2016, though the purpose of the meeting is not clear, and appears not to have been her application, but they discussed it. Neither mentioned this meeting in their statements, and neither could remember anything about it when questioned, but we know about it from emails exchanged on 3 and 4 October, when the claimant said:

"on my application I added notes to explain my reasons for applying that not seeing my husband, not seeing my stepchildren and not getting to church. *In our meeting last Monday* (emphasis added) I mentioned all those reasons to you, and said that it will impact greatly now that I'm also going through the menopause, as I need my husband's support to help me through this time, which is pretty difficult if I'm not able to spend time with him. I believe that information is more than enough to assist you or Jordan with your decision-making",

and Mr MacPherson replied:

"*as we discussed last Monday* (emphasis added) I am aware of the effect that the menopause is having on you personally, and I did advise that we would do everything we could to support you through this. I'm sure you will recall that we agreed on that day for you to leave early, in order that you were given some respite and space. I also remind you on this occasion of the out of hours support that you could call on provided by the MPS. In addition to this, I asked Peter to pass on to you the NHS menopause help page just in case you have not already read it."

From these emails we understand that the claimant had left early that day ("last Monday" being 26 September), but not why. It may have had something to do with her being upset because of the menopause. She had mentioned her VSP application to Mr McPherson, and how a change of hours would help. We guess from what happened next that she was upset about delay getting an answer to her VSP request, and not knowing if she could stop working weekends.

23. That is because two days after that meeting, on 28 September 2016, Chief Superintendent Victor Olisa intervened. He emailed Mr MacPherson, apologising for intervening in an individual case, which he would not normally do, but a colleague approached him. He said: "I understand that you are dealing with the situation but I just want to reassure myself that we (as an organisation) continue to deal with issues diligently and expeditiously. One of your member of staff in the process of discussing work arrangements that would allow the time at home with her new husband and children (from the marriage) however, with the delay in reaching decision, what should have been a straightforward process is

starting to create unnecessary anxiety, which should start to affect performance at work as well as her well-being. Could I ask that the decision concerning DC Newbould is made as quickly as possible? I am happy to have a discussion with you or an SLT member if that would help. However, I would like to be assured that will be dealt with swiftly and efficiently”.

24. Intervention at such senior level is unusual. Peter Walsh explained to Mr McPherson that the Chief Superintendant was a personal friend of the claimant. That explained his intervention.
25. We note that the request to avoid delay was made only 14 days after the application had been made, when her line manager was away, and when the procedure envisaged that three months was acceptable. This suggests to us that the claimant felt desperate to stop working weekends.
26. Mr MacPherson replied immediately to C.I. Olisa that he had put a number of questions to his DS (Sgt) so that they could make a better informed decision, and that he was on annual leave that week but would meet her on his return. He had met the claimant at her request on a number of issues; she needed to address her own personal position by making choices. He had drawn her attention to actions within the organisation and outside - we assume he was referring to her difficult menopause. He said that the unit had been:

“under some considerable pressure to meet a legal deadline imposed by government which has resulted in staff working long hours”.

This had been achieved completely through volunteers, rather than by forced overtime or cancelled rest days; the claimant had in fact worked some rest days for pay, though now he knew the pressures, he was reviewing this. Meanwhile, he had already discussed the case with his SLT, and would review it as soon as possible.

27. At the same time as sending this, he asked Jordan Ford to deal with it as soon as he got back from leave. That was to be on Monday 3 October, but he did not come in that day, so he asked Peter Walsh to meet the claimant about her VSP request instead, as Mr Pherson did not want “any further delays around this case”. He asked Peter Walsh to review seven points, and set out in his email what areas needed to be explored. The first point is the date of the application. The seventh was to check with Jordan Ford the business impact on the team, especially on weekend working. The intervening five points were personal to the claimant: her family circumstances, her husband’s work, her churchgoing, her business interests, and her health. After the meeting he and Mr Ford must work together to compile a report on their findings and make a recommendation by Thursday at the latest. The claimant should be told that they would need to review all the facts in line with business requirements, that the report would be forwarded to Mr McPherson for consideration, and once he had reviewed it, it would be sent to the local LRPM for consideration.

The First Harassment Allegation 3 October 2016 – Factual Findings

28. According to the claimant, Peter Walsh began his meeting with the

claimant on 3 October by saying “don’t shoot the messenger”.

