Case Number: 2201656/2018

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EMPLOYMENT TRIBUNALS

Claimant		*Respondent*
Miss K Miller	**v**	**The Commissioner of Police of the Metropolis**

Heard at: London Central

On: 14-17 May -2019
20-22 May 2019
23-24 May 2019 in Chambers

Before: Employment Judge Glennie
Members: Mr D Kendall
Mr D Eggmore

Representation
For the Claimant: Mr A Korn, of Counsel
For the Respondent: Ms R Tuck, of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. **The complaint of discrimination arising from disability is well founded in respect of the revocation of the Claimant's transfer to the One Met team (issue 22(a)).**

2. **The complaint of failure to make reasonable adjustments is well founded in the following respects:**

   2.1 Not revoking the Claimant's transfer to the One Met team (issue 32(e)).

   2.2 Failing to allocate a different line manager to the Claimant by April 2018 as opposed to August 2018 (issue 32(g)).

3. **All of the other complaints are dismissed**

4. **Remedies will be determined on a date to be fixed by the Tribunal. The dates of 9 and 10 September 2019 indicated to the parties at the hearing are vacated.**

REASONS

1. By her claim to the Tribunal the Claimant, Miss Miller, made the following complaints:

1.1 Direct discrimination because of disability pursuant to s.13 of the Equality Act 2010 (EQA). This complaint was withdrawn.

1.2 Discrimination arising from disability pursuant to s.15 EQA.

1.3 Indirect disability discrimination pursuant to s.19 EQA.

1.4 Failure to make reasonable adjustments pursuant to s.20 and s.39(5) EQA.

1.5 Harassment related to disability contrary to s.26 and s.40 EQA.

1.6 Harassment related to sex contrary to s.26 and s.40 EQA.

1.7 Harassment related to sexual orientation contrary to s.26 and s.40 EQA.

The Issues

2. The issues were the subject of an agreed list, a copy of which is attached to these reasons as an annex. The list of issues was amended as the hearing progressed and the copy attached is the final version.

3. The position at the hearing as regards disability was that it was accepted that the Claimant was disabled at the material time, but knowledge of her disabilities was in issue.

Procedural Matters

4. The hearing was listed for ten days to commence on 13 May 2019. On that date, day one, the hearing could not commence as there were no lay members available to sit. The hearing therefore commenced on day two, 14 May, which the Tribunal took as a reading day. The evidence and submissions were concluded on day eight and the Tribunal deliberated on days nine and ten, reserving its judgment and reasons.

5. At the time of the hearing it was anticipated that the Tribunal would be available to determine any issues arising as to remedies on 9 and 10 September 2019. In the event, one of the lay members is unable to sit on those dates and it will be necessary for a fresh date to be arranged.

Evidence and Findings of Fact

6. The Tribunal heard evidence from the following witnesses:-

1. The Claimant, who is a Police Sergeant.

2. Mr Tom Burman, a Grievance Assessor.
3. Chief Superintendent David Reed.
4. Sergeant Christopher Everett.
5. Mr Ian Griffiths, Senor Deployment Manager in the Respondent's HR Department.
6. Mr Gideon Springer, a former Chief Superintendent.
7. Inspector Jon Childs.
8. Inspector Haydyn Tanner.
9. Superintendent Mark Lawrence.
10. Inspector Stephen Landers.

7. There was an agreed bundle of documents and page numbers in these reasons refer to that bundle.

8. Apart from those individuals who were called as witnesses, various other people were referred to in the course of the evidence. The Tribunal will identify these people by their initials rather than their names and hopes that it will be apparent to the parties who is being referred to at any material point.

9. The Claimant identifies herself as an openly gay female officer who joined the Metropolitan Police in May 2002. In May 2013 she suffered a serious back injury while off duty, an injury which was aggravated in November 2015 when she suffered a slipped disc. Her back condition was the subject of Occupational Health ("OH") referrals in January 2015 and January 2016.

10. Meanwhile, the Claimant secured first a role as an acting Police Sergeant and subsequently promotion to the substantive rank of Sergeant. On 2 May 2016 the Claimant was transferred to the Neighbourhoods team, based at the Empress State Building near Earls Court (known as the ESB) where she reported to Inspector Childs.

11. The Claimant's work in the Neighbourhoods team gave rise to the allegations of harassment related to sexual orientation raised in issue 16. This in turn was sub-divided into two parts. The first part, sub-paragraph (a), referred to paragraph 9 of the ET1, which contained five complaints about interactions involving Inspector Childs. Sub-paragraph (b) referred to the decision to transfer the Claimant to the Emergency Response Team during the period July to September 2017.

12. Dealing first with the allegations in paragraph 9 of the ET1, these all took place during the period 2 May 2016 to April 2017. These were the subject of an issue about time limits which the Tribunal will address in the course of its decision on the issues on the case. The Tribunal made the following findings of fact about these allegations.

> 12.1 Paragraph 9.1 concerned the first occasion on which the Claimant and Inspector Childs met, this being on 2 May 2016. The Claimant's case was that there was a discussion about diversity issues and that she said that in her view it was important for the force to have more women in senior roles. Her evidence was that Inspector Childs said that he did not see the same issues with diversity as she did, that he thought there were plenty of female and ethnic minority officers in the job, and that merit was far and away more important than any form of positive discrimination. Inspector Childs' evidence was that it was the Claimant who mentioned positive

discrimination and that he said he believed in promotion on merit. It was difficult for the Tribunal to make firm findings about exactly what was said on this occasion given the time that has elapsed since the conversation took place. We found that one or other of the Claimant or Inspector Childs mentioned positive discrimination and that at some point Inspector Childs said that he believed in promotion on merit. The Tribunal was not able to make any positive findings beyond this.

12.2 Allegation 9.2 concerned a proposed move of a gay male officer to the Emergency Response Team, in connection with which Inspector Childs was over-ruled by Chief Inspector HW with the result that the officer moved where he wanted, to a different team. Inspector Childs' evidence was that he was aware of this issue but that he did not know that the officer concerned was gay. Ultimately, the Tribunal was unable to see how this matter, whatever it was exactly that occurred, could amount to harassment of the Claimant.

12.3 The Tribunal reached a similar view about allegation 9.3. This concerned another gay female officer. She told the Claimant that she was being bullied by male officers on her team. The Claimant's case was that she encouraged the officer concerned to apply to her team, and mentioned this to Inspector Childs, who did not support the application. Again, Chief Inspector HW ruled that the officer should move to the Claimant's team. The Claimant added that subsequently the officer concerned was being rude to her, and when she complained to Inspector Childs, he was not supportive. Inspector Childs' evidence about this was that he recalled concerns about the proposed move to the Claimant's team and the Claimant saying that the officer concerned was being rude to her. He said that the Claimant tended to take interactions with her team too personally, and that he did not consider that there was a need for intervention as it would have made the Claimant appear to lack confidence.

12.4 In allegation 9.4 the Claimant stated that she registered with Inspector Childs an interest in taking up a role as a Hate Crime Officer as a side role to her existing duties, but that he dismissed this and told her to concentrate on her work based assessment, this occurring in early 2016. Inspector Childs' evidence was that he did not recall this, but that at the time the Claimant was within the first twelve months in the substantive role of Sergeant and that in those circumstances it would have been appropriate for her to focus on her work based assessment, this being a general requirement for all new Sergeants. The Tribunal found nothing unusual in the view that Inspector Childs says that he would have taken at the time and saw nothing sinister in this.

12.5 Allegation 9.5 was that Inspector Childs was particularly supportive and favourable to three officers who were all straight females. The Claimant said that one of these had taken, but failed, the Sergeants' exam in April 2017 and that Inspector Childs was angry and disappointed at this. She said that while looking towards the Claimant he said that passing the Sergeants' exam did not mean anything, and that she overheard Inspector Childs discussing the matter with another officer and saying, "oh that plan didn't work out". The Claimant continued that she felt that the other officer was being lined up to take over her role. Inspector Childs said that he remembered that a particular Police Constable he regarded as a high

performer failed the Sergeants' exam and was disappointed about this. He said that he too would have been disappointed, but would not have been angry or annoyed He did not recall the comments that the Claimant complained of and said that he was not lining this officer up for the Claimant's role. The Tribunal found as a matter of probability that Inspector Childs would not have said that passing the Sergeants' exam did not mean anything, as it clearly did mean something. Again, at this distance in time, it was difficult to determine what a comment such as "that plan didn't work out" might have meant, if indeed it was said.

13. The point will be developed more fully in the Tribunal's conclusions later in these reasons, but we found that these complaints were presented out of time and that it would not be just and equitable to extend time. In reaching that conclusion one of the factors that we have taken into account has been the difficulty in reaching findings of fact about disputed conversations and comments at this distance in time from the relevant events.

14. There also arose in relation to the Claimant's time with the Neighbourhoods Team an issue as to Inspector Childs' knowledge of her disability arising from her back condition. The Claimant's evidence was that during January and February 2017 the problems with her back worsened and were aggravated by her wearing the protective clothing known as the "met vest" which was required to be worn by all officers when on operational duties. Her evidence continued that in March 2017 she told Inspector Childs that her back was killing her and that he replied that this was probably down to her commute (at all material times the Claimant was living in Brighton and travelling by train to the various locations in London that will be referred to).

15. The Claimant spent the period 3-14 April 2017 at the Goring Rehabilitation Unit, having been referred there by her trade union representative. This unit provides rehabilitation facilities to Police Officers who can benefit from the same, regardless of whether their injuries were sustained in the course of their duties or not. The Claimant said that there was only a temporary improvement following this and that she again informed Inspector Childs about her problem, but that he did nothing about it.

16. In paragraph 10 of his witness statement Inspector Childs said that he was surprised when the Claimant went to Goring. He said that on her return he would have asked her whether she had found it beneficial. He continued that, with hindsight, he would have preferred to have considered a more formal debriefing session and/or a referral to OH when the Claimant returned from Goring, although he did not do these things. In cross-examination Inspector Childs said that the Claimant was fully operational and "from my point of view" fit. He added, however, that had he known then what he knows now about the Claimant's back condition, he would have accepted that she was disabled and that this would have been a relevant factor in any transfer decision made thereafter. In this connection, Inspector Childs said that he did not see the previous OH reports concerning the Claimant. These were of 26 January 2016 at pages 133-134 and a management advice report following that on 8 March 2016 at pages 136-137. In summary, these reports referred to the Claimant's continuing back problem and a recommendation that she should work on recuperative non-confrontational duties.

17. The Tribunal accepted Inspector Childs' evidence that he had not seen these documents at the relevant time, namely on or after the Claimant's transfer to his

team. However, Inspector Childs knew that the Claimant had gone to Goring and that doing so was usually linked to recuperative duties. As we have said, he accepted with hindsight that he should have looked into the matter further and possibly made a referral to OH.

18. The Tribunal found that Inspector Childs knew enough about the Claimant's condition to put him on enquiry as to how serious and long-standing it was. He himself said that it would have been preferable to have held a formal debrief of the Claimant on her return, and had he done this the Claimant would no doubt have informed him of the significant and long standing nature of her back problem.

19. A different issue arose in about April/May 2017 when it became apparent that the Neighbourhoods Team was to be scaled down. It was common ground that the Claimant and Inspector Childs spoke about her future and that the Claimant said that she would be interested in moving to a different team. She mentioned in this connection the Directorate of Professional Standards (DPS) and on her evidence, the One Met Model Transformation Team (One Met). These teams were based at the ESB and were non-operational in the sense that they did not involve external policing operations or face to face contact with members of the public.

