THE EMPLOYMENT TRIBUNALS

BETWEEN

Mr Alan Newport

Claimant

AND

The Commissioner of Police of the Metropolis ***Respondent***

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central **ON**: 22, 23 and24 January and 8 October 2019
EMPLOYMENT JUDGE: Mr Paul Stewart **MEMBERS:** Mr Ratnam Maheswaran and Mrs Jules Griffiths

Appearances:
For Claimant: **Mr James Bromige of Counsel**
For Respondent: **Mr Thomas Cordery of Counsel**

JUDGMENT

Unanimously, we dismiss all claims.

REASONS

Introduction

1. This is a claim brought by a serving police officer alleging disability discrimination in two forms: first, that there was discrimination arising from disability and, second, that there was a failure on the part of the Respondent to make reasonable adjustments.

2. In support of his own claim, the Claimant gave evidence while, for the Respondent, we heard evidence from Detective Chief Inspector Paul Whiteman, Detective Sergeant Robert Russ, Mr (formerly temporary Detective Inspector) Terry Cousins, Detective Sergeant Stephanie Reardon.

3. After hearing submissions, the Tribunal of three considered the evidence in chambers on the afternoon of 24 January 2019. We reached a decision but delay set in and we had to return to discuss the case again in chambers on 8 October 2019. Very sadly, by that time, the Tribunal was reduced to two members, Mr

Maheswaran having died in early May 2019. The two remaining members of the Tribunal are in agreement on the reasons for our decision as was Mr Maheswaran in January 2019. This Judgment and Reasons has been a long time in gestation and we apologise for that.

Facts

4. At all material times, the Claimant was a police constable working in the London Intelligence Unit within the Counter Terrorism Command of the Respondent, also known as SO15. In December 2015, he began to experience dull aches in his lower back whilst sitting down at work and this progressively worsened. He was signed off work from 12 January 2016 to 26 March 2016. His GP signed him fit to return with adjustments. The GP made a comment that he would benefit from having regular breaks and would benefit from standing rather than sitting.

5. The Claimant was referred to Occupational Health in early 2016 which led to a report dated 9 March 2016 advising management that the Claimant was currently unfit for work in any capacity with the Occupational Health doctor being unable to advice on a long term prognosis until the Claimant had had a definitive diagnosis. As regards whether the Claimant was disabled within the meaning of the Equality Act 2010, the doctor said it was "unlikely at present – as condition is less than 12 months old".

6. The Claimant returned to work on 26 March 2016. However, his back pain returned and he was signed off sick on 21 April 2016 and, by the time of the hearing in January 2019, had not returned to work.

7. On 23 June 2016, the Claimant was informed he would be moved onto half pay as from 6 August 2016 because his absence by that stage triggered that contractual provision.

8. On 11 August 2016, ADS Reardon invited the Claimant to an Absence Management Case Conference to be held in August, it being stated that the object of the conference was to assist the Claimant to get back to work. The conference was held on 25 August 2016. The Claimant did not attend but his Police Federation representative DC Mark Stapley attended in his place.

9. The outcome of this conference was conveyed to the Claimant by ADS Reardon by email and formal letter both dated 26 August 2016. The formal letter informed the Claimant that he was expected to return to work by 19 September 2016. Should he not return to work by that date, it may be appropriate to start progressing his absence through the Police (Performance) Regulations 2008.

10. That letter was sent under the cover of an email that was very friendly and supportive in tone and which encouraged the Claimant to keep in touch with his manager, ADS Reardon.

11. The Claimant raised a grievance on 28 August 2016 alleging that the Respondent had failed to make to reasonable adjustments by failing to supply a standing workstation. That grievance was subsequently not upheld, a decision which was affirmed on appeal.

12. The Claimant did not return to work. On 26 September, ADS Reardon wrote to advise that the Claimant was required to attend the Unsatisfactory Performance Procedure First Stage (UPP1) meeting scheduled for 18 October 2016.

13. The UPP1 meeting, again conducted without the presence of the Claimant but with the presence of his Police Federation representative, resulted in the Claimant being given a written improvement notice requiring that he return to work on 1 February 2017 and maintain a satisfactory attendance for 12 months. If sufficient improvement was not maintained, the Claimant may be required to attend a UPP2 meeting. Through his representative, the Claimant asked that he be referred to Occupational Health and also to the Chief Medical Officer (CMO).

14. On 10 November 2016, the Claimant had a telephone discussion with Occupational Health which resulted in him being informed the following day that he would be seen by the CMO and that a date for such a meeting would be confirmed shortly. In fact, he was not seen by the CMO until 20 April 2017. The reasons for this related to a 10-week waiting list for referrals to the CMO and to the fact that the Claimant, being absent from work, was not able to access his work email account to which information concerning the appointment with the CMO was sent. It was only when the inability of the Claimant to access those emails was discovered that the Claimant was offered an appointment on 20 April 2017 which he was able to keep.