29. Following the email questions, he began by asking about her parental responsibilities. She explained that her stepchildren were 14 and 20, living in Cheltenham with their mother, making only occasional visits to London. The weekend working made it difficult for her to build up a family relationship with them. On her husband’s work and whether he could flex his working pattern, she said he was self-employed as a consultant, but that would not solve the issue of the fortnightly weekend visits to the children. Then came the questions about churchgoing. The answers show she missed out on church community, both on Sundays and in the week. The next questions drafted by Mr MacPherson were what alternatives has she looked at, could she attend after working hours? Has she considered alternate places of worship around the work vicinity? The answer recorded by Mr Walsh is that she was not able to attend a service during a 45 minute lunch break, and “even if she could find an appropriate service time, she was feeling more and more isolated from her local community due to lack of regular attendance at the church with her family.” She was then asked about the time taken by her declared business interests - letting flats (they did not take up much time), and finally about her health. On this the recorded reply is: “Karen has been seeing a consultant physician since 2008 and has provided me with a copy of a report (attached) which provides significant detail. The condition she believes is exacerbated by the shift pattern, which is causing the family issues highlighted above resulting in becoming emotional at times during working hours leading to bouts of crying over the slightest what appear to be trivial issues...”
30. We have the consultant’s letter, dated 29 September 2016. It states that her perimenopausal symptoms left the claimant “emotional and tearful”.
31. That evening the claimant drafted an email to Mr MacPherson and asked Peter Walsh to send it on to him. In it, she said she was deeply disappointed question asked of her. Officers did not have to provide reasons for wanting to work a flexible working pattern. She had told him about them in the meeting the previous Monday, as well as noting them on her form. She had explained how the impact was all the greater because of the menopause. She said: “I believe that information is more than enough to assist you or Jordan with your decision-making.” Then she went on: “I am extremely insulted by your suggestion that I find an alternative place to worship. My Christian faith is important to me, and it is important to attend church we were part of the church family, it is more than attending a service on Sunday, however attending a service on Sunday is an integral part of one’s faith.” She referred to two earlier applications by colleagues, and wanted to know if they had also been subjected to such questioning. She was seeking advice from the (Police) Federation, and considered the actions discriminatory.
32. Mr MacPherson replied next day that he was concerned as her comments did not reflect the intention of what yesterday’s meeting was about. It had been to get a full overview of personal circumstances to maximise support and support her application for flexible working. He had been brought up in a strong Church of Scotland environment, so was aware of the importance of faith, and the wider family this brings. He respected her desire to involve

the Federation, though disappointed she had not felt able to discuss it with him first. A decision on the application would be made soon; once made it had to go to local LRPM for sign off.

33. Later that day he told her he had got an updated report from Peter Walsh that afternoon, and would be lending his support to the application. He would check whether the new SLP required signoff by LRPM or if this was to be left to local managers.
34. The Tribunal explored with the claimant why she found the questions offensive. She said she had become a committed Christian when working in the Cayman Islands in 2002. She had attended a number of churches in London, first All Souls Langham Place, then two Baptist churches near her home, before settling at Trinity Baptist Church in Bexleyheath where there was a congenial mix. It was important as a Christian to engage in fellowship as well as attend services, and to be part of a church community. Importantly, she thought this should be obvious. She said it was like not being able to attend a tennis club and having instead to use municipal courts where there a lower standard and different people to play with.
35. We also explored Mr. McPherson's understanding. His witness statement explained that in asking the question about alternative services on a Sunday he had in mind the accommodation reached with Muslim officers, who were allowed time off to attend a mosque near work for Friday midday prayers, though not to travel further to a home mosque. In Tribunal he said he had grown up in a small village where there was no choice of place of worship; when in the army he had attended church where he could.
36. It is interesting that in the exchange of witness statements the claimant's husband had also mentioned Muslims. Reporting how she had telephoned him after the 3 October meeting (he was working away and staying in a hotel) he said:

“my first thought was “it’s a good job Karen isn’t of Muslim faith”. Can you imagine if the press were to get hold of this, they would have a field day and create a public outcry. Your faith, your church, the people you pray with and for are so personal to you, almost like your extended family”.

Giving evidence, he said that on the call she went quiet, and he had to drag it out of her. She was “exasperated”.

The Second Harassment Allegation 6 October 2016- Factual Findings

37. On 6 October she met Mr. McPherson to discuss her unhappiness about the questions. This is the occasion of the second allegation of harassment. There is no minute of this meeting; the only contemporary record is in emails sent just afterwards, when Mr McPherson said he hoped he had explained why he had asked for points to be covered off, and he sent her Peter Walsh's report of their meeting. He asked her to prioritise getting a doctor's appointment as mentioned in the meeting. He would push for LRPM dates. She replied about her GP appointment, and asked to know the dates.

38. Later that day her Federation representative, Mark Stapley wrote to Mr McPherson on her behalf. He mentioned procedures, then recorded the claimant's upset at some of the questions asked and the justifications she was asked to provide. He could see the reasoning behind some, as they led to support and welfare, but it was "intrusive and inappropriate" to ask about prayer habits and the possibility of moving her place of worship. Nor was she happy with the questions about parental responsibility. He hoped for a swift conclusion.
39. What is *not* in this email is any mention of Mr McPherson having said that her reaction to the questions was because she was emotional because of the menopause. In Tribunal Mr Stapley agreed that would have been a good point to make. This suggested to us that she had not complained about it to him at the time.
40. Next day the claimant wrote direct to Mr McPherson saying he did not need to wait for LRPM, he could just sign it off, nor did he need to fight her corner, it was just a matter of rubber stamping. The tone of this email comes across as brusque, even defiant. There is no complaint of anything he said about the menopause in connection with her reaction to being asked questions about why she wanted to vary her shift pattern.
41. The following year, in July 2017, after a lengthy period off sick with an ankle injury (December 2016 to July 2017), and a management refusal to reduce her shifts from 4 to 3 ten hours shifts a week, the claimant lodged a formal complaint about very many matters. These included that on 6 October 2016 she and Mr McPherson had discussed her upset about being questioned, and:

"he went on to say that he felt I took it the wrong way and that I was probably upset about it due to my menopausal state! He went on to blame Peter Walsh for asking questions in the wrong manner".