20. The Claimant's evidence was that she told Inspector Childs that Chief Inspector G would support her application and that he replied sarcastically "oh it's nice to have friends in high places". Inspector Childs accepted that he might have said something like this but said that it was not meant sarcastically. This was not an issue before the Tribunal: what is more relevant is that it was apparent from this exchange that the Claimant was interested in a move away from the Neighbourhoods Team in the terms that she expressed.

21. In paragraph 31 of her witness statement the Claimant referred to events which occurred on an occasion in about May 2017. The Claimant had been staying in London overnight with a friend because she was due to start work at 7am at the ESB the following morning. On checking her phone before going to sleep she found a message from an officer in Inspector Tanner's team at Chiswick Police Station saying that she was needed to cover a team known as "Grip and Pace" the following morning. The Claimant spoke to Inspector Tanner, who said that she should get to Chiswick as soon as possible in the morning. She got there before 7am, but when she arrived Inspector Tanner told her that she was no longer required. The Claimant said this was very frustrating and that she received no apology.

22. Inspector Tanner did not dispute any of this in his evidence. Again, this was not an issue before the Tribunal, but we found that this incident, whatever the rights and wrongs of it, (and we thought it was probably a case of miscommunication) gave the Claimant the impression from that date that Inspector Tanner did not like her.

23. There was then an incident that according to the Claimant occurred on the day of the Manchester bombings, 22 May 2017, or according to Inspector Tanner on the day of the Borough Market terrorist attack, 3 June 2017. This again is not the subject of any issue in the case but is of some relevance to the subsequent relations between the Claimant and Inspector Tanner.

24. Although it was suggested in submissions that resolving the difference over

the date of this incident might assist the Tribunal in assessing the relative credibility of the Claimant and Inspector Tanner, we did not find it necessary to reach a conclusion about this. Whatever the date of the incident, there was in fact a degree of consensus about what occurred. The Tribunal considered it perfectly feasible that one party or the other could be mistaken about which terrorist incident had occurred on the day, without this affecting the overall quality of their evidence.

25. It was common ground that on the day concerned the Claimant was the Sergeant managing six Police Constables who attended a knife crime operation in Greenwich. As a consequence of the terrorist incident that day there was broadcast a general recall, meaning that officers on duty would remain so beyond the end of their shifts.

26. The Claimant's evidence was that she was unaware of the recall, perhaps because her radio was still set to the Greenwich frequency. She therefore began her journey home in the ordinary way. When she was at Victoria station she received a phone call from Inspector Tanner instructing her to return to duty, which she did. The Claimant agreed that Inspector Tanner was quite right to phone her in the circumstances.

27. Inspector Tanner's evidence was that he was the Duty Officer at the time of the recall. He said that he discovered the Claimant's six Police Constables with no supervisor and ascertained where the Claimant was. He phoned the Claimant and said that there was a conversation about whether and by whom she had been dismissed. His view was that the Claimant had left her team in the lurch by going home during a major incident.

28. As we have said, this is not an issue in the case and it is not necessary to decide the merits of the stance taking by each of the Claimant and Inspector Tanner. The Tribunal noted that no action was taken over the incident at the time. What is clear, however, is that this event had some effect on the Claimant's and Inspector Tanner's perceptions of each other. Inspector Tanner said that he was disappointed in what he saw as a failure of leadership on the Claimant's part. The Claimant in turn commented in her evidence that, as she saw it, there was a problem between her and Inspector Tanner from then on.

29. In about July 2017 Inspector Childs was told that the Senior Management Team had decided that the number of Sergeants in the Neighbourhoods Team should be reduced from five to three. One of the existing five was acting up as a Sergeant and so could revert to Police Constable. That meant that one of the remaining four had to be moved to another unit, namely the Early Response Team based at Chiswick Police Station. On 14 July 2017 Inspector Childs informed the Claimant that he had decided that she would be transferred to the Early Response Team. In cross-examination he denied the suggestion that "he wanted to get rid of her". His evidence was that it was a difficult decision and that there were reasons why each of the other three Sergeants should not be transferred. These were as follows:-

29.1 Sergeant JF was still completing his work book assessment as a newly promoted Sergeant.

29.2 Sergeant ROB had already been on the Early Response Team and had only just been transferred away from it.

29.3 Sergeant PT was adamant that he wanted to stay with the Neighbourhoods Team, while the Claimant had indicated a wish to move. Furthermore, Sergeant PT had, in Inspector Childs' view, taken a more constructive approach to feedback from the Police Constables that he managed than had the Claimant.

30. It was common ground that the Claimant was very troubled by the news of this proposed move. She said it would lengthen her commute and that Sergeant ROB lived nearer than she did to Chiswick and so should be the one to move. The Claimant's evidence was that Inspector Childs said, "you don't want to be here". Inspector Childs' evidence was that the Claimant said, "I don't want to be here anyway". The Tribunal did not find it necessary to make a precise finding about this point. We concluded that all that this indicated was that one or the other, or perhaps both, of the Claimant and Inspector Childs made reference to the Claimant's stated wish to transfer (albeit not to the Early Response Team).

31. There was an issue about Inspector Childs' reason for selecting the Claimant to transfer. The Tribunal accepted Inspector Childs' evidence about Sergeants JF and ROB. We found the reasons advanced for not transferring either of those to be convincing. This meant that the choice came down to one of the Claimant or Sergeant PT. We concluded that it was not really the case that the Claimant "wanted to leave" in a sense that meant that a move to the Early Response Team would have been welcomed by her. She made it clear that she did not want to go to that team. She had done no more than express a preference for a move to two different teams.

32. The Tribunal concluded that the main reason why Inspector Childs considered that the Claimant should be the one to move was what he perceived as her negative reaction to the feedback from her Police Constables, as opposed to Sergeant PT's perceived positive reaction to it. Inspector Childs had instituted the practice of taking 360 degrees feedback from team members in respect of supervisors such as the Claimant. He clearly regarded this as important and pointed out in his evidence that this approach to feedback had been adopted more widely since he had instituted it in his team. The Tribunal found that it was likely that Inspector Childs would have placed considerable weight on the outcome of that process. We found that Inspector Childs' decision was not influenced by the Claimant's sexual orientation in any way. We found nothing in the evidence to suggest that it was so influenced.

33. Returning to the Claimant's back condition, on 14 July 2017 at pages 141-142 Inspector Childs made a referral to OH. In this he set out what the Claimant had said about her condition and her concern that this might prohibit her posting to the Early Response Team, on the basis of the nature of the work and the shifts involved. Inspector Childs recorded that the Early Response Team shift pattern was one of two earlies, two lates and two nights, and that the Claimant believed that this would exacerbate her condition. He described that condition as a slipped disc causing sciatica and said that there was a concern that the regular night shifts and extended travelling time (at least 30 minutes more each way) and the nature of the work wearing the met vest more often (although this was not confirmed) would aggravate her condition. Inspector Childs said that in the interests of fairness the decision could not be changed without medical advice, hence the referral.

34. Meanwhile, on 28 July 2017 the Claimant appealed against her posting to the Early Response Team, addressing this to the then Borough Commander Mr Springer. She wrote this in terms of the grounds of her appeal:-

> "I have been managing a disc related back injury for the past four years, namely acute sciatica. My condition is exacerbated by extended travel time. I am appealing this decision as I am currently looking to apply for a non uniform role at ESB which will assist my health and wellbeing in my future career. Any extended travel time will add stress to my condition, I am unable to get to Chiswick for E/T, ERPT, night shifts are not advised by my physio and doctor and will add stress to my back. I have been able to manage my condition at an accessible location".

35. The Claimant then listed possible roles that she considered might be suitable. It was common ground that these were not actual vacancies, but rather descriptions of roles that she considered that she might be able to fulfil.

36. The OH advisor Ms D spoke to the Claimant over the telephone on 1 August 2017. The consultation notes at pages 144-145 have been disclosed in the current litigation but were not provided to the Respondent at the time. At point 10 (current capacity for employment/plan) Ms D wrote that the Claimant was "fit for full duties" and "would be better able to manage musculoskeletal symptoms if she is able to work within easily accessible location".

37. This observation was echoed in the report also dated 1 August 2017 that Ms D provided at pages 146-148. This referred to the Claimant's history of musculoskeletal problems and stated that she had managed her symptoms satisfactorily over recent years by regular exercise and physiotherapy as well as being able to work within an easily accessible location. Ms D referred to the proposed move and the Claimant's concerns. She then wrote the following:-

> "Fitness for work and current capabilities: in my opinion, Kirsty is fit for full duties in her current role though would benefit from easy access to her work location.
>
> "Return to work plan, fit for work: Kirsty is fit for full duties in her current role and would benefit from continued easy access to her work location.
>
> "Prognosis: A full recovery is anticipated. It is unlikely that Kirsty would be able to seek protection under the disability section of the Equality Act 2010 because of the nature and duration of his [sic] symptoms".

38. In answer to specific questions Ms D advised as follows:

> "Q1: can Kirsty work nights on a shift pattern (particularly two x two x two shift pattern? Kirsty can work her full hours and duties."
>
> "Q2: does Kirsty's travelling time need to be limited to a specific amount to prevent injury? Kirsty would be better able to manage her symptoms if she is able to work within an easily accessible work location".
>
> "Q3: can Kirsty be deployed in the current met vest without limitation? Kirsty would benefit from limited wearing of a met vest".

39. The Tribunal comments that it found this report somewhat obscure. Advice was sought in the specific context of a move to the Early Response Team in Chiswick. The reply that the Claimant was fit for full duties in her current role did not really address the relevant point, as it was not her current role that was the concern. The statement that the Claimant would benefit from continued easy access to her work location was somewhat unhelpful when a change of location was anticipated. The question about use of the met vest was not directly answered in that it asked whether the Claimant could be deployed in the current met vest without limitation, and the answer given was that she would benefit from limited wearing of it. The Tribunal considered that, to the careful reader, the advisor was expressing reservations about the Claimant's move to Chiswick without putting them in plain terms. The Claimant's evidence was that the advisor made a comment to her about not wanting to write anything that would prejudice her potential earnings, for example by suggesting that she was not fit for operational duties. It may well have been that something like this lay behind the way in which the report was written.

40. The point will be explained further later in these reasons, but the Tribunal concluded that although the complaint about the transfer was out of time, it would be just and equitable to consider it, in particular because it was so clearly documented.

41. On 15 August 2017 the Claimant met Chief Superintendent Springer to discuss her appeal. She said that she found him helpful at that meeting. Mr Springer had received and read the OH report at pages 146-147 dated 1 August 2017. Following the meeting Mr Springer sent the Claimant an email at page 269.1. In this he said that he had dismissed the appeal but stated that it was clear that she had a medical condition that needed to be managed within the shift pattern that she was to work. Mr Springer said that the Claimant would need to get the OH advisor to "properly articulate the medical issues you are suffering from and what restrictions need to be imposed on you in order to assist your recovery".

42. Mr Springer continued that, while the Claimant would be posted to the Early Response Team, he would consider a flexible working pattern to reduce the impact of the move. Mr Springer proposed that the early shift could start at 8am rather than 7am, that the Claimant would work a normal late shift, and that instead of night duties she would work a mixture of late shifts and midday to 8-9pm shifts. Mr Springer said that his would be reviewed after three months and he repeated that the OH report should accurately reflect the restrictions that were needed. On the same date the Claimant sent an email to OH at page 149 setting out these adjustments and asking for recommendations such as restricted duties, no "aid" (an operational function) and no nights. The Claimant said that even though this might result in a pay drop, she would need to go down this route for her long-term health.

