EMPLOYMENT TRIBUNALS

Claimant: Mr Stephen Potter

Respondent: Chief Constable of Merseyside Police

HELD AT: Liverpool **ON:** 22, 23, 24, 25 & 26 July 2019

BEFORE: Employment Judge Shotter

Members: Ms HD Price
Mr PC Northam

REPRESENTATION:

Claimant: In person
Respondent: Mr D Tinkler, counsel

JUDGEMENT

The unanimous judgment of Tribunal is:

1. The claimant's claim for constructive unfair dismissed is dismissed on withdrawal.

2. The claimant's claims brought under sections 15 and 20-22 of the Equality Act 2010 were not presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done), such complaints are out of time, in all the circumstances of the case, it is not just and equitable to extend the time limits and the claims are dismissed.

REASONS

Preamble

1. By a claim form received on 15 January 2018 following ACAS early conciliation between 13 December 2017 to 20 December 2017 the claimant claimed constructive unfair dismissal, that the respondent had failed to make reasonable adjustments in accordance with sections 20-21 of the Equality Act 2010 and discrimination arising from disability under section 15. In short, the claimant maintained that occupational health had indicated in January 2017 he should be medically redeployed and following a capability assessment on 12 February 2017 with Dr Roy from occupational health he requested working from home or in Huyton Police station nearer to home as reasonable adjustments and these adjustments were never made.

2. The claimant referred to being "willing and able to return to work…awaiting reasonable adjustments to be made and waiting to be medically redeployed" and had been subjected to detriments including being placed on half-pay.

3. At a Case Management discussion held on 21 March 2018 the claimant confirmed that he relied upon two practices ("PCPs") namely, (1) Location, that he should work at St Helen's Police Station, and (2) that during any sickness absence six month's pay is paid at full pay and the following six months at half pay.

4. The substantial disadvantage in respect of location was that the claimant could not attend work because he could not drive and he found travelling by public transport too fatiguing.

5. With regard to the reduction in pay the substantial disadvantage was the financial loss, notwithstanding the fact he was waiting for redeployment.

6. Two reasonable adjustments were sought, (1) to allow the claimant to either work from home or Huyton Police Station which was nearer to his home and (2) as he was waiting for redeployment preferably at home or Huyton Police Station where he would have been able to resume his full duties, he ought to have been retained on full pay or moved so that he could resume full pay.

7. Turning to the section 15 complaint, the claimant clarified the "something" that arose from his disability was his absence from work and the inability to travel to St Helens. The claimant will say he was treated unfavourably because of that by being kept off work when he could have been redeployed, either from work at home or at Huyton Police Station, and in reducing his pay to half pay.

8. The respondent denied the claimant's claims maintaining the claimant was not fit to work according to the GP, he was entitled to six months full pay and six months half pay and as it was not envisaged the claimant would return to

work in any capacity his application to extend the sick pay entitlement was refused until 12 October to 30 November 2017. The claimant applied for and was successful in his claim for ill health retirement that took effect on 30 November 2017, the effective date of termination.

Witness evidence.

9. The claimant gave evidence on his own behalf, and the Tribunal hear oral evidence from Constable Mark Potter, the claimant's brother given on behalf of the claimant. In addition, the Tribunal heard oral evidence from Caroline Carmichael, a police officer in the Merseyside Police who has acted in the capacity of a police federation representative for the last 9 years. The claimant also relied upon the signed witness statement of Constable Michael Kelly, the contents of which was disputed by the respondent who did not accept the claimant was expected to return to work early in the New Year 2017 as alleged. Given the fact that Michael Kelly's evidence could not be tested under cross-examination the Tribunal gave his written statement very little weight, having taken into account the duplicated evidence given by Mark Potter that the claimant told him he was intending to return to work early in the New Year.

10. On behalf of the respondent the Tribunal heard from Inspector Karl Robert Baldwin, Sergeant Brian David Pearson, Chief Inspector Stephen Colin Brizell and temporary Chief Inspector Philip John Howie Thompson.

11. The Tribunal found that the evidence given by witnesses appearing on behalf of the respondent was straightforward and credible, and in a large part supported by contemporaneous notes and documentation. In contrast, the claimant was found to be an inaccurate historian who did not always give credible evidence, his recollection could not be relied upon and he contradicted himself on occasion for the reasons set out below. The Tribunal found the claimant was selective in the way he presented his case, for example, his evidence that the first home visit took place 26 July the implication being that there had been very little communication before then when the reality was that Sergeant Pearson and the claimant had reached an agreement that communication would be by telephone, and the Tribunal found this to be frequent, regular and supportive.

12. There were conflicts in the evidence which were resolved by the Tribunal before it came to reach its findings of facts, which have been dealt with below.

The preliminary issue of jurisdiction

13. An initial list of issues was discussed and agreed that included whether the Tribunal had jurisdiction to hear the claimant's complaint of unfair constructive dismissal brought pursuant to section 98 of the Employment Rights Act 1996 ("ERA") given that he was a police officer. In a preliminary hearing the Tribunal heard oral submissions form Mr Tinkler and the claimant, who relied on P v Commissioner of Police of the Metropolis [2017] UKSC 65 in his

argument that the Tribunal had the jurisdiction to consider an unfair dismissal claim brought under the ERA. The claimant clarified that he was not bringing the claim under the ERA but a discriminatory dismissal claims under the Equality Act 2010, a claim which appeared not to have been pleaded and required the claimant to make an application to amend. The claimant, who had actively sought and accepted ill-health retirement at the time, took the decision not to proceed with a claim of discriminatory dismissal under the EqA and the issues were agreed between the parties as set out below.

The agreed issues

Disability Discrimination – Time Limits

1. Does the Employment Tribunal have jurisdiction to hear the Claimant's discrimination complaints regarding the decision to reduce the Claimant's pay from full pay to half pay as the decision was taken more than three months prior to the issue of the ET1?

2. Was the decision regarding the reduction of the Claimant's pay a continuing act on the basis that the decision was subject to monthly review?

3. If the claim regarding the decision to reduce the Claimant's pay is out of time, is it just and equitable to extend time?

4. Does the Employment Tribunal have jurisdiction to hear the Claimant's claims regarding the failure to permit the Claimant to work from Huyton Police Station or work from home because, on the Claimant's case, such adjustments should have been put in place more than three months prior to the issue of the ET1?

5. If the claim regarding the failure to permit the Claimant to work from Huyton Police Station or from home is out of time, is it just and equitable to extend time?

Reasonable Adjustments

6. Provisions, criteria or practices (PCPs) relied on by the Claimant:

   (i) location, namely that he work at St Helens Police Station; and

   (ii) That during any sickness absence six months' pay is paid at full pay and the following six months at half pay.

7. Substantial Disadvantage:

   (i) In respect of the location the Claimant says he was put at the substantial disadvantage in that he could not attend work at St

Helens because he could not drive and he found travelling by public transport too fatiguing;

(ii) With regard to the reduction in pay the substantial disadvantage was the financial loss, notwithstanding that he was awaiting redeployment.

8. Reasonable adjustments:

(i) With regard to the location the Claimant says that it would have been reasonable to allow him to either work from home or Huyton Police Station which was near home as it would have avoided the substantial disadvantages claimed.

(ii) With regard to pay, the Claimant says that he was awaiting redeployment, preferably to home or Huyton Police Station when he would have been able to resume his full duties, he ought to have been retained on full pay or moved so that he could resume full pay.

Discrimination arising from disability

9. The Claimant says that the 'something' that arose from his disability was his absence from work and the inability to travel to St Helens. The Claimant will say that he was treated unfavourably because of that by being kept off work when he could have been redeployed, either to work from home or Huyton Police Station, and then reducing his pay to half pay.

14. The Tribunal was referred to an agreed bundle of documents and having resolved the conflicts in the evidence, considered the oral and written evidence and oral and written submissions presented by the parties (the Tribunal does not intend to repeat all of the oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), it has made the following findings of the relevant facts.

Facts

15. The claimant was a serving police officer from 3 January 1989 and had 2-years' service left in the force before he qualified for his full pension, and this was an important consideration for the claimant. Prior to his ill-health absence the claimant was stationed at St Helen's in the Emergency Incident Team. The claimant was line managed by Sergeant Pearson. Chief Superintendent Ngaire Wayne during the relevant period was head of the response and resolution department. Superintendent Jonathan Davies was also part of the same team as was Inspector Philip Thompson, who had been assigned temporarily in January 2017.