After defending Peter Walsh, she went on:

"I will say that James" (Mr McPherson) "did show some support towards my menopausal health situation, however, that does not take away from the fact that he suggested I change my place of worship, neither does it make it right to say the only reason I was upset due to my menopausal state".

This is the first appearance of a complaint that her upset was belittled by reference to the menopause.

42. The claimant has explained that she felt very fragile on the morning of the 6 October, and that he opened by saying he was disappointed that they were where they were. She experienced this as animosity. He said he needed information so as to fight her corner at LRPM. He spoke about the Church of Scotland, which she experienced as patronising; she thought this upbringing should mean he knew the importance of nurturing relationships within the church family. He said he understood how difficult menopause was, as his own mother had suffered a prolonged and difficult menopause. He had also managed a call centre with many female staff

and so had become familiar with discussion of the difficulties.

43. It is clear from the subsequent email that she was blaming not Mr Walsh, but Mr McPherson for drafting the questions to be asked. She was sent Peter Walsh's report immediately afterwards.
44. In the event Mr McPherson did not wait for LRPM approval. He made enquiries through Chief Inspector Murphy on 8 October, and discovered that in the new merged unit it was not clear who was on the LRPM and no dates had been set for any meetings for it. So he decided to approve it without more, and did so with C.I. Murphy's blessing.
45. Late in November 2016 the claimant sent Mr McPherson a video clip of an ITV programme about the menopause. He did not reply. The programme was about a West Midlands police officer and support groups set up in that Force, though her cover email does not say so.

Harassment – Relevant Law

46. Harassment is defined by section 26 of the Equality Act 2010:

- (1) A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2)....

(3)....

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

- (a) the perception of B;
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.

47. The factors in section 26(4) have been discussed in **Pemberton v Inwood (2018) EWCA Civ 564**, which considered the extent to which the passing of the 2010 Act affected the position set out in **Richmond Pharmacology v Dhaliwal (2009) ICR 724**, and concluded that the substance of the guidance had not changed, but the precise language of the guidance had to be revisited. The tribunal must consider both whether the putative victim perceives themselves to have suffered the effect in question (subjective question) and whether it is reasonable for the conduct to be regarded as having that effect (the objective question). It must also of course take account of all the other circumstances:

“The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have that effect. The relevance of the objective question is that if it was not

reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment, then it should not be found to have done so".

48. It was argued in **Ahmed v Cardinal Hume Academies UKEAT/0196/18** that **Pemberton** put an impermissible gloss on the statute, and that the difference in wording between the 2010 Act and its predecessor was one of substance – no longer was reasonableness the determinative question. The argument was rejected.
49. Mr Watson argues that the objective test requires consideration of what is reasonable by someone "who is B's position", not the man on the Clapham omnibus (we think we are asked to imagine a perimenopausal woman on the Clapham omnibus). Mr Martin for the respondent objects that this imports subjectivity into an objective question and shades into consideration of comparators. We think the reference to B's position means only that what is reasonable should be judged in the knowledge of the other circumstances of the case, but if it means judging what B thinks is reasonable, it is not an objective test.

First and Second Harassment Allegations - Discussion and Conclusion

50. On the harassment complaint about the questions posed on 3 October, we do not doubt that the claimant's perception of these questions was hostile – the implication, she understood, was that she did not really need to go to church on Sundays, or if she did, she could pop out in her lunch hour for a service. It is also clear to us that the way the questions were asked was not seen as hostile, it was the questions as drafted she objected to. She was not trumping up outrage for some other purpose.
51. It is common ground that it is not her case that Mr McPherson's purpose in drafting the questions was hostility, intimidation, etc. We are concerned with their effect.
52. It is a relevant circumstance that she understood the policy to be that requests should be granted if they were operationally feasible. As it quickly turned out, in fact Mr Walsh and Mr Ford both considered the request was one that could be accommodated as there enough people to cover the shift. If they were right, it should not have been necessary to probe the claimant's circumstances.
53. The policy does however ask officers to give reason if they concern the Equality Act, and she did, and the policy does require a meeting, and they were meeting, and it does require a record to be made of reasons for a refusal in an Equality Act case. So if the request was to be granted, there would have had to be a meeting, but need not be a record of the reasons unless a committee was to questions it being granted.
54. It is also the case that Mr McPherson's evidence, which we accept, is that sometimes LPRM committees did question some VSP requests, and he wanted to know enough about the request to determine what was suitable and then defend it if challenged, rather than have to go back for a second interview, even if in this new merged unit that committee meeting did not happen. The tribunal can also see that weekend working may not be

popular with officers, for all sorts of reasons, and it could be important to be clear why some requests were granted if others were not, and that was why Mr McPherson was conscious of a general need to justify decisions, though it does not seem to have been necessary in this case, as it turned out. We considered it relevant that this took place against a background of government imposed deadlines for particular tasks of the team which had led to a lot of extra working.