43. In this email the Claimant also observed that Mr Springer had said that he might consider allowing her to leave the Borough and apply for a non-operational role on welfare medical grounds. Mr Springer's evidence was that he did not recall saying this. The Tribunal concluded that this difference was probably not very significant. Mr Springer's email referred to the Claimant's medical condition in relation to adjustments and did not mention welfare grounds. There is, however, no issue before the Tribunal about welfare grounds as opposed to disability related grounds for any adjustments, and so it was not necessary to

decide this point.

44. There was then an exchange of emails between the Claimant and Inspector Tanner, who was going to be her line manager at the Early Response Team, at pages 270-271. On 20 August 2017 Inspector Tanner wrote welcoming the Claimant to the team and saying that he was happy to work with the suggested shift pattern. He said he was aware of the OH issues around her condition. Inspector Tanner said that he required the Claimant to take a permanent role in the "GPC" (Grip and Pace) part of the team, she would not need to wear the met vest, and she would be able to move around when required so that she would not be stuck in one position for a long time. Inspector Tanner said that he understood that this was not the Claimant's first choice of role, but this was the best supervisory role that could accommodate her adjusted shift pattern. The Claimant replied pointing out that she was not on the rota for working nights because of her back condition and that Mr Springer had also recommended that she should not be put on "aid" duties because of the problems with the met vest.

45. Inspector Tanner replied, still on 20 August, referring to the OH advice which stated that the Claimant could do unrestricted shift work, was fit for full duties including nights, and could perform aid duties. He said that the role in GPC would mean that she did not have to wear the met vest at all, which would mean not performing aid duties. He said that if the OH advice changed and the Claimant was taken off nights, then she would be able to work in the GPC on late turns when the team was on nights. With regard to travel, Inspector Tanner said that he had looked at journey planner websites and that they stated that the trip to Chiswick Police Station was two minutes longer for the Claimant than the trip to West Brompton (for the ESB). To this, the Claimant wrote that she recognised that it sounded confusing but OH was sitting on the fence a bit with the referral because they were worried about her going to restricted duties and losing money. She said that she was anticipating getting a non-uniformed role permanently and was not expecting to be put in the position she was.

46. Then on 23 August 2017 the Claimant sent an email at page 274 to Chief Inspector MW, copied to Inspector Tanner in which she said this:-

> "I was hoping to speak to OH before my move to ERPTB (Inspector Tanner's team) but my OH advisor has now gone on holiday without contacting me so I am unable to get further recommendations from her on my situation at this point.
>
> "On reflection and after Inspector Tanner's proposal for me to be permanent grip and pace aligned with his team – no aid, I think I will stick with the team's shift pattern, the only amendment being a 08:00 start on E/T. Although I am not advised to do nights I will give it a go as I do not think there will be enough rest in between shifts on my proposed shift pattern.
>
> "Could this be please be subject to a review pending how I cope with the nights and once OH have contacted me etc".

47. On 24 August 2017 Inspector Tanner replied accepting what the Claimant had suggested and saying that he had already provided for no aid and no ops until 2 December.

48. Over the weekend of 26-28 August 2017, the Claimant was on duty at the

Notting Hill Carnival. These were operational duties, but ultimately the Tribunal concluded that this did not add a great deal to the overall picture of the Claimant's situation. With particular regard to the question of the met vest, it was not being suggested that the Claimant was wholly unable to wear this, but rather that doing so aggravated the pain from her back condition.

49. The Claimant then had a period on annual leave. She started at Chiswick Police Station in Inspector Tanner's team on 18 September 2017. The Claimant had meanwhile made an application to the Department of Professional Standards (DPS) and at this point was told that this would not be supported by Chief Inspector B, which meant that in practical terms her application was not going to succeed. The Claimant worked on the GRP function. This was office based and involved contact with the public over the telephone in connection with emergency responses to situations.

50. The Claimant's evidence was that she felt pressured to come in at 7am in spite of the arrangement that she did not need to start until 8am. Inspector Tanner described this as an "informal arrangement". That being so, the Tribunal found it unlikely that other members of the team were fully aware of it. We found it likely that the Claimant did indeed feel pressure to come in earlier than 8am and that she in fact tended to arrive at about 7:15am. We also accepted Inspector Tanner's evidence that he did not know about this. There was no suggestion the Claimant told him, or that he asked her how she was getting on with regard to her arrival times.

51. The Claimant's evidence in paragraphs 39-40 of her witness statement was that she found the work on GRP fast paced and pressured. While accepting this, the Tribunal considered that it was unlikely that this work was more stressful than many other aspects of policing. We found that it was probably was faster paced and more pressured than work on the Neighbourhoods Team as all of the work had a degree of urgency about it.

52. The Claimant also stated that she found herself struggling with the night shifts and with the additional journey time when she was commuting. Her estimate was that the latter amounted to about an extra thirty minutes each way, which was the estimate put forward in the OH referral that Inspector Childs had made in connection with the transfer. In the hearing there was fairly extensive discussion about how much longer it would take the Claimant to get from Brighton to Chiswick Police Station as opposed to Brighton to the ESB. Estimates varied from the Claimant's thirty minutes each way to the two minutes each way that Inspector Tanner had referred to in his email when he mentioned having consulted journey planner websites. It was not clear that the Claimant always travelled precisely the same way to the ESB as two different routes, one via Victoria and the other by Clapham Junction, were canvassed in the evidence. We found that her route probably varied according to the trains that she caught from one day to the next.

53. On the basis of the evidence advanced, but also the Tribunal members' general knowledge of travelling by public transport in the London area, we concluded that the Claimant's commute probably averaged an extra twenty minutes each way to Chiswick as opposed to the ESB if travelling via Victoria, and potentially a little more via Clapham Junction. We concluded that a thirty minute addition was probably the maximum that might have applied in the absence of unusual circumstances.

54. The Claimant also stated that during her time in this team she found Inspector Tanner unsympathetic. In paragraph 39 of her witness statement she said that he was furious about her leaving early on occasions. Inspector Tanner's evidence in cross-examination was that he was "disappointed" about this. In his witness statement he said that he was "annoyed". In paragraph 40 of her statement the Claimant said that Inspector Tanner never praised her. The Tribunal noted that he did not in his statement or evidence mention any situation where he had done so.

55. The Tribunal concluded that there was not in fact a great deal of difference between the Claimant and Inspector Tanner over these matters. The difference between someone being furious and being annoyed is a matter of degree and perception. The Tribunal considered that, in any event, Inspector Tanner was entitled to take the view that the Claimant should not have been leaving early, even if the Sergeant taking over from her had arrived early agreed to her going without seeking permission to do so. We did not consider that this meant he was being unsupportive in terms that merited complaint by the Claimant.

56. The Claimant then complained of two comments, one made by Sergeant Everett and the other by Inspector Tanner. The first of these she described as occurring on a date in October 2017 and in the presence of a number of male Police Constables. The Claimant was handing over to Sergeant Everett and in the course of doing so made a mistake about something. Her account was that Sergeant Everett said, "are you blonde and having a brain fart", Sergeant Everett said that what he said was "are you having a brain fart" and he denied making any reference to the Claimant being blonde.

57. The potential significance of the dispute about the words used is not that the Claimant is blonde (she does not have blonde hair) but rather that a reference to being blonde was said to imply something derogatory, and to be referable to the Claimant's gender, such as a stereotypical view about "a dumb blonde".

58. The Tribunal found itself unable to decide whether Sergeant Everett had included "blonde" in his observation to the Claimant, but we were unanimous in finding that this incident on any view was too minor to amount to harassment.

59. The second comment was made by Inspector Tanner on 3 October 2017 in the presence of four male Sergeants and the Claimant. Inspector Tanner agreed that he referred to a female colleague as having "an RBF". The Claimant asked what that was and he explained that it meant "resting bitch face". Inspector Tanner described this in his evidence as "a misguided moment of levity" and said what he meant by it was that "one should not judge a book by the cover". The Tribunal found the latter explanation somewhat unrealistic and found this to be a personal comment about the appearance or manner of the officer concerned. As we will explain however, we found that it did not amount to harassment of the Claimant.

60. On 12 October 2017 the Claimant completed an expression of interest form for a transfer to the One Met Transformation Team. She was then signed off sick on 17 October 2017. The statement of fitness for work at page 151 stated that she was not fit because of a stress related problem and then referred to depression as a result of work related stress and back pain due to prolapsed disc. On 18 October Inspector Tanner texted the Claimant saying that he could see that

she was shown sick on the CARMS system which recorded attendances, and he asked her whether everything was alright and whether there was anything he do to help. The Claimant replied that her sick note would be sent in by her partner and that she had been very low and depressed, all connected with work, and that she would prefer to correspond via email.

61. Inspector Tanner then completed an OH referral on 20 October 2017 at pages 153-155. In this referral Inspector Tanner referred only to the Claimant's back condition and did not mention the diagnosis of depression, although he said that the Claimant had stated that she was not currently mentally or physically fit for work. He asked what arrangements or adjustments could be made to allow the Claimant to resume her role as a Response Team Sergeant.

62. Inspector Tanner also sought to update the Claimant's CARMS records at this point. While doing so he noticed what he regarded as some irregularities dating from the time that Inspector Childs was the Claimant's manager at the ESB. Inspector Tanner then dealt with this issue in the following way.

63. On 23 October 2018 at page 290.6 Inspector Tanner emailed Inspector Childs. He referred to the irregularities that he had found and said:

> "None of these days have any notes explaining who had authorised this time off. Were you aware of them?"

64. Inspector Childs replied the following day stating:

> "In short I was aware but did not authorise it. I had to speak to Kirsty about changing her shifts to suit her at the start of the year and it was also brought up in the 360 feedback. It was discussed as evidence of poor leadership which she accepted".
>
> And then later
>
> "I can expand more if you need when I can properly check the timescales".

65. The Tribunal found that in this reply Inspector Childs was sitting on the fence. He said as little as possible, replying as we have recorded that, although he did not authorise the time off concerned, nor had he forbidden it.

66. Following this Inspector Tanner commenced a misconduct process for the Claimant by completing form MM1 at pages 290.1 to 290.3. At page 290.2 Inspector Tanner stated a rationale for not having spoken to the Claimant before raising the MM1 form. He said that the issues had been discovered after the Claimant had gone off sick. The Tribunal comments that it is true that they had been discovered by Inspector Tanner at that stage, but that as was evident from his reply, Inspector Childs had already known about them before that. These matters prompted Mr Kendall to ask Inspector Tanner what he would have done if the Claimant had not been off sick at that point. Inspector Tanner replied that if she had been at work then the matter could have been resolved face to face. In answer to the Employment Judge Inspector Tanner said that if the Claimant had been at work he would have taken some steps including completing the MM1, whereupon the matter would have come back to him, and he would then have dealt with it face to face.

67. Inspector Tanner sent the MM1 to Inspector K as another team leader to review. He then sent it to Chief Inspector Landers at page 294.6 in order to ask whether the latter thought that he was being overbearing in the action that he was taking. Following all of this, the MM1 form was reviewed by Chief Inspector W, who took the view that the matter should be dealt with under management action, stating in an email of 11 December 2017 at page 294.13 that he regarded this as a performance issue. (Management action, as the Tribunal understood, it was something falling short of a formal disciplinary step). This issue was in the event dealt with by way of management action on 8 April 2018 (page 398).