16. The respondent issued police officers a number of policies and procedures, and the Tribunal was referred to Regulation 28 and annexed K of the Police Regulations 2003 governing sick pay that had statutory effect, the Redeployment –

Police Officers (Policy & Procedure) dated 26 November 2016 and Disability Policy (Policy & Procedure) dated 13 January 2015. The relevant sections of the Policies to which the Tribunal was taken are as follows:

Redeployment – Police Officers (Policy & Procedure) dated 26 November 2016

16.1 At paragraph 1.2 it was provided "Where an officer becomes restricted/disabled as a result of an injury or medical condition and falls within the Equality Act 2010 the Force will: Seek to determine the officer's capabilities…make reasonable to facilitate retention in current post…consider redeployment of the officer to another role if the condition warrants such a move."

16.2 Paragraph 2.1 provided "Once the criterial for redeployment have been established arrangements will be made to carry out a redeployment interview. Officers who are subject of redeployment will be interviewed by their line manager…in order to record their individual needs and preferences for alternative posts…This information must be validated by an appropriate line manager and forwarded to Workforce Management."

16.3 "There will no guarantee afforded to the officer regarding choice of post or location as it will depend on the vacant posts available at that time, suitability and organisation needs." The process provided for a skill match and a redeployment list. The Tribunal found that the thrust of the Redeployment Procedure with reference to medical redeployment was designed to provide a restricted or disabled officer with another role that they could take up on the basis that they are capable of work with or without adjustments.

Disability Policy (Policy & Procedure) dated 13 January 2015

The relevant paragraphs are as follows:

16.4 Paragraph 11.4 defined Disability Related Leave in paragraph 11.4.1 as follows; "Disability related leave must be directly related to the disclosed disability and is a reasonable adjustment that the Force can provide. It enables members of staff to adjust to changes in their life caused by the development of a new disability or to manage an existing disability. **The leave must facilitate rehabilitation, preventative measures, treatment for or adjustment to a disability and must be for a fixed period or periods of time that the Force and member of staff know about in advance…**" [the Tribunal's emphasis].

16.5 Paragraph 11.4.2 provided "**the predictable and fixed nature of disability related leave distinguish it from disability related sickness absence which is unpredictable and for unknown periods of time**…" [the Tribunal's emphasis] The Tribunal found that disability related leave was not applicable in the claimant's case given the undisputed evidence that his absence was for an unknown period with no end date.

16.6 Paragraph 11.6 titled "Paid Leave" provided at 11.6.1 "…if a member of staff is off work because the Force **has not yet provided the required reasonable**

adjustments, this is not disability related leave or disability related sickness. It is paid leave because the member of staff is willing to work, but is unable to do so because the employer has not fulfilled its duty to make reasonable adjustments. Likewise**, if an individual is absent awaiting redeployment required as a result of a disability and any required reasonable adjustments are not in place, the individual should be on full pay,** even if it is following a period of long-term sickness absence until the adjustments are in place" [the Tribunal's emphasis].

17. The claimant was well regarded and respected by the respondent. He was a long-serving front-line police officer who had received a number of commendations. In his personal time, he had taken on the duties of a Police Federation representative. The claimant was rightly proud of his profession in which he had enjoyed a successful career and looked forward to retiring with 30 years-service and full pension at the age of 55. Understandably, it was devastating to him when he became very ill and so disabled that he was unable to continue working as a police officer.

18. On 20 August 2016 the claimant discussed his ongoing health problems with his supervisor, Sergeant Pearson and this culminated in an occupational health report being produced on 19 September 2016. For some time, the claimant had been "double-crewed" in order to reduce the amount of driving as a reasonable adjustment. Constable Michael Kelly had "doubled up" with the claimant prior to him going off sick. The occupational health report highlighted other adjustments that were carried out and with these adjustments in place the claimant continued to work on the front line until he was sent home by his supervisor on the 21 November 2016 and this was followed by a sickness absence from which he never returned.

19. A risk assessment was produced by the claimant's line manager, Sergeant Pearson on the 21 November 2016 that became irrelevant as the claimant never returned to work.

20. It was accepted by the claimant under cross-examination that up to December 2016 and into January 2017 he could not work in any capacity as a result of his debilitating health conditions encompassing osteoarthritis, chronic pain syndrome and fibromyalgia.

21. Following the first 7-days of self-certification the claimant submitted GP notes that uniformly confirmed he was unfit for any work and the alternative suggestions/reasonable adjustments section were struck out. It is undisputed throughout the claimant's absence up until voluntary early retirement the GP's Statement of fitness for Work ("the Statement of fitness for Work") confirmed the claimant was unfit for work and no adjustments were suggested.

<u>Occupational Health report dated 5 December 2016</u>

22. Occupational Health in a report dated 5 December 2016 confirmed the claimant's symptoms had worsened and "he reports ongoing symptoms which are impacting on his activities of living including driving which he tried to avoid due to the

level of medication he requires." Occupational health was of the view the claimant "remains unfit for work at the present and I am not sure whether he will ever be able to resume operational duties due to the symptoms and the level of medication…I will have a discussion with the OH physician to see whether medical redeployment would be an option **in the longer term"** [the Tribunal's emphasis].

23. There was no suggestion the claimant was well-enough to take up any redeployment, and it was clear this was a matter for the future and in the "longer-term" which does not suggest the claimant was able to return to work early in the New Year as now maintained by the claimant and his witnesses. It is notable the Statement of Fitness for Work completed by the GP confirmed during this period that the claimant was unfit for any work with the respondent and the Tribunal finds relying on the medical evidence and factual matrix which culminated in the claimant's ill-health retirement the claimant was not fit for any work and the respondent was not in breach of any duty to make reasonable adjustments.

24. During the claimant's absence communication links with the respondent were retained through the auspices of Sergeant Pearson with whom the claimant had an excellent relationship.

Review 28 December 2016

25. On the 28 December 2016 Sergeant Pearson, the claimant's "special point of contact" spoke with the claimant. Notes were taken by Sergeant Pearson who gave credible evidence on this point. It was recorded the claimant reported that he was in "considerable pain…he would be contacting Red Arc to ask for counselling services…with a view to…coming to terms with the mental impact he is now facing with his illness. He is still suffering from short term memory loss on a regular basis and speaking to him on the telephone his speech was noticeable much slower than normal. He also appeared to struggle to put some sentences together. I reassured him that if he feels the need then he can call me at any time of the night or day and that I would be there for him. **At this time there is no estimated return to duty time for him…I explained that R+R command team have suggested redeployment should be considered**" [the Tribunal's emphasis].

26. The Tribunal took the view that Sergeant Pearson demonstrated the respondent was willing to pursue redeployment when the claimant was fit to return, and was seeking to reassure the claimant that he would be supported at all times. The respondent's policy was for immediate line-managers to maintain contact with officers when they were on long-term sickness absence and these communications provided the means by which officers could discuss their medical conditions, give any indications when they were able to return to work and if any "supportive interventions" were required, for example in the claimant's case the conversations were an opportunity for him to inform the respondent through Sergeant Pearson that he considered himself well-enough to return to work with adjustments. The claimant gave no such indication and given the medical evidence coupled with the information provided by the claimant is was not unreasonable for the respondent to take the view

the claimant was unable to work in any capacity and there were no reasonable adjustments to be made.

27. The veracity of the contemporaneous notes made by Sergeant Pearson placed on the respondent's Absence Management System Origin were not challenged by the claimant. The claimant was at times reluctant to accept their content in their entirety, however he confirmed that there was nothing in them that was "stand-out wrong." The claimant, who had not taken or kept any notes whatsoever at any stage (including this liability hearing) relied upon his memory, and he admitted this had been adversely affected by his medical condition and medication prescribed. The Tribunal accepted Sergeant Pearson's notes as a reliable contemporaneous record, preferring the accuracy of notes made contemporaneously to the claimant's imperfect memory noting that the claimant had persuaded himself over a period that his recollection reflected the truth in this matter.