55. The very wide range of the questions resulted from the inexperience of the officers asking them. Experienced officers would have been able to judge which questions to ask to clarify how the variation related to any protected characteristic and how a need could be accommodated when balanced against likely difficulty within the shift. and which, given earlier answers were not necessary. The element of back seat driving from Mr McPherson – providing guidance on what to ask without being able to coach on whether all the questions had to be asked, made the process less smooth than it could have been.
56. An alternative approach would have been to check the team requirements first, then check how family life and religious observance fitted into the request, then make a decision, without asking so many questions, going back for more if necessary following committee questioning.
57. A circumstance we take into account is the pressure on Mr McPherson to make the decision quickly, from the claimant herself, and from Chief Superintendent Olisa. There was no time for staged decision making.
58. Was it reasonable for this conduct to have the effect of harassment? We have to allow for the fact that the claimant was on her own evidence already becoming emotional for not always good reasons (as reported by her treating consultant) due to the hormone disturbance in a perimenopausal state. Independently of that, she appears to have been under strain not attending her church, and in trying to build a relationship with recently acquired stepchildren. We also considered, from his report of the conversation, that discussion with her husband, rather than calming her and helping her achieve a sense of perspective, may have amplified and reflected back a sense of outrage at such questions being asked at all. This is not a criticism: all relationships have their own dynamic, and employers cannot rely on partners to act as counsellors, but it is a circumstance of the case.
59. Importantly, we did not think it was *unreasonable* to clarify the parental responsibility when she was newly married, the ages of the children were unknown, as was how much time was to be spent with them, even though some managers would not have felt the need if they knew the variation was not going to be a problem for the team, and also knew they would not have to run the decision past a committee for approval. Nor did we consider it *obvious* that she would want to spend Sunday services with a particular congregation. It is clear to committed evangelical Christians that fellowship with a particular congregation is important, but some other Christians may hold it is sufficient to (say) take communion or attend mass, or attend a service of some kind as available, and hold that praying with a particular congregation is desirable but not essential. Mr McPherson's own experience, worshipping where he could, when in the

army, did not necessarily make it obvious; his experience of worshipping with one congregation in youth was not necessarily of significance if that was all there was. A manager without any religious background at all certainly would not have known, and would have had to ask, just as he would have had to ask an officer of some other faith what precisely was important in practising his religion.

60. Our conclusion was that asking these questions on 3 October did not, amount to harassment. The conduct did not reasonably have that effect.
61. We move on to consider the discussion on 6 October. The thrust of the complaint is that Mr McPherson belittled her upset at being asked questions about family life and churchgoing by suggesting it was all down to the menopause: to use the catchphrase, telling her to “calm down dear”. That would have been humiliating and offensive.
62. Here we doubt that at the time the claimant did experience this discussion of menopausal symptoms as harassment. She was not shy of complaining, or challenging Mr McPherson about his handling, and she did challenge the need to seek ratification of his decision, in a very direct way, immediately after this meeting. She also consulted her Federation representative, who complained on her behalf about the questioning. He seems to have been unaware that the claimant also considered the discussion of menopause belittling or intimidating, or he would have said so. She did not mention this until nearly 10 months later, when complaining of many other episodes unrelated to protected characteristics, and she had been in the workplace for nearly three months afterwards, before her knee injury made her unfit for work. Nevertheless, it is *possible* that, having got the variation of shifts, it was politic not to complain further even though she did feel aggrieved. The November reference to a TV programme did not carry any message that she considered the comment belittling. She was with him on the day in question, and did not mention it in discussion.
63. A relevant feature is that the claimant had herself already (26 September), before any questions were asked, raised menopause with Mr McPherson as a reason why she was becoming upset over small things, less resilient, and needed to have weekends free from work. It is possible to view reference to menopause in the 6 October discussion as a reference by either of them to her volunteering that she became upset over little things, including that the claimant herself said on 6 October, as she had earlier, that menopause affected her level of reaction. In our view this explains why the claimant did not complain of any belittling, by reference to menopause, of her reaction to being asked about her religious attendance. She herself held this view, and she had introduced the topic. Mr McPherson tried to show empathy by mentioning his experience of perimenopausal women. It is not suggested he was in any way unsympathetic, and nowhere in the emails is this apparent. Expressing empathy can be tricky to handle, and may come across as patronising, but it was a response, in our view, to the claimant raising it as a relevant factor. We do not think it was reasonable for this conduct to have the effect of harassment, and, importantly, having regard to the subjective test, neither do we do not think she saw it as disparaging or belittling at the time. That has grown in the telling or in the remembering; it was not

reported until a time when she felt a strong sense of grievance over a number of matters, which coloured her recollection of an unrecorded and unminuted conversation.

64. We concluded that neither of the October 2016 episodes amount to harassment.

Events in the New unit until Resignation.