68. The Tribunal found all of this to be consistent with what we found to be Inspector Tanner's tendency to manage "by the book", whereby he would take a more formal approach to these matters than, for example, Inspector Childs. This was a difference in management style; the Tribunal does not mean to say that one approach is necessarily preferable to the other.

69. Meanwhile, the Claimant remained off sick. By 15 November 2017 Inspector Tanner had learned that the Claimant's expression of interest to join the Transformation Team had been successful. On that date he sent an email to the Claimant at pages 292-293 saying that he had observed that she had been shown as posted to the Transformation Team as from 2 January, and he then wrote this:

> "I have a question, before you went off, you sent an email enquiring about a secondment to One Met Model. Any posting off the Borough would require the approval of your Line Manager and Borough Commander. Can you please let me know if you were aware of this requirement, (and, if so, who you requested permission to apply for this role from)?"

70. In cross-examination Inspector Tanner said that he had received an email from a member of the Transformation Team stating that Line Manager approval for the expression of interest was required. His evidence was that the Borough Commander had asked for this information. He denied trying to create a barrier or cast doubt about the way the Claimant had gone through the process.

71. Also on 15 November 2017 the Claimant replied to Inspector Tanner's email saying that she was unaware of a need for prior approval for the expression of interest. On this point, Chief Superintendent Reed's evidence was that manager approval was not in fact required, although applicants were advised to inform their managers when they sent an expression of interest.

72. The Tribunal found that the general practice was that someone in the Claimant's situation should have informed her line manager. The Claimant had not done that. However, we did not find that in raising the question about this Inspector Tanner was in any way trying to "get at" the Claimant, or put an obstacle in her way. As we have said, his management style involves a preference for matters being done correctly, and formalities and practices being observed. We found that this was an example of that approach.

73. A further OH report in response to Inspector Tanner's referral of 20 October 2017 was received on 20 November 2017 at pages 156-158. This referred to the Claimant reporting that she had been diagnosed with stress, anxiety and depression by her GP, that she had been prescribed treatment and that her symptoms were gradually improving. The report also referred to the long term back condition and stated that it was the advisor's opinion that the Claimant was

not fit for response duties and that she had therefore been referred to the Medical Officer for advice regarding adjusted duties. The advisor expressed the opinion that the Claimant was likely to be classified as disabled under the Equality Act and suggested that there were at present no reasonable adjustments to be made to support the Claimant at work or help facilitate a return to work. The Tribunal understood that to mean that there was nothing to be done while the Claimant was off sick.

74. On 8 December 2017 at page 303 Inspector Tanner sent an email to Ms LP of the Transformation Team referring to the Claimant's sickness absence and the CARMS investigation. He asked who would be the Claimant's supervisor on joining Transformation (One Met) as he would like to brief that person "so that PS Miller can be supported through the process she is currently in". Ms LP referred this to Superintendent M, who sent an email on 14 December 2017 to Inspector Tanner asking for information.

75. On 18 December 2017 at pages 300-301 Inspector Tanner replied to that email, summarising the position at that point. He quoted the substance of the most recent OH report referring to a diagnosis of stress, anxiety and depression and to the Claimant's back condition. He also summarised the situation regarding the irregularities he had discovered on the CARMS system.

76. Following this, on 19 December 2017 Superintendent M sent an email to Chief Superintendent Reed and Inspector Tanner, but essentially to the former, referring to the Claimant's sickness absence and the CARMS investigation and suggesting that in the light of the latter the Claimant was not suitable for a post in the Transformation Team because officers within that were expected and trusted to work with minimal supervision, in particular in relation to their working hours. He suggested that the Claimant could be returned to Fulham and Hammersmith (ie to Chiswick) and that she might wish to reapply to the Transformation Team when her sickness absence was suitably managed and the disciplinary matter concluded.

77. Then on 31 December 2017 Inspector Tanner sent an email to Superintendent M asking whether a decision had been made regarding the Claimant's posting, saying that she had an OH meeting arranged for 2 January and that he had set up a case conference on 10 January. Although these post-dated her proposed transfer to Transformation Team, these were both before her planned return from sickness on 17 January. He said "I have put these things in place as I did not want to leave this for her new manager to organise".

78. Meanwhile, on 20 December 2017 Inspector Tanner had sent an email to the Claimant at page 312 which read as follows:

> "Sorry that I have been in touch recently [sic] I was at Goring for two weeks in November sorting out my own Back issue and December has been manic on team.
>
> I have spoken to [JF] at HR and we will be arranging a case conference in the New Year. We are yet to arrange a date, but you will receive the correct amount of notice.
>
> Your fitness to work note covers you until 17 Jan are you intending to return to work in some form on this date?

> Whilst you have been off a number of CARMS issues around your annual leave, use of rest days and booking on and off correctly have been revealed. An investigation is underway and I will keep you informed when I have more information.
>
> As a result of your sickness and the CARMS investigation, your move to Transformation may be affected. Moves between departments only take place when officers are fit for full duties, unless HR and both departments agree that the move is beneficial to everyone involved. This will be discussed at the case conference.
>
> If you have any questions about the above, or anything else, please get in touch, I am available on my mobile and on late today and nights Thursday and Friday".

79. It was put to Inspector Tanner in cross-examination that the reference in his email to his own back problem was aimed at the Claimant in the sense that he was saying that he was back at work despite having a back problem, while she was off sick. The Tribunal considered that that this was not a particularly friendly email and that it did not contain anything positive about the Claimant's situation. We found, however, that it should not be understood as targeting the Claimant in the way suggested: this was reading something into it that was not in truth there.

80. On 28 December 2017 at pages 159-161 Inspector Tanner referred the Claimant to the Respondent's Medical Officer. In the referral Inspector Tanner asked the following three questions:

1. Can PS Miller perform full duties including shift work?

2. Would a transfer to a Borough closer to PS Miller's home, to reduce her travelling, assist in her return to work?

3. Are there any other adjustments that can be made to allow PS Miller to return to full duties?

81. The Medical Officer produced a report on 2 January 2018 at pages 162-163. This read in full as follows:

"Background - Kirsty has been through a rough time. She has a chronic back problem which was picked up during physical exercise. It now gives her intermittent acute exacerbations and the background of constant pain at varying levels of severity. In addition, it is clear that she is undergoing a stress reaction. From the history, it is safe to conclude that this is work related. Given the present advice on this condition, I recommend that the HSEs guidelines on a stress risk assessment and associated management is consulted and used.

"It will take some time and sympathetic and supportive action in the workplace to see her through this period and get her back to duty.

"Fitness for Work and Current Capabilities - Currently, she is unfit for duty. I think this will be temporary given the right support. When it comes time for a return to work, it may well be better to consider her for a redeployment to new location and a new job.

"Plan - Re-refer in three months. Not fit for work. Back to GP. Refer for extra treatment.

82. There was then email correspondence between Chief Superintendent Reed, Superintendent M, and others. At page 296 on 3 January 2018 Chief Superintendent Reed observed that normal policy was not to accept anyone on a transfer while they were sick and that the Claimant's transfer date should therefore be postponed at least until after the case conference, when there could be certainty that she would be returning to full duties. He said that to do otherwise added to the team's management workload. He also asked for an update on the disciplinary matter. This was passed on to HR with a repeat of the request that the Claimant's posting date should be deferred until the case conference and confirmation that she would be returning to full duties. This was considered by Mr Griffiths who wrote also on 3 January 2018 at page 295 that in the circumstances the posting would be rescinded rather than deferred and that the Claimant would remain at Fulham and Hammersmith. He concluded:

> "Depending on return from sickness, outcome of disciplinary, and agreement from Transformation then the posting could be approved at a future date, but at this time it will be cancelled".

83. Mr Griffiths' evidence about this was that there was no written policy that said that officers would not be transferred when on sick leave and that every case is assessed on its own merits. He said that in practice, however, it was generally not practicable to transfer an officer while on long term sick leave. He said that transfers could be deferred rather than revoked when there was a known return date, and he agreed that the fact that the Claimant was on sick leave played a material part in the decision to revoke the transfer. The Tribunal accepted Mr Griffiths' evidence on this point: it was understandable that there would be a general practice of not transferring an officer who was on long term sick leave without a known return date. The transferee team, which of necessity had a vacancy for a transfer to be available, would not know when the officer would be able to take up their duties.

84. This was then communicated to Inspector Tanner, who on 6 January 2018 at page 304 asked Superintendent M whether the Claimant would be able to reapply for a posting to the Transformation Team once the CARMS issues had been resolved and she was back to full duties. He said that he was asking this as he would be updating her at the 10 January case conference. Superintendent M replied that the Claimant would be welcome to reapply once back to full duties and the CARMS investigation had been resolved.

85. A case conference was arranged for 10 January 2018 but postponed because the Claimant was not well enough to attend. Meanwhile, on 9 January 2018 at page 333 Inspector Tanner communicated this postponement and acknowledged receipt of a doctor's certificate covering the Claimant's absence up to 18 February of that year. Inspector Tanner wrote as follows:

> "I have to inform you that your transfer to Met Transformation has been cancelled and you are remaining in FH Borough, under my line management. I have spoken to Superintendent [M] from Met Transformation and he says that you will be able to reapply once you are back to full duties and the CARMS issue has been resolved".

86. The Claimant stated in her evidence that she believed that Inspector Tanner had made the decision to cancel her transfer. The Tribunal could understand why, at this point, she believed that, as he communicated the cancellation to her and did not refer to the decision being made by anyone else. It was clear, however, to the Tribunal that Inspector Tanner did not make the decision. It was made by Mr Griffiths, as explained above.

87. On 23 January 2018 at page 337 Inspector Tanner sent an email to the Claimant expressing the hope that she would be able to attend the adjourned case conference the following day. The Claimant replied saying that she would not be able to do so. On the same date the Claimant lodged a grievance.

88. The case conference then proceeded on 24 January, conducted by Inspector Tanner. There was no attendance by the Claimant or a representative on her behalf. There were minutes of this meeting at pages 343-344. These recorded among other matters the following:

> "… it is clear that the advice is that PS Miller is not fit for full duties. The purpose of this meeting is to identify a method to get PS Miller back to work, en route to full duties. It is to consider suitable adjustments around time and number of days at work, to provide a progressive route to full duties".

89. The minutes continued that it was proposed that there should be a further case conference upon expiry of the current fit note, this proposal coming from JF. Inspector Tanner referred to the proposed transfer to One Met and stated that this had been revoked temporarily due to the Claimant being on sick leave. He said that it had been confirmed that she would be able to reapply once she had returned to full duties.

90. The Tribunal concluded that all of this meant that, for the situation to move forward, the Claimant had to return to the GRP team at Fulham and Hammersmith. Inspector Tanner sent a letter also of 24 January 2018 at pages 341-342 summarising what had been said at the case conference, stating that it was intended to arrange a meeting under the unsatisfactory attendance process, and that a further case conference would be held on 22 February 2018.

91. A new Police Federation Representative, Mr DL, was appointed to represent the Claimant. On 2 February 2018 DL sent an email to various people, including Inspector Tanner, in which he made a number of points. One of these was that currently the Claimant did not have a tablet device and he asked that the relevant person should look into this.