Occupational health report dated 17 January 2017

28. The claimant was reviewed by the occupational health who produced a report dated 17 January 2017 that confirmed the claimant had been referred to a pain management team, his medication was being changed and he was undergoing counselling. Occupational Health took the view the claimant "will not be able to return to his role as a response officer and that medical redeployment will be the way forward to support him in his last 2-years of service. To that end I have spoken with the PIU for Stephen to attend a capability assessment which should help in the decision-making process with regards to future posting." The Tribunal found that as at 17 January 2017 there was no indication the claimant was well enough to return to work in any capacity and sick notes continued in the same vein as previously referred the GP being of the view the claimant was too unwell to work and there were no adjustments.

29. Sergeant Pearson spoke with the claimant on the 12 February 2017. The contemporaneous record reflects Sergeant Pearson was informed the claimant was "still suffering with a lack of sleep, this causes fatigue that means when he feels extremely tired very quickly. He is also very conscious about his anxiety however feels counselling sessions are helping him…**He is taking various prescribed medications and is aware** that following assessment with the OHU **that when he feels better and able to return to work he is likely to be deployed to a different role. There is no estimated return to work now as his condition has not changed since our last contact**" [the Tribunal's emphasis]. The claimant at the liability hearing conceded Sergeant Pearson's note was correct, and the Tribunal found the description of his medical condition related to Sergeant Pearson was at odds with the information reflected in Dr Roy's capability assessment that took place two days later, concluding that the respondent was entitled to take at face value the claimant's description of his medical condition and Sergeant Pearson's view that the claimant was not well enough to return in any given what the claimant was telling him and the contents of the Statement of Fitness for Work.

30. The conversation between Sergeant Pearson and the claimant took place 2-days before the capability assessment with Dr Roy, occupational health, on 14 February 2017 and there was not mention by the claimant that he was well enough to return to work at that point in time either working from home or close to home at Huyton Police Station to avoid driving or taking public transport to work and so the Tribunal found.

Dr Roy's capability assessment 14 February 2017

31. On 14 February 2017 Dr Roy, occupational health, met with the claimant and completed a "Restricted duty – capability assessment proforma." The way the form was completed was not very clear and caused the Tribunal some confusion that was partly clarified later when it was established it did not have a complete form as a result of a scanning error by the occupational health department. The form was incomplete and nowhere on the document before the Tribunal did Dr Roy confirm the claimant may have a permanent disability. The respondent in February 2017 was sent an incomplete copy of the report and it only came to light at the liability hearing that pages 2,4 and 6 were missing. Giving the missing pages, the Tribunal has done its very best to extrapolate what it can from the report. It is clear that nobody, apart from Dr Roy, has ever seen the missing pages.

32. Dr Roy found the claimant could not return to front-line duties and when it came to carry out a range of generic activities Dr Roy under the heading "Reasonable Adjustment" inserted "will need enhanced support supervision and training if entering an unfamiliar role…until such time as has become comfortable and confident in role. Workload will need to be managed (and I would advise against safety critical duties or high pressure high demand duties until his confidence and familiarity with these duties has been established." Under the heading "overall summary" Dr Roy wrote "lifting carrying moving objects impacted/limited by chronic underlying muscular skeletal…memory, ability to understand, ability to concentrate and ability to learn and retain information Impaired because of the medication and the underlying conditions. Will need enhanced training, support, mentoring and ongoing review and monitoring of workload."

33. Dr Roy identified the claimant was not capable of full duties as his "physical condition renders him unfit to engage in duties such as pursuit, restraint and public facing duties where confrontational risks cannot be eliminated. As per above memory, concentration and decision making impaired both by effects of the both conditions and associated medications." Whilst Dr Roy identified the claimant was not capable of his full front-line duties, he appears to be advising that the claimant is capable of other duties i.e. back office, with significant adjustments and support. Dr Roy made no comment on what type of role the claimant could carry out, shifts, locations, driving and mobility.

34. The Tribunal struggled to reconcile Dr Roy's capability assessment with his view of the claimant's limitations including memory and ability to understand, the information provided by the claimant to Sergeant Pearson and GP Statements of Fitness for Work that confirmed the claimant was not fit for work and no adjustments

were suggested according to the information given by the claimant to Sergeant Pearson two-days previously. The Tribunal took the view that had Dr Roy's report been dealt with by the respondent, as expected by the claimant who was of the understanding HR would deal with his redeployment, the contradictions could have been considered and resolved. However, on the basis of the information before it at the time, the respondent accepted the GP Statement of Fitness for Work was reinforced by Sergeant Pearson's reports of his conversations with the claimant and not unreasonably chose to regard Dr Roy's report as recommendations for the future when the claimant was well enough to consider a return to work.

35. In oral evidence on cross-examination the claimant stated he had told Dr Roy that he would work at home or the Huyton police station "the next day." This evidence was not reflected in the limited report before the Tribunal, and there was no mention by the claimant of the possibility of any immediate return to work in any conversation with Sergeant Pearson until much later on in the chronology, the catalyst being the reduction in the claimant's pay. On the balance of probabilities, the Tribunal preferred the evidence of Sergeant Pearson that the claimant never mentioned he was well enough to immediately return to work with adjustments, and concluded the claimant's evidence was unreliable due to his faulty recollection that could well have been adversely affected by poor memory as noted by Dr Roy. It is notable the 8 March 2017 Statement of Fitness for Work ("SFW") struck out the reference to adjustments and was silent about the claimant being fit enough to immediately work from home or at Huyton on Police Station.

Statement of Fitness for Work 8 March 2017

36. The claimant obtained a Statement of Fitness for Work on 8 March 2017 that confirmed he was not fit for work because of Fibromyalgia, with the statements "You may be fit for work taking account the following advice…if available and with your employer's agreement you may benefit from a phased return to work, amended duties, altered hours, workplace adaptations" all struck out. The claimant questioned this prognosis at the liability hearing in the light of what he had allegedly informed Dr Roy about his immediate return, evidence which the Tribunal did not find credible.

37. The claimant's GP is under a duty to complete the Statement of Fitness for Work truthfully, and it is incomprehensible to the Tribunal that had the GP any reason to believe the claimant was fit and capable of returning to work, albeit in a different role and at a police station nearer home, this would not have been reflected in the Statement of Fitness for dated 8 March 2017 and so the Tribunal found. The respondent was entitled to rely on the GP's recommendation received by Sergeant Pearson on 10 March, and on 14 March 2017 he followed it up with another conversation with the claimant. There is evidence before the Tribunal that Sergeant Pearson was aware of the contents of Dr Roy's partial report, and it found on balance Sergeant Pearson interpreted Dr Roy's advice to mean the respondent should look to redeploying the claimant to a suitable role upon his return to work when he was well enough to return. The credible oral evidence from the respondent's witnesses was that that they were keen to get absent officers back into work, and there was a drive to do so at the time. In short, the respondent needed the

claimant to return to work given the consequences of well publicised financial cuts and reduced numbers of police officers. In short, had the claimant offered to return to work as he now alleges, a suitable position would have been found following the necessary assessments of the claimant's capabilities and reasonable adjustments would have been put in place, as they had been in the past.

38. The claimant had not received a copy of the Dr Roy's report; however, reference was made to it. Sergeant Pearson's contemporaneous notes record "I have spoken to Stephen and he confirmed **that he has still no improvement in his condition**. He is due to attend an appointment with the pain management clinic and hopes that this will start to ease his condition and symptoms that he is suffering from. Stephen is happy with the continued telephone contact as opposed to home visits, however, I have informed him that I will carry out a face-to-face visit soon. He is aware that he is approaching the 6-month point of his absence and is likely to move to half pay…**I have explained to Steven that the report from Dr Roy has stated that he will be redeployed to a suitable role upon his return to work and that local policing have been asked to ascertain if they have any positions available to him**" [the Tribunal's emphasis]. The claimant did not indicate to Sergeant Pearson that he was well enough to return to work in any capacity either from home or Huyton police station, and the respondent was not in breach of its duty to make reasonable adjustments given the fact the claimant was in no position to return to work, and so the Tribunal found.

39. On the 19 April 2017 the claimant obtained an identical statement of fitness for work as set out above, and there was no suggestion by the GP of any adjustments capable of supporting the claimant back into work. The Tribunal found the respondent was entitled to rely on this as evidence concluding the claimant, whose condition had not improved according to the claimant's report, was unfit for any type of work, with or without adjustments.