65. After taking extended sick leave, at the same time as lodging her grievance in August 2017, the claimant sought and was granted a transfer to another operation, with a new chain of command. This was effective from November 2017, though she did not join the unit until January 2018.
66. Before joining she had a preliminary discussion in November 2017 with her new manager, Sue Thomas. She seems to have found her sympathetic. She told her she was having a difficult menopause, and also was waiting for a polyps operation. Ms. Thomas mentioned that she too was perimenopausal.
67. On 9 January, on joining, they had a meeting in the small office on the open floor (known as the goldfish bowl for its glass walls) she told D.S. Thomas she was managing the menopause well on four 10 hour days. On 31 January Ms Thomas had a hospital appointment and they shared their experience of night sweats.)n 12 February the claimant emailed saying she was very upset by a development in the grievance investigation of events in her previous unit, and said she wondered “if this could be an M-thing”, a reference to the menopause. On 7 March she sent a text to Ms Thomas about time off for a pre-operative assessment (9 April) and feeling “teary” and how she could not wait for “all this rubbish to be done”. These show the claimant was comfortable discussing her symptoms with Ms Thomas. Other exchanges show a calm and friendly relationship. On one occasion she discussed reducing her hours to 30 a week, on another the possibility of a career break as her husband had been shortlisted for a job in the Gulf.
68. On 16 March 2018, a Friday, the claimant became extremely upset at work. She does not mention any reason for this but says the extreme reaction was a consequence of the menopause. A contractor (in fact Ms Thomas’s sister) came and prayed with her and she calmed down enough to remain at work for the rest of the day. On Saturday 17 March she saw the consultant endocrinologist, who wanted to sign her off work, but she declined, conscious she had already taken a lot of sick leave with her knee, and was about to take time off for the operation. She understood that after three periods of sick leave she could or would (there is dispute between the parties) be placed on a management action plan to improve attendance, something she wanted to avoid. On the way home she discussed with her husband cutting back her 10 hour days to 8 hour days so she could get home earlier. She sent a text to Ms Thomas to ask of they could speak, and was told she would call in 10 minutes. Ms Thomas was on a rest day and would not normally speak to staff then, but says she wanted to be supportive, knowing she was in a fragile state. When she did call, the claimant put her on speakerphone, so her husband could hear the discussion, but did not tell Ms Thomas. The claimant, who was crying,

told her she had been upset since Thursday, and the doctor had wanted to sign her off, but she did not want to, but instead to see if she could go part-time. Ms Thomas expressed sympathy, and said that when she had been in bad way with menopausal symptoms the previous year, she had on HRT (hormone replacement therapy, a common treatment for menopausal symptoms) and had found it very effective. On changing her working pattern, she said they could discuss that at work on Monday. At some point towards the end of the conversation Ms Thomas heard a comment in the background from the claimant's husband and learned that he had heard the entire discussion. She was cross about the discourtesy, but also uncomfortable that she had unwittingly shared so much personal information about her experience of the menopause with a man she did not know.

The Third Harassment Allegation 19 March 2018 – Factual Findings

69. On Monday 19 March, first thing, the two had a discussion in the goldfish bowl. The claimant was upset and crying, and they discussed hot flushes and how she took medication for migraines. Ms Thomas says she recognised the claimant felt at stalemate, with problems but no solutions, and reiterated how HRT had worked for her and that she should discuss with her doctor if that would be a way forward. The claimant became calmer. Ms Thomas said something to the effect that police officers had to be robust and resilient, and it was paramount, in order to keep the public safe, that “we look after our mental and physical wellbeing”, and encouraged her to find out if there was other treatment that could help, as in her own experience, it was “taking control” that had made her feel more positive. The claimant says “I seem to remember she even waved her finger at me whilst telling me”, something Ms Thomas denies. At this point Ms Thomas asked the claimant to consider whether she needed to call her on a rest day, or whether the subject matter could wait until a working day. She also asked if the Saturday conversation had been on speakerphone; the claimant confirmed it had and that it was so her husband could hear; Ms Thomas said that had she known she would have been less open about her own symptoms. The claimant was still feeling emotional, and it was agreed she could go home for the day.
70. The claimant tried to see her GP but due to a mix up did not make the emergency appointment she was offered. She saw a practice nurse instead, who said HRT might not be suitable as she also had a thyroid deficiency. On the way to the surgery she messaged Ms Thomas about the appointment and got the reply “Karen. That is good. Take control”, and later, “How about going to Goring?” Ms Thomas also asked for her home email so she could send her “the OH referral”, and was sent it, and then asked for her mobile number so OH could call her on it. Meanwhile the claimant explored a private referral, and then spoke to a private GP, who specialized in HRT and said it would be best to consider HRT after the polyps operation, as that might affect which combination was suitable.
71. She reported all this to Ms Thomas by email next day (20 March), adding “I hope you can see I am doing all I can to get on top of this”.
72. The claimant told the tribunal she did all this because she felt her job was on the line “if she did not do as ordered”.