92. The further case conference took place on 22 February 2018 and DL attended on behalf of the Claimant, who was not present. There were minutes at pages 384-387. Some of the points recorded were as follows: First, DL said that the Claimant would return to work but with the following conditions:

1. A new Line Manager.
2. Adjusted duties.
3. A transfer to Croydon Police Station.
4. Working from home with a laptop with a phased return to a Police Station nearby (meaning nearing to her home than Fulham and Hammersmith).

Inspector Tanner said that there could be some compromises that he would have to clear with his Senior Leadership Team. With regard to the specific points, he commented as follows:

1. There could be a change whereby he remained as Line Manager but any communication passed through an intermediary.
2. The Claimant could be re-referred to OH regarding adjusted duties.
3. Any transfer request could be made when the Claimant returned to work, but would be unlikely to take place before she returned to full duties.
4. There were no viable roles at Fulham and Hammersmith that were suitable for home working.

93. DL stated that the Claimant was adamant that the points that she had raised were non-negotiable and that she would not return to work until they were sorted. He also asked why the Claimant had not been issued with a tablet computer. Inspector Tanner said that these had not yet been issued to Fulham and Hammersmith officers, although this was likely to take place soon. He said that on the Claimant's return to duty she would return to a role in GRP.

94. Then on 2 March 2018 at pages 387.1 and 387.2 Inspector Tanner sent a letter to the Claimant stating that her failure to attend the case conferences on 24 January and 22 February contravened the attendance management policy and standard operating procedures, and that he required an improvement in her attendance. He said that this would involve either a return to full duties or engaging with him to arrange a recuperative duty plan, or to attend the next case conference on 20 April. Inspector Tanner stated that this constituted management action.

95. In paragraph 46 of his witness statement Inspector Tanner said that this letter was based on HR advice that he received at the time. Inspector Tanner continued that he subsequently received different advice to the effect that management action was not appropriate, following which on 24 May 2018 at page 406 he wrote to the Claimant rescinding the management action and apologising for the error. When challenged about this in his oral evidence Inspector Tanner said that the first letter had been sent on the advice of Ms JF of HR.

96. The Tribunal noted that there was an email at page 402 on 23 May 2018 from Inspector Tanner to DL in which he said that the management action had been rescinded "on further HR advice". This was consistent with what Inspector Tanner said in his evidence about acting on HR advice in this issue. The Tribunal accepted that this was the reason why he sent the management action letter in the first place and why he subsequently rescinded it.

97. Meanwhile, on 9 March 2018 the Claimant presented her claim to the Tribunal.

98. On 8 April 2018 at page 396 Inspector Tanner sent an email to the Claimant pointing out that her current fitness for work note expired on 14 April and enquiring about her intentions. He asked whether she thought that she would be fit enough to return to work or whether her sickness period would be extended. He summarised what would be needed in either case.

99. There was a further case conference on 1 June 2018 with minutes of this at pages 415-417. This was chaired by Inspector Tanner and attended by DL and the HR Advisor JF. One point that arose was that the Claimant was requesting to be issued with a laptop or digital device so that she could work remotely. Inspector Tanner said that this could not be given to her while she was off sick and that she would need to return to work first. He explained that he would not want a device to be issued to her while she was signed off as not fit to work as he would see this as going against doctors' advice and would risk adding pressure to her. Inspector Tanner said that when the Claimant returned to work she would be issued with a tablet as all Sergeants had been. There was further discussion about how the Clamant might return to work.

100. There was a further OH referral on 18 June 2018 at pages 171-173. In this referral Inspector Tanner gave the history and said that the Claimant had stated that she could not return to work with himself as her line manager. He continued that he had approached the Senior Leadership Team to organise a different line manager and said that other roles and work locations within Kensington and Chelsea or Westminster Boroughs were being considered. He recorded that the Claimant had submitted a grievance and commenced the Employment Tribunal process regarding her complaints in the matter. Inspector Tanner asked the following questions:

1. If an alternative Line Manager were to be identified to support the Claimant, was there any reason why she should not resume under a recuperative duties programme.
2. What adjustments were required to allow the Claimant to return to work.
3. Would the Claimant be fit for full duties at the end of any recuperative duties programme, or would she need to be place on adjusted duties (the latter referring to a permanent adjustment as opposed to a temporary one under recuperative duties).

101. In the event the OH report that was produced following a consultation on 27 June 2018 added little to the situation as it already was.

102. On 23 July 2018 Chief Inspector Landers was identified as a possible interim line manager for the Claimant: he agreed to take up this role, as he put it in an email at page 462.1 "both from the welfare perspective and with regard to a suitable role." He took on the role in August 2018, and first made contact with the Claimant on 20 August.

103. The Claimant's grievance was not given a great deal of prominence in the hearing before the Tribunal. Mr Burman produced a report on 15 October 2018. He found against the Claimant's complaints of harassment and discrimination, but made 3 recommendations for action, namely:

103.1 Inspector Tanner's "RBF" comment should be investigated.

103.2 Given the latest OH report, there should be discussion of re-deploying the Claimant.

103.3 Feedback should be given to Sergeant Everett regarding his "brain fart" comment.

104. The Claimant appealed against the grievance outcome, but this appeal was rejected on the basis that it did not meet the relevant criteria in the Grievance Policy.

105. In the event, Inspector Tanner and Sergeant Everettt received Management Action for the comments made by them.

106. There was also an issue about a grievance raised by Police Constable H against the Claimant and Inspector Childs. This, also, was not explored in great detail in the course of the hearing. As identified by Mr Korn in his submissions, the history of this grievance is somewhat obscure. PC H's grievance, at pages 372-380, is undated, but refers to events between May 2016 and April 2017. In an email of 1 March 2018 to DL, Sergeant AJ stated that this grievance had been raised in November 2017 and that he had met PC H on 28 December 2017. The Claimant took an email of 6 April 2018 from Chief Inspector FS at pages 388-9 as meaning that this officer had resolved the grievance informally, although a careful reading of the email indicates that this cannot have been the case as Chief Inspector FS was writing about an earlier interaction when PC H failed to come back to him with a formal grievance. There were then at pages 608-610 minutes of a meeting with Inspector Childs regarding PC H's grievance which took place on 30 October 2018.

107. The Claimant's case, as put in her evidence in cross-examination, was that "one of the senior management, I don't know who, re-opened this grievance". Her case, as put in submissions by Mr Korn, was that pursuing this grievance while she was off sick with depression amounted to harassment.

108. The Tribunal noted that PC H's grievance was raised at a time when the Claimant was off sick, but related to the earlier period when she was working in Inspector Childs' team. We also noted that the grievance named the latter as well as the Claimant. There was nothing in the evidence to indicate why the grievance was being investigated in October 2018, or why (seemingly) no action was taken on it between December 2017 and that date.

109. These matters did not, however, lead the Tribunal to infer that the grievance had been "revived" for reasons connected with the Claimant's sickness absence. There were other plausible possibilities: it might have been overlooked; others might have made the same mistake as the Claimant and thought that it had been resolved informally by Chief Inspector FS; and then PC H might have asked why nothing was happening. There was no evidence that any member of senior management had re-opened the grievance, nor any evidence that its re-appearance was connected with her sickness absence. What was done about it at this stage (i.e. interviewing Inspector Childs) was not consistent with its being used adversely towards the Claimant: she was not involved at all.

110. Finally, as regards the chronology of events, a further OH assessment of 11 December 2018 recorded that the Claimant was now seeking ill-health retirement.

<u>The Applicable Law and Conclusions</u>

111. The Tribunal will give its conclusions by reference to the list of issues and the numbered issues therein. Issue number one describes the claims and needs no further comment.

112. With regard to the burden of proof, section 136 of the Equality Act 2010 provides as follows:

> *(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.*

113. In **Ayodele v Citylink Limited [2018] ICR 748** the Court of Appeal affirmed the approach to the burden of proof in set out in previous authorities, including **Igen v Wong**, **Madarassy v Nomura** and **Hewage v Grampian Health Board**. These authorities envisage a two-stage process. At the first stage, the Tribunal considers what the facts are in order to see if a prima facie case of discrimination has been established. As stated by the Court of Appeal in **Madarassy**, for this to be so there must be something beyond a difference in treatment and a difference in protected characteristic, although this "something else" may not in itself be very significant. If the facts are such that the Tribunal could properly conclude that discrimination occurred, the burden is on the Respondent to prove that it did not. In **Hewage** the Supreme Court noted that there would be cases in which the Tribunal could make direct findings about the reason why certain events occurred, which need not involve consideration of the burden of proof by way of the two-stage process.

114. Issues 2 to 5 concern time limits. It was common ground that any act or omission that occurred prior to 25 October 2017 was out of time. In these reasons, the Tribunal will only address issues as to time limits to the limited extent necessary in the light of our conclusions on liability.

Disability

115. The list of issues, at issues 6 and 7, posed the questions whether the Respondent had actual or constructive knowledge that the Claimant suffered from a chronic back condition and/or depression, and if so, from what date? As stated by Mr Korn in his written submissions, the correct question (combining the two), is from what date the Respondent knew or ought to have known that the Claimant was disabled by reason of either or both conditions. This reflects paragraph 20 of Schedule 8 to the Equality Act, which provides as follows:

> *(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know –*
> *(a)……..*
> *(b)…..that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."*

116. In applying this test, the Tribunal is not concerned with whether the Respondent was aware of the legal definition of disability, but with whether there was actual or constructive knowledge of the matters which form the factual basis of the disability in question.

117. This in turn requires consideration of the definition of disability in section 6 of the Equality Act, as follows:

(1) A person (P) has a disability if –

(a) P has a physical or mental impairment, and

(b) The impairment has a substantial and long-term effect on P's ability to carry out normal day-to-day activities.

118. A "substantial" effect is one that is more than minor or trivial (section 212(1) of the Equality Act). An effect is "long term" if it has lasted for at least 12 months; is likely to last for at least 12 months; or is likely to last for the rest of the life of the person affected (paragraph 2(1) of Schedule 1 to the Equality Act).

119. Dealing first with the Claimant's back condition, Ms Tuck submitted that Inspector Childs did not have actual or constructive knowledge of this giving rise to a disability at any time during his interactions with the Claimant. She further submitted that Inspector Tanner had knowledge that the Claimant was likely to be disabled by reason of this condition from receipt of the OH report of 20 November 2017. Mr Korn submitted that the Claimant was already disabled by the time that she arrived at the Neighbourhoods Team in April 2016, and that this would have been confirmed by one or more OH referrals; but that in any event Inspector Childs knew or ought to have known that the Claimant was disabled by this condition by the date of his first relevant act, namely the decision to transfer her to Chiswick in July 2017.

120. The Tribunal has already found that by the time the Claimant returned from her stay at the Goring Rehabilitation Unit in April 2017, Inspector Childs knew enough about her condition to put him on enquiry as to how serious and long-standing it was. In evidence Inspector Childs said that, had he known then what he knows now, he would have accepted that the Claimant was disabled. The Tribunal found this to be a realistic view. The Claimant's condition had been present since 2013 and had worsened in January / February 2017. The Tribunal found that, by July 2017, the Claimant was disabled. The effect of her condition was substantial on normal day to day activities such as walking, standing for prolonged periods and travel by train (paragraphs 8, 15 and 17 of her witness statement). The effect was long term as she had experienced significant symptoms since November 2015 (paragraph 8 of her witness statement). These are the matters that Inspector Childs would have learned about had he enquired.