40. Between the 19 and 23 April 2017 the respondent was in the process arranging a transfer of the claimant away from response and resolution to local policing at St Helen's which "may help with him returning to work." A meeting with Superintendent Davies was proposed in order that the move could be discussed; this did not happen and no explanation was given. The claimant was aware of the possibility of his transfer, but unaware at the time that it had been confirmed. Given the Tribunal's finding that that the claimant was in no condition to return to work with or without adjustments for the reasons already stated, the fact that no explanation was given as to why the meeting with Superintendent Davies did not take place, did not reverse the burden of proof in the claimant's favour.

Half Pay

41. In a letter dated the 21 April 2017 the claimant was given formal notice referred to as a "Regulation 28 letter" that his full pay would cease from 5 May 2017. The following points made in the Regulation 28 letter is relevant:

42.1 The Regulation was set out and highlighted the fact that there are only 3 exceptional criteria in which the Chief Constable had a discretion to continue full

pay. The relevant regulation was "where the Force Medical Advisor informs the absences related to a disability in accordance with the Equality Act 2010 the **Chief Constable may consider that it would be a "reasonable adjustment" to extend sick pay to allow (further) reasonable adjustments to be made to enable the officer to return to work** [the Tribunal's emphasis]. These cases will be determined on an individual case by case basis."

42.2 Reference was also made to the 'Police Pension Regulations – Assessment of Permanent Disability' and it was clear that the "application of this process **will not** automatically trigger a right to remain on full or return to full pay unless the officer meets on of the three criteria above."

42.3 The letter invited the claimant to make representations that were to be forwarded to Area commander/Department Head concerning his continued entitlement to full pay. The claimant had an opportunity to put information before the respondent and he did not take it, and chose instead to rely on the Police Federation to do this on his behalf.

42.4 The Chief Constable would decide on the claimant's pay status on 8 May 2017.

43 By 23 April 2017 the arrangements to transfer the claimant to St Helen's local policing were well in hand. There were no permanent vacancies and Chief Inspector Brizell emailed on 27 April 2017 the claimant "may have to go into a temporary post as there are no vacancies…but there are significant welfare issues for this move." The claimant was unaware of this internal dialogue until these proceedings.

H1 process early ill health retirement and half pay

44 On the 27 April 2017 Sergeant Pearson spoke with the claimant and he recorded contemporaneously the two conversations. The claimant indicated he was speaking to the Police Federation with a view to initiating the H1 process and early ill-health retirement. The claimant confirmed his condition had not improved. Sergeant Pearson recorded "he still suffers from pain, fatigue and psychological effects of the Fibromyalgia." It is notable the claimant had made the decision to initiate the early ill-health retirement process before the Chief Constable had considered whether to extend or reduce pay and the claimant had not, despite the invitation, made any written representations regarding this.

45 In the second conversation the claimant confirmed the meeting with the Federation went well, a home visit from Inspector Thompson was being arranged and an agreement was reached that Sergeant Pearson, in his own time, would drop off a form for the claimant explaining Regulation 28 dealing with half pay.

46 In oral evidence the claimant explained to the Tribunal that he had initiated the H1 process because he was concerned with a possible risk that the respondent would dismiss him for unsatisfactory attendance. The Tribunal did

not find this explanation credible, and it concluded on balance the claimant applied for ill health early retirement because he believed at the time his medical condition was so severe he could not return to work. There was no evidence before the Tribunal that the respondent intended, at any stage, to progress through any formal attendance management. It is undisputed that the claimant did not informed the respondent he was initiating H1 for this reason, and as far as the respondent was concerned, specifically Sergeant Pearson, the view was taken that the claimant initiated H1 because of his medical condition and inability to work.

47 The following morning on 28 April 2017 Sergeant Pearson called at the claimant's house, described by the claimant as a "door step visit." There is a dispute as to whether the conversation was as set out in Sergeant Pearson's notes, the claimant denying that it was.

48 Sergeant Pearson recorded; "Steve looked visibly in pain and stated that during my visit he was in pain in his legs and neck. This is happening all the time in various parts of his body due to the fibromyalgia and he never gets a break from it. We discussed his ongoing situation and his mental health as he was visibly upset and distressed about his illness and circumstances…without a cure it is a case of adapting to pain management strategy…The visit to the counsellor helps him however it does not stop the pain or the anxiety and depression that is aligned to his illness." In oral evidence the claimant agreed that he had made references to his health during this conversation and the Tribunal concluded the contemporaneous notes were reliable and reflected the true position at the time taking into account the general factual matrix.

49 Sergeant Pearson also recorded that the claimant had informed him he missed working with his colleagues, sharing the banter and stories "however he is no physical or mental condition to return to work." The claimant accepted he had made a comment about missing colleagues and keeping in contact with them, but denied he had informed Sergeant Pearson that he was in no condition to return to work, and there is a direct conflict of evidence on this point that the Tribunal has resolved in Sergeant's Pearson's favour. Sergeant Pearson's notes are contemporaneous, the claimant has no notes and the notes reflect some of the conversation as accepted by the claimant. The only matter in dispute was whether the claimant has said he was not well enough to return to work. Sergeant Pearson's account is in keeping with the contemporaneous evidence pointing to the claimant's unfitness to work and his intention to initiate ill-health early retirement. At no point did the claimant, on his own evidence, indicate to Sergeant Pearson that he was well enough to return to work in any capacity, either at home or in a police station near home and there was no information before Sergeant Pearson to put him on notice that this could be an option.

Inspector Thompson's recommendation 29 April 2017

50 Inspector Thompson wrote a recommendation to the Chief Constable in relation to Regulation 28 of the Police Regulations 2003 for the half-pay review.

He relied entirely on what Sergeant Pearson had told him about the claimant's ill-health, and was not required to undergo any additional investigation of his own. He did not access Dr Roy's report although referred to it as follows: "Steve has stated Dr Roy confirmed that his condition is covered by the Equality Act, however I have not seen this in writing." His final comment was "In regards to his pay **the Equality Act 2010 states we can maintain his full pay whilst we explore what reasonable adjustments can be made for him to continue working. However current condition is that he is unfit to come into work** [the Tribunal's emphasis]. I have explored the possibility of working from home using a laptop however again his condition means that he would not be able to complete any meaningful work due to the constant pain he is in." It could reasonably be interpreted from a common sense reading of the note that a discussion concerning working from home had taken place with the claimant, but no such discussion had taken place. Inspector Thompson explored the possibility with Sergeant Pearson and not the claimant and he accepted Sergeant Pearson's understanding of the claimant's medical position based sick notes and available information from the claimant and Doctor Roy. The Tribunal took the view that Inspector Thompson's conclusion was supported by the evidence and a reasonable one to draw. Nevertheless, it would have been preferable to seek the claimant's views whether he could return to work in April 2017 working from home. In oral evidence the claimant confirmed by the month of May 2017 he was incapable of returning to work in any capacity, and the Tribunal took the view that the conclusions reached by Sergeant Pearson and Inspector Thompson were reasonable given the information before Sergeant Pearson at the relevant time.

Half-pay meeting 10 May 2017

51 On 10 May 2017 the Chief Constable took the decision not to retain the claimant on full pay following the command team recommendation made by Inspector Thompson of half pay on 29 April 2017. The half pay review took place with Peter Singleton, chairman of the Merseyside Police Federation, present. The claimant had tried to contact Peter Singleton on the 10 May, the day of the review, and was told he was too late and the review had taken place. The claimant's evidence, which was accepted by the Tribunal, was that Peter Singleton informed him he had been placed on half pay and he did not know the claimant was disabled. The Tribunal found the fact the claimant was likely to be regarded as disabled would not have assisted him. Inspector Thompson had specified in his recommendation that Dr Roy had confirmed the claimant was covered by the Equality Act, and the issue was whether the claimant was fit enough to work with adjustments and there was no evidence before the respondent that he was and no end date for the sickness absence with or without adjustments.

52 On 11 May 2017 the claimant was sent a formal notification that the Chief Constable on 10 May had placed him on half pay with effect from 5 May 2017. For the purpose of time limit the relevant date was 10 May 2017 when the decision was made, and the claimant informed of it by Peter Singleton. The

decision was reviewed by the Chief Constable every month and half pay continued to be paid until the claimant's ill-health retirement was agreed.