15. Before he saw the CMO, the Claimant was invited to a UPP2 meeting to be held on 16 March 2017. Again, it was held in his absence with his representative in attendance and a letter dated 21 March 2017 attached a final written improvement notice which required him to return to work by Monday 15 May 2017.

16. On 29 March 2017, the Claimant appealed by way of grievance against the issue of the final written improvement notice. Before the grievance appeal hearing could be conducted on 27 April 2017, Dr Schuchart-Wuest on behalf of the Chief Medical Officer reported on the appointment held on 20 April 2017 that the Claimant was unfit for his duties and that she was writing to the Claimant's specialist to obtain a clearer picture of the Claimant's prognosis and ability to return to any type of duties. She recommended a review appointment after the specialist's report was received. In her opinion, the Claimant was likely to fall within the definition of disabled contained within the Equality Act 2010.

17. DCI Whiteman heard the grievance appeal meeting and he decided it would be practicable to allow the CMO to obtain the specialist's report before continuing the UPP process. This, in his opinion, would allow the avenue of Ill-Health Retirement to be explored. Thus, he extended the return to work date from 15 May to 15 August 2017.

18. On 6 June 2017, Dr Schuchart-Wuest in Occupational Health wrote a Management Advice Report stating her opinion that the Claimant was unfit for his duties, that no improvement was expected, that his condition was expected to be permanent and that she was recommending he apply for Ill-Health Retirement (IHR).

19. In consequence, the Claimant completed an IHR application form on 12 July 2017, sending it off on 31 July 2017. This led to Detective Chief Superintendent Jarrett, the Head of Operational Support, considering the recommendation of Dr

Schuchart-Wuest and declaring himself to be supportive of the Claimant's application for IHR.

20. DS Russ, who had taken over the line management of the Claimant in January 2017, decided in September 2017 to delay the UPP3 process for two weeks pending the completion of the IHR application. Subsequently, he was advised not progress the UPP3 process further but, still later, he was advised by Ms Sarah Waller of HR to continue with the UPP process. Consequently, he issued a letter dated 13 October 2017 which informed the Claimant that a Stage 3 meeting would be convened whereby the Claimant would be obliged to attend before a panel and that the details of this meeting would be sent separately by the Claimant's senior manager as soon as reasonably practicable.

21. No details were ever sent to the Claimant and no further UPP meetings took place.

22. The Claimant's application for IHR was turned down at the initial hearing but his appeal against that decision was heard on 17 January 2019 and, at the date of the Tribunal Hearing, the outcome of the appeal was not known.

The Law

23. Both counsel referred us to the law in their written skeleton arguments. We did not discern any relevant disharmony between them as to the approach we should adopt in reaching our decision. Accordingly, we adopt such references to statutes and case law as they made without repeating such references.

Discussion

24. We were presented with a draft Amended List of Issues that was agreed between the parties. Our conclusions on the issues so listed follow.

25. The Respondent conceded that the Claimant's back condition, referred to as Ankylosing Spondylitis, amounts to a disability within the meaning of section 6(1) of the Equality Act 2010 from May 2016 onwards.

26. The Respondent further conceded that the Claimant's sickness absences arose from his disability. We did not consider the Respondent to have treated the Claimant unfavourably by "unnecessarily delaying referring the Claimant to the Chief Medical Office". There was no delay in so referring the Claimant given that the referral was made on 11 November 2016, the day after the Claimant was seen by Occupational Health who, in such a case, acted as gate keeper for the CMO.

27. We did not consider the Respondent to have treated the Claimant unfavourably by "placing the Claimant on two Unsatisfactory Performance Procedure (*UPP*) notices". We accept the submission advanced by counsel for the Respondent that we should judge the warnings delivered by the "broad experience of life" referred to by Langstaff P in Williams v The Trustees of Swansea University Pension & Assurance Scheme [2015] ICR 1197 at paragraph 29. When we do, we observe that the Claimant suffered no tangible consequence as a result of the UPP notices which formed part of a robust and fair absence management process which was beneficial to all employees, disabled and non-disabled.

28. We did not consider the Claimant to have been "threatened" with Stage 3 of the UPP. The Claimant was told by DS Russ on 13 October 2017 that he was required

to attend before a panel at a Stage 3 meeting as this was the required course of action under the Police (Performance) Regulations 2012 should it be the case, as it was, that DS Russ did not consider sufficient improvement to have been made within the terms of the Final Written Improvement Notice.