The Fourth Harassment Allegation 19 March 2018– Factual Findings

73. Later on Monday 19 March Ms Thomas composed a referral to OH (occupational health) asking for advice on how to manage the claimant's condition. It was copied to the claimant that afternoon. This is the document complained of as the fourth act of harassment.
74. The standard form asks the referring manager to give the reason for referral and relevant background information", and to specify (with the instruction to "be specific and elaborate where necessary" including "any work related/management issues which may be impacting health, details of local adjustments and risk assessments. The referring officer can add three questions to be answered, in addition to a set of standard questions. The standard questions include whether there should be a referral to a physician or other specialist doctor, how long the person is likely to be off work, whether recuperative measures such as graduated return are useful. The added questions Ms Thomas asked were "Please state how Karen's welfare should be managed in the office. Can she be signposted for suitable medical advice regarding this", and she requested a telephone call to the claimant "at your earliest convenience".
75. The background information given by Ms Thomas, was - and for context, the words are quoted in full:

"Karen has advised me that she has been perimenopausal since 2006. She also has polyps and a slow thyroid. She is medicated for the thyroid and is awaiting an operation in April for the polyps. Karen has stated that she has really bad intermittent night sweats and since Thursday has been really tearful and could not stop crying this morning in the office. She states that everything is good in her life with the exception of the hormones. I had to send Karen home as she was so upset. I suggested Karen consider HRT (as I have had exactly the same symptoms and could not believe how well HRT worked). Karen was reluctant to go down this route but has booked an appointment with her doctor to discuss the options although it might not be suitable due to the thyroxine she takes. Karen cannot continue in this way. She has only been in the unit since January 2018 and I need advice as to how best to manage her welfare. Karen works 4 x 10 hour days. The workload is very manageable. I carried out a risk assessment for Karen because she has not done OST/ELS as she had a knee operation last year. I have proposed Goring but Karen does not deem it right at this time".

It is the sentence about going onto HRT which is alleged as harassment.

76. On 20 March the claimant did not arrive for work, and when chased up she said she had had night sweats and woken with a migraine. Ms Thomas helped her book off sick, as the claimant found the website difficult. She asked the claimant to email her fitnote, and said "hang in there".
77. In reply to the 20 March email about the medical options, Ms Thomas thanked her for the update and said "glad you are taking control, and

considering all the options". She asked for permission to tell two colleagues about the health difficulty, so they could manage her welfare when she was not on duty, and permission was given. She then added "Also, this will take you up to four sickness absences in 12 months so they need to be aware of this for attendance management purposes". She said she would text once a week but she should feel to keep in touch.

78. The claimant replied saying it would only take her to three absences not four), and Ms Thomas immediately agreed, saying she had confused her with another.

79. The claimant says of this time:

"I had a kind of sinking feeling. I had just had what seemed like a 'battle' with my previous line managers, and here we were again".

80. Next day, 21st of March, the claimant email us about Monday morning discussion pain "you wanted us to be honest in our communication and you let me know didn't appreciate me calling you at the weekend. Which I do get and I apologised for it. I would like to be honest in return. When you said we are police officers and we are meant to be robust, I did not find it helpful. At the end of the day, we are all human too. We all have mental health, sometimes good and sometimes not so good. At the moment mine is being challenged by an imbalance of hormones I needed to to communicate this to you, so I can leave it behind and move on with the positive steps getting back on track".

81. Ms Thomas was away that week but when she got back on 26th of March she drafted the following message to the claimant in reply, explaining what she thought she had meant:

"apologies if I upset you with anything that I said, that most definitely was not my intention....When we spoke on the Saturday (17th March), the Monday and in previous conversations I told you about the problems that I had experienced over the last 9 months with the perimenopause whereby over and above extreme bleeding I had the most awful anxiety and hot flushes, which had culminated in me feeling so on edge all that time that I thought I was close to having a breakdown... I was not coping well. I was so desperate I would have tried anything. The thing that worked for me was HRT and as such I am an advocate of it (I'm not saying I'm a medical expert by any means nor is it suitable for everyone). When we spoke on Saturday and previously you had said you did not want to go on HRT because it may lead to weight gain and you felt weight gain would be detrimental to your mental wellbeing. You explain further on the Monday that your doctor did not support HRT because of increased chance of breast cancer. I refer you to the NICE guidelines which contradicts suggestion in women under 50. Still reluctant around the option. Your workload is very manageable and you told me that everything in your life was good except that you had felt upset since the previous Thursday (or no apparent reason). As such you deemed that the way you were feeling was due to your hormones. I did say that police officers need to be robust (we are here to protect the public – as trite as that may sound) but I also said – because of this good mental health has to be

paramount (in fact thinking on I can't think of a scenario when good mental health shouldn't be paramount)... I was trying to encourage you to at least seek advice around all of the options and not just discount HRT without seeking advice. All of us (myself included) have a responsibility to safeguard our fitness for work and that means exploring all avenues of recuperation". She then noted the steps the claimant begin to get advice, and that the advice HRT (apparently the claimant had been told that the combination she recommended could help weight loss) was encouraging news. It congratulated her on taking charge of the situation, even if the response had been negative. She concluded by referring to the weekend contact, and that she had been asking her to consider whether future conversations could wait till she was back at work – "I don't want to be heavy about this", but she "needed relaxation time away from work and as such basic ground rules assist all".