53 Kerry Brown, HR, emailed Keith McLachlan and copied David Sim of the Police Federation the following; "I have now received confirmation from Dr Roy that Constable Potter is to be medically redeployed. Could I ask that the attached redeployment interview is completed with him and returned to Nicola Ackers in Workforce Management. As per my previous email if you could still progress his return to work in an alternative role pending his redeployment." The Tribunal was perplexed by this email given Dr Roy's report had been referred to and seen by management in the middle of February 2017, approximately 3-months previously, and the claimant's health had not improved during that period culminating on the claimant's own case a total inability to work in any capacity from May 2017 onwards. There is no explanation for this, nevertheless the Tribunal took the view that the fact a redeployment interview had not taken place earlier did not assist the claimant given the information before the respondent that the claimant was not well enough to work in any capacity and was seeking early ill-health retirement as a result.

54 Kelly Brown's email triggered an exchange of emails that confirmed the claimant was still off sick and unable to work in any capacity, would be relocated to local policing at St Helen's on his return and a hope on the respondent's part that the posting would facilitate a return to work when fit enough to return to duty. Sergeant Pearson was asked to notify the claimant which he did on the 26 May 2016.

55 Prior to Sergeant Pearson's communication on the 16 May 2017 Dave Simm informed the claimant by text message that he had spoken with Kerry Brown "again, R&R have looked to produce a return to work to level one investigation at St Helens. Your supervision is due to visit with this…this would be a temporary posting with redeployment forms being completed from Dr Roy." The claimant's response was "Thanks Dave", and it is notable that he expressed no objection, there was no mention of his inability to drive to St Helen's and nor did he indicate that he was well enough to return to work forthwith, which is unsurprising given his evidence before the Tribunal that he was in no fit state to return to work in any capacity and had already sought to initiate ill-health retirement proceedings.

<u>The claimant's fist mention of Huyton Police Station 26 May 2017</u>

56 Sergeant Pearson contacted the claimant on 26 May 2017 in accordance with the accepted form of communication as agreed between them. His written report reflected "I had previously informed him that when he is ready to return to duty that he will be posted to local policing and he will be posted to St Helens. Stephen has stated that his condition now means that he is unable to drive and that travelling to and from work will require that he uses public transport. He has asked that when he is able to return to work that consideration is given to him possibly being moved to Huyton Police Station as it is within walking distance

from his house. I have assured him…I will bring it to the attention of the R&R and policing command team." In oral evidence it was accepted by the claimant that this communication had been made in the terms described by Sergeant Pearson. The claimant complained that the respondent had not supported him during this period, however, it was apparent from this entry and others Sergeant Pearson was supportive, caring and kept the claimant uppermost in his mind and so the Tribunal found. It is notable that this was the first reference made by the claimant to being moved to Huyton Police station and it is undisputed the claimant was not well enough to return to work with or without this reasonable adjustment.

57 Sergeant Pearson emailed OHU immediately and requested a follow up report, his understanding being that the claimant was expecting further contact from occupational health. He wrote "his medical condition has not improved and he has been diagnosed with further ailments since his previous appointment. A further assessment may be beneficial in determining his needs and a strategy in assisting his capability in carrying out duties or the completion of a return to work action plan." A return to work plan was never produced, despite HR's request, and the reason for this was that there was no expectation of a return to work by the claimant in any capacity on the part of the respondent given the claimant's intention to apply for early ill-health retirement.

58 The last time Sergeant Pearson spoke with the claimant was 19 June 2017 when he arranged for a home visit with Chief Superintendent Wayne for 26 June. He confirmed in the contemporaneous notes that "Steve is continuing with his prescribing medication and medical treatment program. He is still suffering with his condition and has no improvement to report at this time."

59 The Tribunal accepted Sergeant Pearson's evidence that at no point did the claimant mention he was well-enough to work from home or at Huyton Police Station, and there was no suggestion that if the respondent could accommodate these adjustments the claimant could undertake any form of work and so the Tribunal found.

60 Acting Sergeant Adam Reti replaced Sergeant Pearson as the point of contact for the claimant. The Tribunal were referred to Acting Sergeant Reti's contemporaneous notes recorded on the Origin system which it accepted at face value. On 24 June Sergeant Reiti contacted the claimant who confirmed "he is coping but his emotions are still everywhere due to his ongoing ailments and pain."

Chief Superintendent Waine and Inspector Thompson home visit with the claimant on 26 July 2017

61 Chief Superintendent Waine and Inspector Thompson conducted a home visit with the claimant on 26 July 2017. They concluded the claimant was very ill, he had not seen Dr Roy's February 2017 report, he was unfit for any work and preference was ill health retirement, expressing a frustration that he had not been considered for this earlier. Chief Superintendent Waine did not provide the

claimant with a copy of Dr Roy's report, but she did respond immediately to his request that the issue of early ill health retirement should be considered.

62 During this period, the claimant through auspices of the Federation, had obtained an agreement that the Federation would finance a medical report at a considerable expense with a view to persuading the respondent to grant him early ill-health retirement.

63 Chief Superintendent Waine initiated a number of emails concerning early ill-health retirement on 27 July 2017, and in response to this Dr Roy confirmed he had conducted a capability assessment [in February 2017] and "it was my opinion that he was capable of some form of work and the capability assessment reflected this. As you know, I would only complete a capability assessment of an individual if I felt if they were contemporaneously fit to engage in work at some level…if he did not subsequently resume work then what we perhaps should have done is initiate a Reg 33 challenge on any subsequent sick note that he produced…my view, there is a real chance (given the relatively recent identification of his diagnosis) an SMP may not ultimately deem it to be permanently disabling." Following an exchange of various emails which reflected in varying degrees an issue as to whether the claimant would be classified as permanently disabled with Dr Roy being of the view that the claimant did not meet the criteria for a referral, Chief Superintendent Waine took the view the claimant was not fit to be in work and his sick note should not be challenged.

Occupational health report dated 10 August 2017

64 In an occupational health report dated 10 August 2017 it was confirmed the claimant was "likely to need medical redeployment when he was well enough to return…I consider him to be unfit for work in any capacity at this time."

Dr D Eastwood's medical report

65 Dr D Eastwood, a consultant in pain management, was instructed by the Police Federation in respect of the claimant's application for medical retirement under Regulation H1. He recorded the claimant's account of the history and symptoms. It is notable the claimant informed him "if he had to return to work he knows he will not be able to cope…he records at times he struggles with his words, memory and emotions…all incompatible with him being able to return to work."

66 In Dr Eastwood's opinion the claimant "**has not been able to work since November 2016**…**on the case history as presented…to be permanently disabled from the ordinary duties of a police officer…constant fatigue and sleep problems as a consequence of his widespread pain/fibromyalgia together with his low emotional state and irritability will prevent him from having the stamina necessary and mental capacity to function as a police officer. He would not be able to do the tasks of a uniformed response officer at a desk job, he would not have the concentration/memory/decision making abilities**" [the Tribunal's emphasis].

In summary, Dr Eastwood's conclusion was that the claimant "is not capable of continuing to work within the police force in any capacity" and his application for medical retirement was supported. Dr Eastwood provided key information from which the Tribunal was satisfied that the respondent was at no time in breach of its duty to make reasonable adjustments as the claimant was never well enough to return to work in any capacity whether it be from home or Huyton Police Station.

67 Having seen Dr Eastwood's report Dr Roy changed his mind and in a report dated 25 September 2017 concluded "In my opinion this officer is unlikely to resume their normal role in the foreseeable future and therefore we would refer this officer to SMP in order to establish either permanent incapacity status and/or capability issues."

68 On the 3 October 2017 Peter Singleton from the Police Federation emailed Sergeant Reti regarding the Chief Constable's decision to continue paying the claimant half-pay pointing out "we did represent Steve and ask he be retained on full pay…you should understand that being disabled is no part of the decision-making process, unless the disablement cannot be adjusted for in the workplace. Unfortunately, Steve's own GP states he is not fit for any work, so Disability Act has no relevant to the Chief's decision – if it had we would have asked the Chief to reconsider. The Federation have spent over £2000 to get a medical report to look at him entering the H1 process." Contrary to the claimant's arguments before this Tribunal, his Federation took the view the claimant could not be retained on full pay under the Regulations given he was not fit enough for any work with or without adjustments and therefore eligible for ill-health early retirement.