121. The Tribunal therefore found that Inspector Childs had constructive knowledge of the disability caused by the Claimant's back condition from at least July 2017. It follows that the Respondent has this knowledge, as once Inspector Childs should have known of the disability, the position is that all other relevant individuals within the Respondent's management team should have known, as Inspector Childs should have informed them.

122. With regard to the Claimant's depression, Ms Tuck submitted that the first diagnosis of a mental impairment known to the Respondent was contained in the OH report of 20 November 2017, and that the Respondent could not have known that the Claimant was disabled by reason of this condition at this stage. Mr Korn submitted that as at 17 October 2017 the Claimant was signed off sick with depression resulting from work-related stress, as well as her back condition. Mr Korn further submitted that Inspector Tanner had been unwilling to accept that diagnosis at the time and (by implication) had he accepted it, he would have made further enquiries and discovered its serious and long-term nature.

123. The Tribunal accepted the Claimant's evidence that her depression had a

substantial adverse effect on her ability to carry out normal day to day activities, such as speaking by telephone (paragraph 48 of her witness statement) and attending meetings (paragraph 59). We concluded that the Medical Officer's report of 2 January 2018 gave Inspector Tanner (and therefore the Respondent) the means of knowing that the Claimant's condition was likely to continue for at least 12 months. The diagnosis had by then been in place for over 3 months; the Medical Officer stated that it would take "some time" to get through this period; and the next referral was to be in 3 months' time. These matters would not, however, have been apparent to Inspector Tanner before this point, nor would the evidence available before this point have put him on notice as to the likely duration of the condition, or as to a need to enquire about whether that might be more than 12 months.

124. The Tribunal therefore concluded that Inspector Tanner (and therefore the Respondent) had constructive knowledge of the Claimant's disability by reason of her depression as from 2 January 2018.

Harassment related to disability

125. Section 26 of the Equality Act provides as follows:

> *(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.*
>
> *(4) In deciding whether conduct has the purpose or 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.*

126. Issue 8 posed the question of fact as to whether the various acts complained of by the Claimant occurred. There was no suggestion that these acts were other than unwanted by the Claimant. Issues 9 and 10 concerned whether the conduct concerned had the prohibited purpose or effect. There is, however, a further issue to be decided, namely whether such conduct as occurred was related to disability. The Tribunal has addressed that as part of issue 8.

127. Issue 8(a) concerned Inspector Tanner's enquiry of 15 November 2017 as to whether the Claimant had requested permission from anyone to seek a transfer to One Met Model. This act occurred: however the Tribunal's finding that it was no more than an example of Inspector Tanner's management style, and did not involve anything in the way of "getting at" the Claimant, means that it was not related to disability.

128. Issue 8(b) also concerns conduct which undoubtedly occurred, being Inspector Tanner's reference in his email of 20 December 2017 to his own "Back issue". The Tribunal has found that this was not targeting the Claimant in any way, and should not be read as meaning anything more than what is says on its face. The Tribunal found, however, that it was related to the Claimant's disability,

as it is unlikely that Inspector Tanner would have made the comment had the Claimant not had a back condition.

129. Issue 8(c) concerns Inspector Tanner's initiation of a formal investigation of the CARMS irregularities. This allegation was made out on the facts, to the extent that Inspector Tanner drafted an MM1 and took advice on it, rather than discussing the matter with the Claimant in the first instance. The Tribunal has found this also to be consistent with Inspector Tanner's management style. We found this to be the complete explanation why he acted in the way that he did, rather than by initiating an informal discussion. This was not, therefore, related to disability.

130. Issue 8(d) concerns the revocation of the Claimant's transfer to One Met Model, and the communication of that revocation by Inspector Tanner. This was related to disability, as part of the reason for the revocation was the Claimant's sickness absence, which arose from her disability.

131. So far as the facts of issue 8(e) are concerned, it is not quite correct that the Claimant was required to attend the case conference on 24 January 2018: it would perhaps be more accurate to say that it proceeded without her. In any event, this was related to disability, as the Claimant's absence (on sick leave) arose from her disability.

132. Issue 8(f) concerns Inspector Tanner issuing informal management action in response to the Claimant's non-attendance on 24 January 2018. The Tribunal has accepted Inspector Tanner's evidence as to why he did this: we found that this was related to the Claimant's disability in that, although he acted on incorrect advice, the reason for issuing informal management action was the Claimant's non-attendance, which was itself related to her disability.

133. Issue 8(g) concerns the grievance raised by PC H. As the Tribunal has observed, the evidence about this is somewhat obscure. The conclusions that the Tribunal has reached, however, exclude any actions with regard to this being related to the Claimant's disability.

134. The Tribunal then turned to issue 9, and asked itself whether the conduct identified in issues 8(b), (d), (e) and (if applicable) (f) had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment or effect. (The Tribunal will refer to these with the shorter expression "having the purpose or effect of harassing the Claimant".)

135. The Tribunal has found that Inspector Tanner's comment about his own "back issue" ((b)) was not aimed at the Claimant. It was not, therefore, made with the purpose of harassing her. Whatever was the Claimant's perception of the comment, the Tribunal found that it was not reasonable for it to have the effect of harassing her: as we have said, this would be reading something into the comment that is not, in reality, there to be found.

136. In relation to the revocation of the transfer ((d)), the Tribunal has accepted Mr Griffiths' evidence as to why this was done. This effectively excludes this being done for the purpose of harassing the Claimant. So far as the effect of this is concerned, whatever the Claimant's perception of this may have been, the Tribunal found that it was not reasonable for this to have the effect of harassing

her. There is a separate issue about making adjustments, which will be explained later in these reasons, but as a general point the Tribunal has found it understandable that the Respondent would have a practice of not transferring officers while they are on indefinite sick leave. It would not be reasonable for the operation of a reasonable practice to have the effect of harassing the Claimant.

137. As to the manner of communication of the revocation, Inspector Tanner's email was factual and conveyed the point that the Claimant would be able to re-apply once she was back to full duties and the CARMS issues had been resolved. The Tribunal could not see any reason for the Claimant to take exception to the way in which Inspector Tanner informed her of these matters. Indeed, the main point made by the Claimant in her evidence about this aspect was that she had believed that it was Inspector Tanner who had made the decision, and it seemed to the Tribunal that this may have been the real basis for her complaint. The Tribunal found nothing to suggest that Inspector Tanner wrote in the way that he did with the purpose of harassing the Claimant. Nor, whatever, the Claimant's perception, was it reasonable for a straightforward communication of this form to have the effect of harassing the Claimant.

138. The Tribunal found no reason to believe that the decision to proceed with the case conference on 24 January 2018 ((e)) was taken with the purpose of harassing the Claimant. We found that the purpose of going ahead was, as stated in the minutes, was to identify a method of getting the Claimant back to work.

139. Whatever may have been the Claimant's perception, the Tribunal concluded that it was not reasonable for this decision to have the effect of harassing her. The Claimant might understandably have been displeased with the decision to proceed, but she had only indicated that she would not be attending on the day before the meeting. This was not a disciplinary process, but a meeting intended to facilitate the Claimant's return to work. The minutes state that Inspector Tanner wished to have a discussion with the Claimant, or her Federation representative, and that this could be by phone, email or personal contact. None of this could reasonably have the effect of harassing the Claimant.

140. The issuing in error of informal management action ((f)) was unfortunate. In assessing this, however, the Tribunal considered that it was necessary to have regard to the whole transaction, including the rescinding of the management action and the apology given by Inspector Tanner. The Tribunal has accepted Inspector Tanner's evidence about this issue: he gave the management action because he was advised that this was the appropriate course. The Tribunal found that he did not do so with the purpose of harassing the Claimant. Had the matter stopped there, the Claimant might well have reasonably perceived this as having the effect of harassing her. The Tribunal found, however, that it was not reasonable for this to have had the effect of harassing the Claimant given the retraction and apology.

<u>Harassment related to sex</u>

141. Subject to the Tribunal's uncertainty as to whether the word "blonde" was used, the factual basis of issue 11(a) (Sergeant Everett's "brain fart" remark) has been established. Issue 14 asks whether the conduct concerned was of a sexual nature: it seemed to the Tribunal that this was incorrectly drafted and that, given the nature of the conduct relied on, the question should be whether it was related

to sex. If the "blonde" reference was made, then the Tribunal would find that the remark was related to sex, given that the stereotypical reference to "blondes" is not usually applied to men.

142. The Tribunal was satisfied that Sergeant Everett did not make the remark with the purpose of harassing the Claimant. We accepted that it was an expression that he used from time to time when individuals (including himself) made minor mistakes.

143. As to the effect of the remark, the Tribunal found that, whatever the Claimant's perception of this, it was not reasonable for it to have the effect of harassing her. We found that it was a fairly innocuous comment that did not reach the threshold of harassment.

144. There was no dispute that Inspector Tanner made the comments that were the subject of issue 11(b). Although the word "bitch" can, in particular contexts, be applied to men as well as women, the word is gender-specific. We found that Inspector Tanner's words were related to sex (although not, as above conduct of a sexual nature).

145. The Tribunal considered that it was inappropriate for Inspector Tanner to use this word in relation to a female officer under his command. We found, however, that this comment was not in any way directed at the Claimant, and was not said with the purpose of harassing her. The Tribunal also found that, however the Claimant perceived the comment, it was not reasonable for it to have the effect of harassing her. The comment was not aimed at her and, at the time, it must have been apparent to her that it was not. It was an (unkind) comment about someone else.

<u>Harassment relate to sexual orientation</u>

146. Issue 16(a) concerned the interactions between the Claimant and Inspector Childs listed in paragraph 9 of the ET1. There was an issue as to time in relation to these complaints and the one that formed issue 16(b). It was common ground that the 16(a) complaints had been brought outside the primary time limit of 3 months from the date on which the act concerned occurred. It was also apparent that, even if they formed part of conduct extending over a period including the issue 16(b) complaint, they would still be out of time. The issue, therefore, was whether it was just and equitable for the Tribunal to consider these complaints under section 123(2)(b) of the Equality Act.

147. The Tribunal has already referred to the difficulty in resolving the factual issues about these allegations. They concerned oral exchanges, the details of which were disputed, and matters of impression such as whether Inspector Childs was particularly supportive of individual officers. The Tribunal concluded that these difficulties meant that it was not just and equitable for it to consider these allegations. The Claimant did not give any evidence about why she did not bring a claim within time, although in submissions Mr Korn suggested that she was, or might have been, awaiting the outcome of the grievance. (That point would have been of limited assistance in any event, as the grievance was raised in January 2018, by which point these allegations were already out of time). The Tribunal considered that trying to resolve these issues in the circumstances would not be just and equitable because the passage of time had adversely affected the Tribunal's ability to reach fair conclusions on the evidence.

148. The Tribunal did not, therefore, have jurisdiction to consider the complaints under issue 16(a). We found the position to be different in respect of issue 16(b), which concerned the transfer to Chiswick.

149. This issue concerned the reasons for a decision, rather than differing accounts of conversations or interactions. It was not suggested on the Respondent's behalf that Inspector Childs or Mr Springer had any difficulty recalling the relevant matters or giving an account of their reasons for their decisions. The Tribunal therefore decided that it was just and equitable to consider this complaint.