82. This is not the email that was sent. In fact, Ms Thomas got a colleague to check the content and tone of this and another draft before sending a final version to the claimant on 28 March. This reads:

"I am sorry if you found my comment unhelpful in relation to officers being robust and I feel you may have taken out of context what I was trying to say. I was really encouraged to hear that you have sought advice from your doctor and may have found a treatment that could potentially improve life for you at the moment as I know you are having a difficult time. I was trying to convey that, as an organisation, we need to be robust or take a proactive approach if you like, to ensuring that we support you in getting better and also that you are doing everything can to get better. I have a responsibility to support you towards an eventual return to work and the ultimate aim is to have you back to work. With that in mind I have made the OH referral to see what advice, if any, can be offered to you and also to me as a line manager".

She went on to clarify what she had said about not calling her at home – if it was an emergency or there was no family or friend she could speak to, she could ring. There were then some updates about office events.

83. The text of the initial draft and final version are quoted here because the initial draft is in our view likely to reflect what was actually said in the Monday conversation about HRT, even if with a week's distance some retrospective additional explanation of the "robust" remark had crept in. The final version is more businesslike and concise as to Ms Thomas's understanding of the purpose of what she had said about getting treatment.

84. The claimant and Ms Thomas had a further discussion on 29 March. Ms Thomas noted:

"Karen felt I forced her take HRT. I advised I'm sorry she felt that way, that it was not my intention to make her feel forced, just encouraging to explore all avenues to get better".

85. At some point (date not known) the claimant had a telephone call from OH; she reports the adviser saying she was "shocked" at the suggestion

on the form that she take HRT. There is no further detail or contemporary email so it is hard to judge the context of this alleged comment.

The Claimant's Resignation

86. The claimant was still off sick, and there is a factual dispute about whether and to what extent they discussed whether she was to return to work before the planned polyps operation, and if so on recuperative duties (when she could work part-time hours but be paid full time) or on formal part-time hours. On 3 April Ms Thomas was told by payroll that as the claimant had now been off sick 84 days in 12 months she must now warn her she would be moving onto half pay. Ms Thomas emailed the claimant on 6 April about arranging a contact visit before her operation, and adding that she had to send her the attached standard letter about going onto half pay. She explained: "the letter was sent through to me on 3rd of April but I sought advice before putting because I had been told anecdotally that it did not apply to gynaecological matters, however I have been advised that this is not the case. She then said "we appreciate that you are signed off sick until and but would like to of the option returning office prior to operation on a part-time basis stop even a few hours a couple of days a week in a friendly office may be something that may interest. I know that she would like to see you. This is a matter for yourself dependent on how you are feeling. Let us know your thoughts". The formal standard letter was attached.

87. Two hours later the claimant replied:

"please accept this email as notification of my resignation with immediate effect. Following my treatment in JFIT, our conversation 19th March, and now this email, this is the final straw, I cannot continue to work for the MPS".

88. She involved the Police Federation representative, Ken Norman, who emailed the respondent's grievance team: "I will be making serious representations to the organisation as I am appalled at the way the officer has been unsupported and treated throughout this whole episode".

89. On 19 April the claimant wrote a two page letter headed "Claim for Constructive Dismissal". She referred to the August 2017 grievance for "direct faith discrimination" and "direct sex discrimination" and working in a bullying environment leading her to change her job, then to the impact:

"in the weeks and months leading up to tendering my resignation I was physically sick and nervous going to work, not knowing what was going to happen to me next. I went from being a very good person to want medal confidence knocked out of the. I felt intimidated by my line managers and insulted the actions. I feel as though there is no careful consideration and well-being certainly they respect me as an individual. I have been made to feel that I am a "problem" and that I am looked at disappointingly, as someone who is viewed as the means of providing evidence for their promotion aspirations. This means some managers feel the need to orchestrate situations in order to "tick" the boxes in their promotion

applications.”

We did not understand that the claimant felt intimidated in the weeks and months between the move to the new unit in January 2018 and the conversation on 19 March. On the contrary, all the signs point to the relationship being a good one.

90. The claimant is now working as a mortgage adviser.

The Third and Fourth Harassment Allegations – Discussion and Conclusion

91. The claimant's case is that Ms Thomas intimidated her by saying police officers had a duty to get themselves fit and put her under pressure to take HRT when the claimant said first it caused weight gain and then that it could cause breast cancer.

92. It is also her case that it was Ms Thomas's purpose to force her to take HRT to resolve her emotional instability. In any case, it is argued, it had that effect, and reasonably can be considered to have that effect.

93. The tribunal considered the section 26(4) factors. The claimant perceived the remarks as intimidating. Being told off at the conclusion of the meeting, however gently, about calling her unnecessarily on a rest day about changing her hours will have reinforced that this was a conversation with a manager rather than a friend. Ms Thomas may have been understandably cooler than usual about the claimant's husband listening in on the Saturday call. We add that the admonition was necessary and merited, and Ms Thomas was admirably restrained about the ostensibly private call being overheard. In any case it is clear the claimant was already in a very emotional state, and had been since the previous Thursday, so her perception of vulnerability will have been heightened. Her immediate actions – seeking, not always getting, advice from a GP, a practice nurse, a consultant and then a private GP – show she took the words to heart. She did feel obliged to take these steps as matter of duty as a police officer because of what Ms Thomas said about being robust.