Claimant's grievance 12 October 2017

69 On the 12 October 2017 the claimant completed a grievance form for the first time to which he attached a document setting out his complaint that "on 14 February I attended a capability assessment during which I requested working from Huyton Police Station or working from home as reasonable adjustments that would enable me to return to work. To this day I am still posted to response. …if the reasonable adjustments I requested…had been approved, this would have facilitated my return to work and I would not have gone onto half pay…" It is notable the information provided in the claimant's grievance was contradicted by the medical evidence of Dr D Eastwood, a consultant in pain management. In short, he was never in a position to return to work and the grievance was aimed at pressuring the respondent to increase his salary and accede to the ill-health retirement application and so the Tribunal found.

70 In oral evidence before the Tribunal the claimant confirmed it was expected officers formally raising a grievance would complete and sign a prescribed form, with the support of the Federation if necessary. The claimant also confirmed he had contacted the Federation on 12 May 2017 raising his grievance, and did not chase it up until October in the knowledge that a formal grievance should be in

written form and be signed by the complainant and he had not done so. The Tribunal concluded the claimant would have known a formal grievance had not been lodged with the respondent until he completed the form on 12 October 2017. The Tribunal was perplexed with the claimant's comment that he was "still posted to response" when the fact of the matter was the claimant had not lodged a grievance previously.

71 Dr Nasir was instructed to provide a medical report dealing with early ill-health retirement in his capacity as a selected medical professional ("SMP") on 9 October, and he produced the report on 16 October following his examination of the claimant on 12 October. Dr Nazir concluded the claimant was unfit to "return to both his working role or any alternative non-frontline work due to the ongoing symptoms for the foreseeable future." Dr Nazir completed the H1 form which was duly endorsed by the claimant on 26 October 2017 his preference for medical retirement. In his written witness statement, the claimant described the appointment he attended with Dr Nasir. He recalled how Dr Nasir had "explained that I still had capability and it was difficult for him to support medical retirement. I was crying and begged him to support me, I told him I cannot and will not go back to Merseyside Police." The claimant did not state that Dr Nasir had supported him in his report, and the Tribunal found it incomprehensible that an SMP in recognition of his or her professional obligations, would be swayed by an emotional plea from an officer seeking the financial benefit of early ill-health retirement. This evidence cast a further question mark over the claimant's credibility.

72 In an email sent 27 October 2017 following a home visit Inspector Karl Baldwin recorded the claimant had informed him he was consulting with a legal advisor and if "he was reduced to no pay he would immediately commence legal proceedings…and would not confirm if this was an Employment Tribunal…from what I gather Steve is under the impression that the job should have offered the adjustments and then he would ask his DR for a fit note to return to work. I explained that an adjustment was agreed whereby he worked on LP at St Helens/or Huyton. This would have been put in place on receipt of FIT note indicating he was okay to return to work with adjustments but no note was given. Steve indicated it was not his responsibility to do this…he had asked for adjustments in February 2017 and his perception was that it had never been mentioned to him since…"

73 Acting Sergeant Reti sent a supportive report to the command team asking them to extend half pay or revert to paying the claimant full pay. It is clear from the report that Acting Sergeant Reti was in regular communication with the claimant and these communications were also reflected in the contemporaneous log which the Tribunal considered but does not intend to set down in these reasons.

Retired on the grounds of ill health and the claimant reverting to full pay on 12 November 2017

74 On the 8 November 2017 Acting Sergeant Reti received confirmation that the claimant will be retired on ill health on 30 November 2017 and he would revert to full pay from the date he saw Dr Nasir. Formal notification of that decision was sent to the claimant on 14 November 2017 and he received a full salary from 12 November 2017 to 30 November 2017.

75 The claimant's grievance was investigated and Chief Inspector Brizell produced a report dated 12 December 2017 following his meeting with the claimant on 16 November 2017. The claimant was accompanied by Caroline Carmichael, described as his federation representative. In the liability hearing both the claimant and Caroline Carmichael played down her role as federation representative maintaining that she supported him as a friend and not representative. The evidence before the Tribunal was that the Caroline Carmichael was in communication with the claimant throughout his absence, she believed he was "vulnerable" and needed her help. The Tribunal formed the view that whatever Caroline Carmichael's status was, she could advise the claimant on matters such as reasonable adjustments, claims to employment Tribunals, statutory time limits and the part played by the Federation when it came to draft formal grievances. The Tribunal was satisfied that both the claimant and Caroline Carmichael held sufficient information on discrimination claims, Employment Tribunal proceedings and statutory time limits.

76 The claimant's grievance was not upheld.

77 The effective date of termination was 30 November 2017 following which the claimant elected to receive an annual pension of £18,996.02 per annum and lump sum of £126,640.15.

The law

Discrimination arising from disability (S.15 EqA)

78 Section 15(1) of the EqA provides-

"(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B less favourably 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.

79 Paragraph 5.6 of the Equality and Human Rights Commission: Equality Act 2010 Code of Practice provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with than of another person. It is only necessary to demonstrate that the

unfavourable treatment is because of something arising in consequence of the disability.

80 In order for the claimant to succeed in his claims under s.15, the following must be made out:

80.1 there must be unfavourable treatment;

80.2 there must be something that arises in consequence of C's disability;

80.3 the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability;

80.4 the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim

81 Unfavourable treatment is not the same as detriment. The test is whether a reasonable worker would consider that the treatment is unfavourable. An unjustified sense of grievance will not suffice. Useful guidance on the proper approach to a claim under s.15 was provided by Mrs Justice Simler in the well-known case of Pnaiser v NHS England and anor [2016] IRLR, EAT:

> "A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it."

82 Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572 in which it was held "A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…" The causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

83 With regard to the objective justification test, when assessing proportionality, the Tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations

involved, having particular regard to the business needs of the employer (see the well-known principle set out in Hensman v Ministry of Defence UKEAT/0067/14/DM).

The duty to make reasonable adjustments

84 The duty to make reasonable adjustments is set out in S 20 of the Equality Act 2010 ("EqA"). Section 20(3) sets out the first 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. Section 21(1) provides that a failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments. Schedule 8 of the EqA 2010 applies where there is a duty to make reasonable adjustments in the context of 'work' and the Statutory Code of Practice on Employment is to be read alongside the EqA. The Code states that a PCP should be construed widely so as to include, for example, informal policies, rules, practices, arrangements, criteria, conditions and so on.

85 The EAT decision in the well-known case of Secretary of State for Work and Pensions (Job Centre Plus) v Higgins [2013] UKEAT/0579/12 held at paragraphs 29 and 31 of the HHJ David Richardson's judgment that the Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage. HHJ David Richardson clarifies at paragraph 34 that "the purpose of identifying a PCP is to see if there is something about the employer's operation which causes substantial disadvantage to a disabled person in comparison to persons who are not disabled. The PCP must therefore be the cause of the substantial disadvantage – Para. 35.

86 At Para. 49 HHJ David Richardson emphasises that S.20 (3) sets out the fundamental test to be applied by the Tribunal in determining whether an employer is under a duty to make reasonable adjustments. The duty to take the step arises if it is a step which is reasonable for the employer to have to take to avoid the disadvantage and the Equality and Human Rights Commission's Code of Practice on Employment at Para. 6.28 makes reference to the factors, including "whether taking any particular steps would be effective in preventing the substantial disadvantage." As in the case of Mr Higgins, one of the key issues in the case of Mr Potter was how far the step or steps would have been effective in preventing any substantial disadvantage to him caused by the PCP, and given the fact he was too unwell to return to work in any capacity none of the steps would have been effective in preventing a substantial disadvantage. And his return to work.

Burden of proof

87 Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

88 In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that he did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondents and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds. In Mr Potter's case the burden of proof did not shift in respect of the reasonable adjustments claim, however he has produced primary facts from which inferences of unlawful discrimination could be drawn in respect of the disability related claim, the burden shifted to the respondent who gave satisfactory evidence on the objective justification test.

Time limits

89 (1) [Subject to [sections 140A and 140B] proceedings] on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.
(2)..

(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Conclusion: applying the law to the facts

Discrimination arising from disability (S.15 EqA)

Disability Discrimination – Time Limits

90 With reference to the first issue, does the Employment Tribunal have jurisdiction to hear the Claimant's discrimination complaints regarding the decision to reduce the Claimant's pay from full pay to half pay as the decision was taken more than three months prior to the issue of the ET1, the Tribunal found it had not. The claimant's pay was reduced from 5 May 2017. The claimant made contact with ACAS on 13 December 2017 when early conciliation commenced, some 7 months after the act complained of took place and well outside the statutory limitation period.