150. The Tribunal has already stated its finding that Inspector Childs' decision was not influenced by the Claimant's sexual orientation in any way, and has made positive findings as to the reason why he decided that the Claimant should be transferred. Alternatively if the **Madarassy** approach is to be taken, the facts were not such that, in the absence of an explanation, the Tribunal could properly find that the decision related to the Claimant's sexual orientation in any way. There was nothing in the evidence beyond the fact of the decision, and the fact of the Claimant's sexual orientation. Although Mr Korn suggested that the Claimant could rely the matters in issue 16(a) as background to 16(b), we have not been able to make findings that would provide the "something more" that is required. If the Tribunal is wrong in all of that, our primary finding means that we have found that the Respondent has proved that the decision was not related to the Claimant's sexual orientation.

151. The Tribunal did not understand the Claimant to be complaining about Mr Springer's act of not upholding her appeal. If she was, we again found that there was nothing in the facts that could properly provide the basis for a finding that Mr Springer's decision was related to the Claimant's sexual orientation.

Direct discrimination because of disability

152. This complaint (issues 19 and 20) was withdrawn and is dismissed for this reason.

Discrimination arising from disability

153. Section 15 of the Equality Act provides as follows:

> *(1) A person (A) discriminates against a disabled person (B) if –*
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

154. In **Pnaiser v NHS England [2016] IRLR 170** at paragraph 31(b) of the judgment of the Employment Appeal Tribunal, Simler J stated that:

> "The "something" that causes the unfavourable treatment need not be the

main or sole reason, but have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason or cause for it."

155. The Claimant relied on three instances of unfavourable treatment, set out in issues 22 (a) to (c). There was no dispute that each of these events occurred in the terms alleged.

156. The "something" arising in consequence of the Claimant's disability was, in each case, her being on sick leave and/or not being able to perform full duties. There was no dispute that these applied, and arose in consequence of the Claimant's disability.

157. With regard to issue 22(a), the Tribunal found that the revocation of the Claimant's transfer to One Met was because of her being on sick leave. Mr Griffiths' evidence confirmed that the fact that the Claimant was on sick leave played a material part in in the decision to revoke the transfer.

158. Issue 22(b) concerned Inspector Tanner's investigation of the Claimant's CARMS activity. The Tribunal has already observed that Inspector Tanner's approach to this matter was consistent with his "by the book" management style. We found that this was the complete explanation for the approach that he took. Although Inspector Tanner stated that, had the Claimant been at work at the material time, he could have resolved the matter face-to-face, it was evident from his answer to the Employment Judge that he meant that this could have occurred after he had instigated the formal process with the MM1 form. The Tribunal concluded that, while the process might have taken a slightly different form had the Claimant not been on sick leave, the "treatment" of being the subject of a formal process did not occur because she was on sick leave. We found that the fact the Claimant was on sick leave did not influence Inspector Tanner's approach: he would have taken a formal approach had the Claimant been at work.

159. Issue 22(c) concerned the management action issued by Inspector Tanner on 24 January 2018 (and subsequently rescinded on receipt of further advice). The Tribunal decided that this treatment did not occur because the Claimant was on sick leave. The immediate cause of this treatment was an error on the part of HR. That error was connected with the Claimant's disability, in that it would not have occurred if the Claimant had attended the case conferences on 24 January and 22 February 2018; and her non-attendance was connected with her disability.

160. The Tribunal had in mind Simler J's further observations in paragraph 31(d) of **Pnaiser**, that the causal link between something that causes unfavourable treatment and the disability may include more than one link. Simler J went on to say that "it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability." In the present case, where there are 3 "links" and one of them was an error, we found that the test was not satisfied.

161. The Tribunal then turned to issue 23, which asks whether the treatment concerned was a proportionate means of achieving a legitimate aim. We reminded ourselves that, under section 15(1)(b), the burden is on the Respondent to prove this. Although, given the findings made above, the issue only arises on issue 22(a), we have additionally determined it in respect of the other two points in case we are wrong about those.

162. We found that, in each case, there was a legitimate aim, namely the efficient running of the service. Assessing whether the treatment concerned was a proportionate means of achieving the aim involves balancing the importance of the aim to the Respondent, and the effect of the treatment on the Claimant.

163. With regard to (a), the Tribunal reminded itself of what it has already said about it being undesirable for vacancies to be left unfilled indefinitely and for officers to be "lost in the system". That said, vacancies could clearly be left unfilled for some time – for example, where an officer was on sick leave but with a return date. Chief Superintendent Reed had thought that a transfer could be deferred in the circumstances. The Medical Officer had suggested that, when it came to a return to work, it might be better to consider re-deploying the Claimant to a new location and a new job. The Tribunal considered that removing the prospect of a return to work in a new position, and leaving the Claimant to return to one that she found problematical, was likely to reduce the prospects of a return.

164. Having weighed up these factors, the Tribunal concluded that it was not proportionate to revoke the transfer at this stage. (This is not to say that the position should have been left open indefinitely, but rather that the transfer should not have been revoked when it was).

165. The complaint of discrimination arising from disability therefore succeeded in this respect.

166. Were it necessary to decide it, the Tribunal would find that Inspector Tanner's actions in relation to the CARMS issues ((b)) were proportionate. These had an effect on the Claimant, in that a formal process was undertaken, which no doubt would have caused her some concern. There were, nonetheless, some discrepancies that required some investigation and resolution. The Tribunal did not consider that Inspector Tanner's formal approach was disproportionate.

167. It is, perhaps, somewhat artificial to address something that has occurred in error ((c)) in terms of justification or proportionality. If it were necessary to do so, however, the Tribunal would find that Inspector Tanner's actions were proportionate, taking into account the retraction and apology, as described above.

Indirect disability discrimination

168. Section 19 of the Equality Act provides as follows:

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

169. The PCPs relied on were set out in issue 24. PCP's (a) to (c) related to the transfer to Chiswick in July/August 2017; PCP (d) was of general application and PCP (e) concerned the revocation of the transfer to One Met. The Claimant withdrew reliance on PCPs (f), (g) and (h).

170. Issues 24 to 30 set out the various elements of the statutory test under section 19. The Tribunal found it convenient to determine the various issues, where appropriate, by reference to each of the five live PCPs in turn.

171. The Tribunal considered that, with reference to PCPs (a) to (c), the disability in issue was that arising from the Claimant's back condition, given that her depression was first diagnosed in October 2017.

172. PCP (a) was put as "not considering and/or not giving due consideration to an officer's place of residence and length of commute when posting to a different workplace." The Tribunal found this PCP somewhat nebulous. The Claimant told Inspector Childs that the proposed move would lengthen her commute: this did not convince him that he should make a different decision, but this is not necessarily the same as his not considering the point or not giving it "due consideration". By the time of the appeal decision, Mr Gibson had seen the OH report which referred, among other things, to travel time. Although Mr Gibson upheld the decision to transfer the Claimant, there is no reason to think that he did not consider, or did not give due consideration, to this aspect. Indeed, the Claimant had specifically referred to it in her appeal. Mr Gibson made or offered adjustments to the shifts that the Claimant was to work.

173. All of this led the Tribunal to conclude that the Respondent did not in fact apply this PCP. Even if it did, there was (as Ms Tuck submitted) no evidence of a group disadvantage as required by section 19(2)(b). Beyond this, the Tribunal found that, if this PCP was applied, there was no particular disadvantage to the Claimant. Although the Tribunal accepted the proposition that, if a journey of a certain length caused the Claimant to suffer symptoms from her back condition, a longer journey was likely to cause more such symptoms, this did not in our judgment mean that any increase in the length (in time) of the commute automatically caused a particular disadvantage. One would have to consider the details of the different journeys, what aspects of them caused an aggravation or even an amelioration of symptoms, and whether the overall effect was substantial enough to amount to a particular disadvantage. Our findings have gone no further than that there was an increase in the average commute of around 20 minutes each way. We do not have the evidence to show that this gave rise to a particular disadvantage.

174. Consideration of the defence of justification involves asking whether the Respondent has shown that the PCP was a proportionate means of achieving a legitimate aim. The burden of doing so is on the Respondent. The Tribunal found that the aim of treating all officers fairly regardless of their home address was a legitimate one. If, contrary to the Tribunal's findings, the Respondent in fact had an immutable PPC of never considering, or never giving due consideration to, an officer's home address, that would not be proportionate.

175. It is apparent, however, that account was taken of this, in particular in the Claimant's case by the adjustments made and offered by Mr Springer. We found that, with these taken into account, the PCP was operated in a proportionate way

in the Claimant's case. In doing so, the Tribunal took into account the importance of the aim to the Respondent and the impact on the Claimant. The latter was mitigated by the adjustments.

176. PCP (b) was put as "not conducting a work risk-based assessment ahead of an officer's transfer to a new role in a new location". The Tribunal accepted Ms Tuck's submission that, although there was no document created entitled "risk assessment", in substance an assessment was carried out. Inspector Childs sought OH advice about specific elements of the proposed new role at Chiswick, namely the shift pattern, travel time, and use of the met vest. Mr Springer and Inspector Tanner took the report into account when making adjustments. The Claimant takes issue with the report (with some justification in the Tribunal's view), but this does not mean that a PCP of not conducting an assessment was applied.

177. Given this finding, the Tribunal saw no purpose in trying to consider the remaining elements of the statutory test on a contingent basis with regard to this PCP.

178. PCP (c) was "having to work the prescribed shift patterns, including early, mid and night shifts, in Grip and Pace in particular from 22.00 to 07.00". In his written submissions, Mr Korn addressed this in terms of the Claimant being required to work shifts without adequate rest breaks. This did not reflect the PCP as drafted, which referred to the prescribed shifts rather than to the taking of breaks. The PCP as drafted was not applied to the Claimant, as Inspector Tanner agreed to the proposed shift pattern (excluding nights) as proposed by Mr Springer, but the Claimant in her email of 23 August 2017 chose to give night shifts a go.

179. If, contrary to the Tribunal's finding, PCP (c) was applied, there was no evidence of group disadvantage. The Tribunal found that it could not be assumed that persons disabled by a back condition and/or depression would be put at a disadvantage by a requirement to work shifts: they might, or they might not.

180. As to the particular disadvantage to the Claimant, Mr Korn's submission was based on "the requirement to work specific shifts without adequate rest breaks and to commute for an additional hour." As the Tribunal has already observed, the introduction of rest breaks goes beyond the PCP as drafted, while the reference to the commute re-introduced PCP (a), already discussed above. The Tribunal concluded that, without these additional elements, the requirement to work shifts, to the extent that it was applied, did not as such cause the Claimant any particular disadvantage.

181. The Tribunal understood PCP (d) to be of general application: it was "failing to implement OH medical advisors' or doctors' recommendations in the workplace." In the event, Counsel addressed this issue in different ways. Ms Tuck took it as referring to the OH advice of 2 January 2018 to undertake a stress risk assessment. Mr Korn referred again to a requirement to work shifts without adequate rest breaks and to commute for an additional hour.

182. The Tribunal concluded that, on either approach, the Respondent did not apply this PCP. We agreed with Ms Tuck's submission to the effect that the Respondent did not, in reality, fail to implement the advice about a stress risk assessment: Inspector Tanner took the view that this could not be done until it

was known to what role, hours and location it was proposed that the Claimant would return. The Tribunal agreed: without that information, there would be nothing to assess. On Mr Korn's approach, the observations that we have made above about shifts, etc, would apply equally here.

183. Again, in the light of this finding, the Tribunal did not consider that any useful purpose would be served in addressing the other elements of the test in relation to this PCP.