94. It is important context that until this time the two had had an easy relationship. They had shared their experience of menopause, the claimant had felt able to share with Ms Thomas that a difficulty might be an “M-thing”. But for this we would have had reservations about a manager intervening to suggest treatment and seeking advice from someone other than her own doctor. Ms Thomas spoke not in an abstract way advising what the claimant should do, but of her own experience and how HRT had proved extremely effective, and was its advocate from her own experience as a colleague with similar problems, rather than as a manager. She remained sympathetic to the claimant's difficulty. The claimant experienced tis enthusiasm as pressure.

95. We do not doubt that Ms Thomas did seek both of the police force supporting the claimant but also of the claimant needing to take steps herself. We do not think this was said to compel the claimant to return to duty, but as a form of counselling, that in a frame of mind where every thing made her tearful, taking control – active steps to try to deal with the physical causes of her symptoms – would improve her mental wellbeing. While we accept it is possible there was some retrospective elaboration of

her reasons for saying what she did, she impressed us as a conscientious and measured person, and that in gist she did say that the claimant and the respondent were jointly responsible for getting better. We do not accept that she waved a finger at the claimant. This is retrospective embellishment.

96. We concluded that it was not reasonable for Ms Thomas's conduct to have an intimidating effect. It was part of ongoing discussion of her difficulty with perimenopausal symptoms, where they shared experiences. Ms Thomas was undoubtedly sympathetic, based on her own experience, and until now had been experienced by the claimant as sympathetic. There was an undesirable scope for ambiguity in their relations as colleagues and relations as manager and subordinate, but the advice was to get an alternative opinion on the merits of HRT, not to take HRT, and was clearly based not on managerial need but Ms Thomas's own experience. The claimant did not recognize this (1) because the discussion had been followed by a mild reprimand for calling her on a rest day to discuss cutting her hours of work, and (2) the claimant was on her own account very emotional about small things, but viewed objectively, the advice was not, in our finding, reasonably to be experienced as an order. The allegation of harassment in this conversation is not made out.
97. We turn to the OH referral. Read cold, it is not an instruction to the adviser, nor to the claimant, but a record that Ms Thomas had suggested it as *an option*. We considered whether it had to be said. The purpose of the referral was for a manager to get advice on how to manage an ailing employee. As is clear from the form, a referral without context is not useful to the adviser who has to make recommendations.
98. We do not accept that the referral was an attempt to steer the advice or direct the adviser. In these days of near universal internet access, doctors and nurses must be wearily experienced in resisting attempts by patients and their managers to direct their diagnosis and treatment, and are practiced in reaching their own conclusions. Nor do we accept that a referral form must be agreed by the employee before it is sent. Our experience suggests that if that were the case, some referrals could never be sent. What Ms. Thomas wrote to the adviser was an accurate summary of the problem from her point of view and was fair minded, not malicious, high handed or distorted.
99. The claimant experienced it as hostile or intimidating for the same reasons as the face to face conversation – the rebuke reminding her she was dealing with a manager, and possibly, in the background, concern about the effect of prolonged or repeated sickness absence on her record. She did not experience it in this way because of the way the referral is phrased, but because she already saw the advice to seek other opinions on HRT as an order. We have already concluded it was not reasonable to do so, and that the advice to take control, and seek alternative opinions as harassment. We conclude that this was not harassment either.

Constructive Dismissal

100. As the claimant cannot bring an unfair dismissal claim, but only for dismissal as the conclusion to one or more acts of harassment, then

whatever the complexities of argument as to whether the last straw must be more of the same (**Nottingham City Council v Meikle (2005) ICR 1, Kaur v Leeds Teaching Hospital NHS Trust (2018) EWCA Civ 978**), we need not be concerned with that, because we have not found any harassment.

Time Points

101. The time limit to present a claim is three months from the act complained of. The statute provides that there can be an act “extending over a period”, such that time runs from the end of the period, and there is much case law on what is such an act, and whether a course of conduct persists. If a claim is out of time, the tribunal can exercise discretion to allow it to continue because just and equitable, and the relevant factors to be considered in this exercise of discretion are set out in **British Coal Corporation v Keeble**.
102. No finding is required because we have not found harassment, but briefly, had we found there was, it is unlikely we would have concluded there was a course of conduct linking the 2016 episodes with the 2018 episodes. They involved different managers. Ms. Thomas had had nothing to do with the past unit or the ongoing grievance. The sole link is the menopause. That continued for the claimant, but was not the respondent’s course of conduct, or the respondent’s act extending over a period.
103. We would have found it not just and equitable to extend time for the second 2016 episode. The claimant did not raise a grievance about it, the discussion was unminuted, and oral evidence does not improve with time, there were no clear reasons for not doing so, as she was not afraid to complain about other things, and the delay compromised the respondent’s ability to defend the claim. As for the first episode, it is unlikely we would have extended time: the claimant had access to advice through the Police Federation, she delayed several months bringing a grievance at all, even though at work for over two months after – and was in the workplace after injury from May 2017 though not full time until July 2017. There was no good reason why she postponed a claim until after resigning in April 2018. The delay compromised the cogency of the evidence.

EMPLOYMENT JUDGE GOODMAN

Dated 18 July 2019

JUDGMENT SENT TO THE PARTIES ON

16 August 2019

FOR THE TRIBUNAL OFFICE