91 With reference to the second issue, namely, was the decision regarding the reduction of the Claimant's pay a continuing act on the basis that the decision was subject to monthly review, the Tribunal found that it was not. The claimant conceded in evidence that as of May 2017 he was not able to return to work in any capacity, with or without adjustments and therefore, by the 10 May 2017 pay review date the claimant did not qualify under any of the exceptions to enable the Chief Constable to use his discretion in the claimant's favour. There were no adjustments and no return to work date pending adjustments and it cannot be said the Chief Constable's decision on review every month until the decision was made to pay the claimant his full salary between 12 and 30 November 2017 was an act of unlawful discrimination. The Tribunal accepts theoretically the fact the Chief Constable reviewed his decision monthly could amount to a continuing act from the time the decision was made and took effect on 5 May 2017 to 12 November 2017, however, it accepted Mr Tinkler's submission that the respondent had no statutory power to pay the claimant in full during this period under Regulation 28 and annex K of the Police regulations 2003 governing sick pay that had a statutory effect.

92 With reference to the third issue, namely, if the claim regarding the decision to reduce the Claimant's pay was out of time, is it just and equitable to extend time, the Tribunal found it was not on the basis that the claimant, through the auspices of the union and his legal advisors, was aware of the time limits and chose not to issue proceedings within the statutory time limit when the decision to reduce his pay to half pay was made and took effect.

93 Employment Tribunals have discretion to extend the time limit for presenting a complaint where they think it 'just and equitable' to do so — S.123(1)(b) EqA. In the well-known case of Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA, the Court of Appeal stated a Tribunal cannot hear a claim unless the claimant "convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule." Mr Potter did not

convince the Tribunal that its discretion should be used in his favour, and it accepted Mr Tinkler's submission that the cogency of the evidence had been affected by the delay; the case concerned what the claimant had said between January and the end of April 2017 with conversations taking place more than 9-months before receipt of the ET3 and memory were hazy and so the Tribunal had found.

94 With reference to the fourth issue, namely, does the Employment Tribunal have jurisdiction to hear the Claimant's claims regarding the failure to permit the Claimant to work from Huyton Police Station or work from home, the Tribunal found the claims were out of time and it did not have jurisdiction. On the Claimant's case such adjustments should have been put in place by 1 May 2017 and they were not. The claimant confirmed after the 1 May 2017 the adjustments could not be put in place as he was unable to work in any capacity and as a consequence the date of the last act relied upon was 29 April 2017 and the claim was lodged well out of time.

95 With reference to the fifth issue, namely, if the claim regarding the failure to permit the Claimant to work from Huyton Police Station or from home is out of time, is it just and equitable to extend time, the Tribunal found it was not taking into account its observations above. The claimant's explanation for failing to issue proceedings within the statutory limitation period was twofold; he did not think about it and wanted to progress with the internal grievance, an explanation found by the Tribunal to be contradictory. The claimant was aware of time limits through the Police Federation represented, and he had access to advice through the Police Federation. He was in regular contact with Federation representatives on a formal and informal basis including Caroline Carmichael, David Simm and Peter Singleton. Even if the Tribunal gave the claimant the benefit of the doubt, by October 2017 the claimant was in a position to submit his formal grievance and in receipt of legal advice as he had threatened to issue proceedings if his salary was reduced to nil, and yet he took no step to issue proceedings for unlawful disability discrimination. In oral submissions the claimant attributed the delay to the effect of his disability, a reason not given by him when he gave oral evidence under oath dealing with time limits and therefore could not be cross-examined on it. The Tribunal did not find the claimant's explanation credible. It was clear to the Tribunal as the claimant could compete his formal grievance report, he was also able to contact ACAS, write numerous emails, attend doctors' appointments for the purposes of a medical report being provided and deal with his application for early ill health retirement.

96 The Tribunal concluded the claimant was not prompt in his actions; the written grievance dated 12 October flagged up a course of action and it is clear that by this date at the latest (and most probably a lot more earlier) the claimant was cognisant of his legal rights with access to support and assistance. Mr Tinkler reminded the Tribunal in submissions that the claimant gave evidence to the effect that he had discussed on October 2017 issuing proceedings with the Federation and yet was unable to explain why he failed to contact ACAS until December.

97 In exercising its discretion to allow out-of-time claims to proceed, Tribunals may have regard to the checklist contained in S.33 of the Limitation Act 1980 (as modified by the EAT in British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT) and consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case — in particular, the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action. In Mr Potter's case the Tribunal has weighed up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other and concluded the balance of prejudice lay with the respondent acknowledging the claimant would feel himself to have been prejudiced if his claims were not considered on the basis that the Tribunal did not have the jurisdiction to do so. It was notable to the Tribunal that the substantial delay in issuing proceedings affected the quality of the evidence. The claimant's own memory was clearly flawed and in the absence of documentation the respondent's witnesses struggled to recall back to 2017 due to the passage in time and the fact they had moved on in their careers.

98 But for the limitation bar, the Tribunal concluded for the reasons set out his disability discrimination claims would not have succeeded in any event on the balance of probabilities and this factor was weighed in the balance before reaching its conclusion not to use its discretion and extend time, even taking into account the claimant's disability which the Tribunal found on balance did not prevent the claimant from issuing proceedings in time.

99 In conclusion, the claimant's claims of unlawful discrimination were received by the Tribunal outside the statutory time limit, the Tribunal does not have the jurisdiction to consider them, it is not just and equitable to extend time in the particular circumstances of the case and the claims are dismissed in their entirety.

100 In the alternative, if the Tribunal is wrong in respect of time limits and jurisdiction it has gone on to consider the substantive claims as follows and deal with the agreed issues.

Reasonable Adjustments

101 With reference to the PCP's relied upon it is agreed by the respondent two PCP's existed to the effect that the claimant was required to work at St Helens Police Station ("the location PCP") and during any sickness absence six months' pay is paid at full pay and the following six months at half pay.

102 The Tribunal accepted the claimant was put at a substantial disadvantage by the PCP's. In respect of the location the Claimant, had he been well enough to work (which the Tribunal found he was not on the evidence before it) could not drive

and he found travelling by public transport too fatiguing. With regard to the reduction in pay the substantial disadvantage was the financial loss, but this loss was no worse for the claimant than somebody who is not disabled or disabled with a different medical condition.

103 Mr Tinkler submitted the respondent did not know and nor could it reasonably have known the location PCP did or was likely to put the claimant at a disadvantage because it did not know a key issue for the claimant was driving to and from work in St Helens given the first indication made to Sergeant Pearson by the claimant was on the 26 May 2017 when the claimant responded to being told he would be relocated to local policing in St Helens when well enough to return to work. The claimant indicated he was unable to drive because of medication. The Tribunal accepted on the evidence before it this was the first mention made by the claimant, and on balance it did not accept the claimant had informed Dr Roy of his inability to drive as far back as February 2017. There was no reference in Dr Roy's report (produced in part as a result of a problem with scanning by the occupational health department) by the claimant until the May discussion about St Helens. The evidence reveals the claimant was informed by Dave Simms he was to work in St Helens by text sent 12 May 2017 and no problem with driving was identified to the Federation at that point. The Tribunal accepted Mr Tinker's submission that the claimant made no mention of his inability to drive until the 26 May 2017 at the earliest and when this was put to the claimant in cross-examination his response was "it looks that way." The Tribunal accepted the respondent did not know and could not have reasonably known the requirement to work at St Helens put the claimant at a disadvantage during the relevant period, and it was entitled to rely on the GP fit notes confirming the claimant was not fit to work with or without adjustments.

104 The Claimant submitted it would have been reasonable to allow him to either work from home or Huyton Police Station near home as it would have avoided the substantial disadvantages claimed. The Tribunal did not agree on the basis that the claimant was never able to return to work with or without the adjustments at any stage during the relevant period in February to 1 May 2017. It is notable Dr Roy's report does not mention the reasonable adjustment. When the adjustments were raised on 26 May 2017 on the claimant's own case according to his own consultant's report he was not capable of working in any capacity. There is no evidence the claimant stated he could work from home, and even had he suggested to Dr Roy as stated by the claimant, the Tribunal accepted the respondent's evidence that it was not reasonable to put that adjustment in place given the extent of the supervision requirement. It is notable, Dr Eastwood's conclusion was that the claimant "is not capable of continuing to work within the police force in any capacity" and his application for medical retirement was supported on this basis. The claimant cannot have it both ways and Dr Eastwood provided key information from which the Tribunal was satisfied the respondent was at no time in breach of its duty to make reasonable adjustments given he was never well enough to return to work in any capacity whether it be from home or Huyton Police Station.