184. PCP (e) was "revoking transfers to the one met model or another team as the case may be because an officer is on sick leave." Given Mr Griffiths' evidence, the Tribunal was satisfied that this PCP was applied when there was no known return date.

185. With regard to the question of group disadvantage, the Tribunal had regard to **Rutherford v Secretary of State for Trade and Industry (No.2) 2006 ICR 785**, where Baroness Hale stated that there should not be brought into the equation people who have no interest in the advantage or disadvantage in question. Ms Tuck submitted that the correct pool for comparison was that of officers who were on sick leave, and that officers disabled by a back condition and/or depression would be at no greater disadvantage than non-disabled officers who were also on sick leave. Subject to the rider about the absence of a known return date, the Tribunal agreed with this. Mr Korn's submission that anyone with a chronic back condition would have suffered this disadvantage did not address the point about the pool for comparison. In the result, the Tribunal found that no group disadvantage had been shown.

186. If the Tribunal is wrong about group disadvantage, for example because the pool for comparison should be all officers seeking a transfer, whether on sick leave or not, then it would find that the Claimant had demonstrated that she had suffered that particular disadvantage. In that event, the Tribunal would also find that the Respondent had shown that the PCP was a proportionate means of achieving a legitimate aim. The latter was put as "ensuring that they have a smooth transition back into the workplace and have a return to work interview and time to move from one location to another and to prevent officers being lost in the system." The Tribunal considered that it was important that vacancies should not remain unfilled indefinitely, with an officer "lost in the system" in the sense that he or she was taken as transferred into the vacancy, but was unable to take it up for an indefinite period. There would be a disadvantage to the officer concerned, in that he or she would have their transfer revoked, but the significance of this would be mitigated by the fact that they would be able to apply to be transferred once they had returned to work.

187. PCPs (f), (g) and (h) were not relied upon.

Failure to make reasonable adjustments

188. The Equality Act includes the following provisions about the duty to make reasonable adjustments:

> ***20 Duty to make adjustments***
> *(1)……..*
> *(2) The duty comprises the following three requirements.*
> *(3) The first requirement is a requirement, where a provision, criterion or*

practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

21 Failure to comply with duty

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

189. In **Wilcox v Birmingham CAB Services Limited UKEAT/0293/10**, decided under the equivalent provisions of the Disability Discrimination Act 1995, Underhill J stated that the duty does not arise unless the employer knows, actually or constructively, both that the employee is disabled and that she is disadvantaged by the disability in terms of the relevant PCP.

190. The PCPs relied upon were set out in issue 31; the proposed adjustments in issue 32; and the substantial disadvantages relied on in issue 33. Issue 34 asked whether the Respondent was aware, or ought reasonably to have been aware, that the Claimant was likely to be disadvantaged in this way.

191. Issue 35 asked whether the adjustments would have overcome the disadvantages and whether it was reasonable to expect the Respondent to make the adjustments in the circumstances. In **Leeds Teaching Hospital NHS Trust v Foster EAT 0552/10** the EAT held there does not have to be a good or real prospect of an adjustment alleviating the disadvantage: it is sufficient that there would have been the prospect of its doing so.

192. The PCPs mirrored those relied on for the purposes of indirect discrimination, and the Tribunal will not repeat these or the observations already made about them.

193. We have already concluded that PCPs (a) to (d) were not in fact applied. The Tribunal considered, in addition, that PCP (b) could not be maintained in the light of the decision in **Tarbuck v Sainsbury's Supermarkets Limited [2006] IRLR 664** to the effect that consulting about reasonable adjustments is not in itself a reasonable adjustment.

194. PCP (e) was applied. The Tribunal has previously expressed its conclusion that the PCP was a proportionate means of achieving a legitimate aim. That conclusion relates to the overall PCP and does not exclude the possibility that it might have been a reasonable adjustment to not apply it in the Claimant's case.

195. With regard to the question of substantial disadvantage to the Claimant (issue 33(e)), the Tribunal had regard to paragraph 6.16 of the EHRC Code of Practice on Employment, which reflects the observations of the EAT in **Fareham College Corporation v Walters [2009] IRLR 991**, in the following terms:

The purpose of the comparison with persons who are not disabled is to establish whether it is because of disability that a particular provision, criterion or practice…..disadvantages the disabled person in question. Accordingly – and unlike direct or indirect discrimination – under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's.

196. The Tribunal found that the practice of revoking transfers when officers were on indefinite sick leave disadvantaged the Claimant in that she remained in a role that she found problematic. If she were to return from sick leave, it would be to that role.

197. The Tribunal found that the Respondent was aware, or ought reasonably to have been aware, that the Claimant was likely to be disadvantaged in this way: this was, we considered, obvious.

198. The Tribunal further found that not revoking the transfer would have overcome the disadvantage in that the Claimant would not have been facing the prospect of returning to a role that she found problematic. There was a chance (and we emphasise that this was a chance) that not revoking the transfer in January 2018 would have enabled the Claimant to return to work in the new position, no doubt after a case conference and consideration of any further adjustments that may have been required within that role.

199. Was it reasonable for the Respondent to have to make that adjustment? Here, the Tribunal took into account the factors that it has already set out in relation to this PCP under discrimination arising from disability. In the circumstances, and for the same reasons, the Tribunal concluded that it was reasonable for the Respondent to have to make an adjustment to the usual practice, and not revoke the transfer at this stage. (Again, this is not to say that the position should have been left open indefinitely, but rather that the transfer should not have been revoked when it was).

200. Applying **Leeds v Foster**, was there a prospect that making this adjustment would have alleviated the disadvantage? The Tribunal concluded that there was, in that there was a prospect that the knowledge that she would be transferring to a different team would have assisted the Claimant in recovering from her depression sufficiently to enable her to return to work.

201. The complaint of failure to make reasonable adjustments therefore succeeded in this regard, although in practical terms this adds little to the Tribunal's equivalent finding under discrimination arising from disability.

202. PCP (f), which was admitted by the Respondent, was that of not allocating laptops / tablets for remote working in the Grip and Pace team. The Tribunal concluded, however, that this did not cause the Claimant to suffer a substantial disadvantage. The Tribunal accepted that there was no real scope for working remotely in the Grip and Pace team, which involved telephone contact with the public and responding on an emergency basis. The real problem for the Claimant was that she was not well enough to go to work at Chiswick: allocating a laptop would not have enabled her to work. Alternatively, the same point means that there was no prospect of the proposed adjustment overcoming the advantage, and/or that it was not reasonable for the Respondent to have to make the adjustment.

203. PCP (g), which was also admitted by the Respondent, was assigning Inspector Tanner as manager of Grip and Pace and/or requiring the Claimant to work under his supervision as her line manager.

204. So far as disadvantage to the Claimant is concerned, the Tribunal found that this practice was of no relevance to her back condition. With regard to the

Claimant's depression, Ms Tuck submitted that the Claimant perceived this as placing her at a disadvantage because of her antipathy to working on the Early Response Team and/or under Inspector Tanner; in other words, that there was no actual disadvantage.

205. The Tribunal concluded that the Claimant's difficulty about working under Inspector Tanner went further than an antipathy towards doing so. Although it was not expressly stated in the OH reports that the relationship with Inspector Tanner was contributing to the Claimant's depression, the Tribunal found as a matter of probability that it was. Many of the interactions between the Claimant and Inspector Tanner described in these reasons were negative or had negative aspects. In addition, the Medical Officer's report of 2 January 2018 recommended re-deployment to a new location and a new job. On 22 February 2018 the Claimant's representative asked, among other things, for a new line manager for the Claimant. Inspector Tanner seemed unsurprised by this and proposed a change in terms of use of an intermediary, which suggests to the Tribunal that he recognised that there was a problem about interactions between him and the Claimant.

206. The latter point means, in turn, that the Tribunal finds that the Respondent was aware, or ought reasonably to have been aware, that the Claimant was likely to be disadvantaged in this way.

207. Was there a prospect that the proposed adjustment (i.e. a change of line manager) would have alleviated the disadvantage? Chief Inspector Landers took up the role in August 2018. Although this point was not canvassed in submissions, the Tribunal noted that it might be said that this had evidently not enabled the Claimant to return to work. We concluded that the fact that this did not achieve the desired effect in August did not mean that there was no chance that it could have assisted a return to work had it been done at an earlier date. The Tribunal found that there was a chance (and again, we emphasise that this is very much a chance) of its doing so, as one of the factors contributing to the Claimant's depression was, as we have found, her interactions with Inspector Tanner. This element would be removed, at least to a significant degree, if he ceased to be her line manager.

208. The Tribunal therefore asked itself whether it was reasonable for the Respondent to have to make this adjustment in the circumstances. Given what we have already said about the difficulty that the Claimant had working under Inspector Tanner; his evident recognition of this; and the fact that the Respondent found it possible to make the adjustment in due course, the Tribunal concluded that it was reasonable.

209. There remained a further argument on the Respondent's behalf, namely that the adjustment was in fact made within a reasonable time. The Tribunal accepted that the Respondent should not be held in breach of the duty as soon as the request for a change of line manager was made and not acted upon. We noted, however, that the process of identifying Chief Inspector Landers had begun in July 2018 and had taken about a month to complete to the point where he approached the Claimant. Had the Respondent acted on the Claimant's request for this adjustment within about a month, or even a little longer, the Tribunal would not have found there to have been a breach of the duty.

210. In the event, we found that the adjustment was not made within a reasonable

time of its being identified, and that the complaint of failure to make reasonable adjustments was in this respect made out for the period (approximately) early April 2018 to 20 August 2018.

211. PCP (h) referred to the formal investigation of the CARMS issues. This undoubtedly took place. The Tribunal accepted the Claimant's evidence to the effect that she experienced an aggravation of her depression because of worry about this process. It was less clear that a different approach – for example, asking the Claimant for an explanation first – would have lessened that, not least because it seems unlikely that any explanation given would have prevented management action being issued.

212. The Tribunal therefore doubted that the Claimant suffered a substantial disadvantage compared to someone who was not disabled, by virtue of the matter being approached in the way that Inspector Tanner adopted, as opposed to some other way. (It was not suggested that, by way of adjustment, the issue should have been ignored or dropped). For effectively the same reasons, the Tribunal did not consider that the Respondent was aware, or ought reasonably to have been aware, that the Claimant was likely to be disadvantaged; nor that there was a prospect that the proposed adjustment would have overcome the disadvantage (if any).

213. In any event, the Tribunal did not consider that it was reasonable for the Respondent to have to make the adjustment concerned in the circumstances. Inspector Tanner was entitled, and bound, to investigate the apparent discrepancies. The process by which he did so was, in the Tribunal's judgment, of marginal significance, and would inevitably have led to the same outcome whatever approach he adopted.

214. Remedies remain to be determined in relation to the parts of the claim that have succeeded. A remedies hearing was originally set for 9 and 10 September 2019. As indicated in the Tribunal's judgment, one of the lay members is now unable to sit on those dates. In the first instance, the parties may wish to see whether remedies can be agreed upon without a further hearing. If they cannot, the best approach will probably be to list a 30-minute telephone Preliminary Hearing at which dates of availability for all concerned are available. The hearing can then be re-listed and any further case management orders as may be necessary can be made. The parties should liaise and write to the Tribunal accordingly.

Employment Judge Glennie

Date: 30th August 2019

JUDGMENT SENT TO THE PARTIES ON

02/09/2019

FOR THE TRIBUNAL OFFICE