29. After concluding that the Respondent did not treat the Claimant unfavourably in the manner alleged, we do accept that the treatment he did receive was because of his sickness absence. We also accepted that the UPP was a proportionate means of achieving a legitimate aim in the manner set out in the list of issues, namely:

    i) To monitor attendance levels of serving officers;

    ii) To ensure adequate supervision during sickness absence;

    iii) To provide support for officers in order to facilitate a return to work; to assess whether and when an officer will be able to return to full partial duties;

    iv) To assess whether and when an officer will be able to return to full or partial duties.

30. The list of issues asks: "Did the Respondent not know, or could not reasonably have been expected to know, that the claimant had a disability at the material time?" We took the view that the Respondent could not have been expected to know that the Claimant had a disability within the meaning of the Equality Act 2010 until Dr Schuchart-Wuest on behalf of the Chief Medical Officer reported on the Claimant following her consultation with him on 20 April 2017.

31. We turn now to the claim that the Respondent failed to make reasonable adjustments. The list of issues asks the question as to whether the UPP placed the Claimant at a substantial disadvantage in that he was "threatened with UPP Stage 3, which could have resulted in his dismissal". This is in the context of section 20 of the Equality Act 2010 which imposes a duty on a person referred to as A in certain situations, one of which a requirement:

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

32. The premise on which the issue appears to be based is that the UPP (the Unsatisfactory Performance Procedure) is a provision, criterion or practice of A. Does this put the Claimant as a disabled person at a substantial disadvantage in comparison with persons who are not disabled? On the face of it, the UPP applies to both disabled persons and persons not disabled. The fact that the Claimant was told that dismissal was a possible outcome of UPP3 does not, as we have said, seem to us to amount to him being threatened with dismissal. That possible consequence would be true for a non-disabled person whose performance merited the Respondent implementing that procedure.

33. But, in any event, the UPP3 stage was never implemented. So even if it might have placed the Claimant at a substantial disadvantage, the Claimant was never so placed.

34. The list of issues then poses the question:

> Would the postponement of the absence procedure pending the outcome of the ill-health retirement process have been a reasonable step to avoid the disadvantage?

35. As the evidence of DS Russ revealed to us, DS Russ had discussions with A/DI Couzens and A/DCI Whiteman as to the appropriateness of proceeding with UPP3 when it was known that the Claimant was applying for Ill-Health Retirement. DS Russ formed the opinion that to proceed thus would be unfair. Later, he had his opinion supported by advice on the correct procedure given by Ms Jacqueline Baldock, the Case Manager at the Medical Retirement Secretariat. Thus, the UPP process was put on hold and was still on hold at the date of the Hearing.

36. So, in answer to the question, the postponement of the absence procedure pending the outcome of the Ill-Health Retirement which occurred was a reasonable step for the Respondent to have taken which had the effect of avoiding any disadvantage that may, contrary to our view, have resulted from the Claimant being told dismissal was a possible outcome of UPP3.

37. The list of issues continues with:

> Did the Respondent not know, or could not reasonably be expected to know, that the Claimant had a disability and was likely to be placed at the substantial disadvantage?

38. We consider that the Respondent did not know the Claimant had a disability until it received the report of the CMO following his consultation with Dr Schuchart-Wuest on 20 April 2017. Thereafter, it seems to us that there was an appreciation on the part of DS Russ that proceeding with UPP3 was unfair. Such a view seems to us to encompass a recognition of there being a substantial disadvantage so to continue.

39. To recap, therefore, we do not consider there to have been a failure on the part of the Respondent to make reasonable adjustments.

40. We move on to the question of jurisdiction: are any of the Claimant's claims out of time? The ET1 in this case was received on 22 March 2018. Early Conciliation Procedure was initiated with ACAS on 10 January 2018 and concluded with ACAS producing its certificate on 24 February 2018. This means that such of the Claimant's claims as occurred before 11 October 2017 are, at first sight, out of time.

41. We were not satisfied that the various acts and omissions that the Claimant complained about collectively fall to be described as conduct extending over a period. And the Claimant did not supply us with reasons as to why, in the event that we considered any of his claims to be out of time, it might be just and equitable to extend time. In the circumstances (and having regard to the well-known dicta of Auld LJ In **Robertson v Bexley Community Centre** [2003] IRLR 434 (CA)[1]) we

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[1] 25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.

dismiss those claims relating to acts or omissions that occurred before 11 October 2017.

Conclusion

42. For all the above reasons, we dismiss all the claims.

Paul Stewart

EMPLOYMENT JUDGE

On:

15 October 2019

DECISION SENT TO THE PARTIES ON

24/10/2019

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FOR SECRETARY OF THE TRIBUNALS