105 Turning to the issue of pay, the Claimant says that he was awaiting redeployment, preferably to home or Huyton Police Station when he would have been able to resume his full duties, he ought to have been retained on full pay or moved so that he could resume full pay. The Tribunal did not agree; there was no satisfactory evidence the claimant was waiting to resume his full or any duties pending redeployment. The evidence before the respondent and Tribunal was to the contrary; the claimant was too unwell to work and could not have worked had redeployment taken place. The claimant would not have qualified for a payment of his full salary under the 2003 Police Regulations as the exception in the Regulation required an end date and there was none.

106 The Tribunal did not accept the claimant's argument that had he been relocated and had salary been paid in full he would not have been so unwell. The EAT decision in Secretary of State for Work and Pensions (Job Centre Plus) v Higgins cited above requires the Tribunal to identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage. The Tribunal carried out this exercise and conclude had the respondent paid the claimant his full salary he would have remained off work too unwell for any type of duties. Paying the claimant his full salary contrary to the Regulations was not a step reasonable for the respondent to have to take in circumstances, given the statutory obligation and the fact there was no end date in sight for the claimant's absence. The Tribunal's finding in this respect is also applicable to the issue of objective justification set out below.

107 Mr Tinkler submitted in relation to pay the claimant adduced no evidence to show he had suffered a greater hardship that anybody else who was not disabled and the Tribunal accepted this was the case. The claimant relied upon Meikle v Nottinghamshire CC [2004] EWCA Civ 859 in which the Court of Appeal found on the "sick pay issue" in the Judgement of LJ Keene at paragraph 55 onwards. In contrast to the position Mr Potter had found himself in, Mrs Meikle claimed the cause of her absence from work was the respondent's failure to make reasonable adjustments. At paragraph 66 the Court of Appeal confirmed the proper approach was to ask whether the respondent had shown, if all the reasonable adjustments had been carried out, she would have been absent for as long as she was and therefore liable to the reduction in her sickness payment, the evidence pointing to her lengthy absence being the consequence of "the prolonged failure of NCC to take appropriate steps to cope with her disability." Mr Potter was not in the same or similar position in that the respondent had not failed to take the appropriate steps and it could meet the applicable legal test of objective justification.

108 The Tribunal was referred to the case of O'Hanlon v HM Revenue and Customs Commissioners [2007] ICR 1359, CA, a disability-related discrimination case under old S.3A(1) DDA. The claimant was on long-term sick leave and the HMRC's sick pay policy provided for full pay for the first 26 weeks of sickness absence, followed by half pay for a further 26 weeks. The claimant complained of disability-related discrimination when her pay was reduced and then stopped

in line with this policy. The reduction in pay can be described as unfavourable treatment because of something arising in consequence of the claimant's disability. The Court of Appeal held HMRC's sick pay rules provided for the generous, fair and flexible treatment of those suffering from a disability. H's only argument before the tribunal and the appeal tribunal for not applying R's sick pay rules to H had been that she would suffer financial hardship. H's skeleton argument for the tribunal did not set out any particular reason why the application of R's rules discriminated against H personally as opposed to all disabled employees. It would therefore be unjust and unrealistic to say that R should now be found to have failed to establish justification because they did not have regard to other unstated factors relating to H. Accordingly H's argument that she was entitled to full pay whilst absent for reasons of disability after the expiry of the six-month period failed.

109 Mr Potter's claim is more analogous with that of O'Hanlon in comparison to Meikle, and in the former the Court of Appeal found there was no obligation for the respondent to consider, as a reasonable adjustment, to pay an employee full sick pay beyond the statutory entitlement. The Tribunal accepted Mr Tinker's submission that both cases can be differentiated in that Meikles's sickness absence was caused in the first place by the respondent's failure to make reasonable adjustments, and in an "ordinary case" where this did not happen it was not a reasonable adjustment to consider paying sick pay for longer. The Tribunal agreed with the proposition that had the respondent failed to make any reasonable adjustments (which for the avoidance of doubt it did not as there was no satisfactory evidence before the Tribunal that the reasonable adjustments sought by the claimant would have alleviated any substantial disadvantage) the claimant may potentially have had a good argument on the reduction of pay, but as a stand-alone claim it must fail.

Discrimination arising from disability

110 The Claimant's case is the 'something' that arose from his disability was his absence from work and the inability to travel to St Helens. He was treated unfavourably because of that by being kept off work when he could have been redeployed, either to work from home or Huyton Police Station, and then reducing his pay to half pay. For the reasons already stated above, the Tribunal did not accept the claimant was treated unfavourably when he could have been redeployed on the basis that he was never well enough to return to work into any alternative role as confirmed by the claimant's own consultant Dr Eastwood in his medical report and his claim falls at the first hurdle. Dr Eastwood's medical report was fatal to the claimant's claims relating to redeployment. He confirmed the claimant had not been able to work since November 2016, was permanently disabled from the ordinary duties of a police officer…and did not possess the stamina necessary and mental capacity to function as a police officer. He would not be able to do the tasks of a uniformed response officer at a desk job as he would "not have the concentration/memory/decision making abilities."

111 Turning to the reduction in the claimant's pay the Tribunal accepted the claimant was absence as a result of his disability and due to the length of the absence suffered a reduction in pay, the unfavourable treatment relied upon by the claimant arising in consequence of his disability. The key issue before the Tribunal was whether the respondent can show that the reduction of the claimant's pay when he was absent from work as a result of his disability is a proportionate means of achieving a legitimate aim. The reason for the claimant's treatment was the application by the Chief Constable of the respondent's policies and procedures in relation to disability, disability related leave, paid leave and the 2003 Police Regulations by which the respondent was statutory bound. As set out above, the Regulation highlighted three exceptional criteria existed in order that the Chief Constable could use a discretion to continue paying an officer full pay and the claimant did not fall into any as accepted by the Police Federation representative Peter Singleton in his email of 3 October 2017.

112 An Employment Tribunal must carry out a balancing exercise, weighing the organisation's need to impose the PCP against the PCP's discriminatory effect. Having an apparently sound reason for imposing the relevant PCP is not enough in itself: the employer must also demonstrate that the reasons for its imposition are strong enough to overcome any indirectly discriminatory impact. The more discriminatory the PCP, the more difficult it will be for the employer to show that it was justified. The EHRC Employment Code contains guidance on objective justification in the context of indirect discrimination; the aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration — para 4.28. The Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not have been achieved by less discriminatory means — para 4.31.

113 Taking into account all of the evidence above, the Tribunal concluded on the balance of probabilities the Chief Constables decision to reduce the claimant's salary to half pay after a 6-month absence in which full pay was made was objectively a proportionate means of achieving a legitimate aim taking into account the needs of the respondent to manage sickness absence and pay, and the real need to comply with the statutory regulations in relation to sick pay and absence. The Tribunal took into account the generous sick pay benefits and the fact the respondent was not in breach of its duty to make reasonable adjustments. As indicated above, the respondent was keen to manage sickness absence generally given the reduction in personnel as a result of financial cuts, it needed police officers to return to work given the adverse effect absences had on colleagues who were not sick and required to shoulder the responsibilities for those who were. Limiting the amount of pay, albeit in generous measures, could achieve the legitimate aim of ensuring police officers were not absent for longer than 6-months on full pay and a further 6-months on half-pay. The discriminatory impact of reducing pay to the claimant who was absent to half pay was a proportionate means of achieving

a number of legitimate aims and the balancing exercise was not in the claimant's favour.

114 In conclusion, the claimant's claims brought under sections 15 and 20-22 of the Equality Act 2010 were not presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done), such complaints are out of time, in all the circumstances of the case, it is not just and equitable to do so and the claims are dismissed. In the alternative, the claimant was not subject to unlawful discrimination and the claimant's claims of unlawful disability discrimination are not well-founded and dismissed.

27.9.19

_____

Employment Judge Shotter

JUDGEMENT SENT TO THE PARTIES ON

3 October 2019

FOR THE TRIBUNAL OFFICE