



**IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH**

**Judgment of the Tribunal in Case No: 4118201/2018 Heard at Edinburgh on 25<sup>th</sup>, 26<sup>th</sup>, 27<sup>th</sup> March and 18<sup>th</sup> April with deliberations on 23<sup>rd</sup> April, 27<sup>th</sup> May, 16<sup>th</sup> and 27<sup>th</sup> September 2019**

**Employment Judge: J G d'Inverno, QVRM, TD, VR, WS  
Members: Mrs Lorraine Brown  
Mr John Terry**

**Mr S Wilkinson**

**Claimant  
Represented by  
Mr McGuire, Advocate  
instructed by Levy &  
McRae, Solicitors,  
Pacific House,  
70 Wellington Street,  
Glasgow, G2 6UA**

**Chief Constable Of The Police Service Of Scotland**

**Respondent  
Represented by  
Dr A Gibson, per  
Morton Fraser LLP,  
145 St Vincent Street,  
Glasgow, G2 5JF**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous judgment of the Employment Tribunal is:-

**(First)** That the claimant's complaints of discrimination in terms of section 21(2) and section 15 of the Equality Act 2010 succeed.

**(Second)** That the same acts and omissions of the respondent, which constituted the breach of duty to make adjustments arising in terms of section 20, also constituted the unfavourable treatment which the Tribunal has found established in terms of section 15 of the Equality Act 2010.

**(Third)** That the respondent shall pay to the claimant a total sum of £10,000 as damages for hurt to feelings in respect both of the section 21(2) and section 15 EqA 2010 Discrimination, together with interest thereon at the judicial rate of 8% per annum from 1<sup>st</sup> January 2017 until the date of this judgment.

## REASONS

1. This case called for Final Hearing at Edinburgh on 25, 26 and 27<sup>th</sup> March and 18 April 2019. Both parties enjoyed the benefit of professional representation; for the claimant Mr Maguire, Advocate, for the respondent Dr Gibson, Solicitor.

### The Claims

2. The claimant, who suffers, and as is conceded by the respondent, at the material times suffered, from Parkinson's Disease and was, as is further conceded by the respondent for the purposes of his complaints, a person possessing the protected characteristic of disability in terms of section 6 of the Equality Act 2010, presents complaints of:-

- Discrimination in terms of section 21(2) by reason of alleged failure to comply with a duty to make adjustments said to arise in terms of section 20 of the Equality Act 2010; and
- Discrimination by reason of the respondent's alleged treatment of him unfavourably because of something arising in consequence of his disability.

### **The Response**

3. The respondent entered appearance disputing the claims and, while conceding the claimant's disability status:-
  - Denying that the respondent had breached any duty to make reasonable adjustments arising in terms of section 20 of the Equality Act, and asserting that the respondent had separately made "significant adjustments to accommodate the claimant's condition";
  - Denying that the claimant had been treated unfavourably because of something arising from his disability in terms of section 15 of the Equality Act 2010, separately, and in any event offering to prove that the treatment in question constituted a proportionate means of achieving a legitimate aim and that accordingly, in terms of section 15(1)(b) of the Equality Act 2010 ("EqA 2010"/"the 2010 Act"), the treatment complained of did not constitute discrimination.

### **Documentary Evidence**

4. Parties lodged a Joint Bundle of Documents extending to 199 pages to which was added, in the course of the Hearing, an additional document "Scottish Police Authority/Police Scotland Disability in Employment Standard Operating Procedure" extending to pages 200/1 to 200/20.

## Oral Evidence

5. The Tribunal heard evidence on oath/affirmation from the following witnesses:-
- (a) The claimant gave evidence on his own behalf
  - (b) In addition evidence was led for the claimant from FB a former IO colleague of the claimant
  - (c) For the Respondent, the Tribunal heard evidence from;
    - Sergeant Hugh Hendrie,
    - Andrew Dunsmore a former Intelligence Officer and colleague of the claimant; and from,
    - Chief Inspector Jennifer Thornton the claimant's Second Line Manager in the period September 16 to the date of the claimant's retirement, and who additionally, from end December 2016, assumed the duties and responsibilities, exercised remotely of First Line Manager in relation to the claimant in the period January 2017 to January 2018 and, thereafter, continued as Second Line Manager in the period February 18 to 25<sup>th</sup> June 2018 the effective date of the claimant's retirement and during which latter period Andrew Dunsmore acted up as team leader.
6. In advance of the Hearing, parties' representatives lodged an Articulation of Issues which the Tribunal reproduces, by way of background information, within inverted commas and in italic type, at paragraphs 7(1) to 7(5) below. Parties also lodged an Agreed Statement of Facts confirming, in respect of the latter, their intention that they be binding upon the Tribunal for the purposes of the Hearing and which, in their turn, are re-produced in bold type at paragraphs 8-1 to 8-36 of this Note of Reasons.

## Parties Articulation of the Issues

7. *“(1) Did the respondent treat the claimant unfavourably because of something arising in consequence of the claimant’s disability, the unfavourable treatment alleged being that the respondent did not provide the claimant with a satisfactory response to his request for reasonable adjustments to be made?”*

***The issue for the Tribunal** is whether or not the respondent did provide the claimant with a satisfactory response to his request for reasonable adjustments to be made and if they did not, did this amount to unfavourable treatment because of something arising in consequence of the claimant’s disability.*

*(2) If yes to (1), can the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent denies that they did not provide the claimant with a satisfactory response to his request for reasonable adjustments to be made. They do not seek to defend the alleged treatment as a proportionate means of achieving a legitimate aim, they deny the allegation of unfavourable treatment.*

*(3) Did the respondent have a duty to make reasonable adjustments because a provision, criterion or practice of theirs put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? The PCP relied upon is ‘**requiring the claimant to satisfactorily perform the workload given to him by the respondent**’ [sic; in the circumstances pertaining in and during the period May 2015 to 25 June 2018.] [In response to a request from the Tribunal for clarification in relation to the apparently very broad scope of the PCP referred to, parties’ representatives joined in confirming that the scope of the PCP relied upon was restricted to the circumstances pertaining in and during the period May*

2015 to 25<sup>th</sup> June 2018; and the PCP relied upon is accordingly recorded in those restricted terms] *“The respondent denies that this PCP put the claimant at a substantial disadvantage in relation to a relevant matter, in comparison with persons who are not disabled, because the respondent never doubted that the claimant was satisfactorily performing the workload given to him. **The issue for the Tribunal is** whether or not the respondent did have a duty to make reasonable adjustments because requiring the claimant to satisfactorily perform the workload given to him by the respondent put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.*

*(4) If yes to (3), did the respondent fail to take such steps as it was reasonable to have to take to avoid the disadvantage? It is the respondent’s position that they took such steps as it was reasonable to have to take to enable the claimant to satisfactorily perform the workload given to him, which he did. The issue for the Tribunal is if they agree with the claimant that requiring him to satisfactorily perform the workload given to him did put him at a substantial disadvantage, did the respondent fail to take such steps as it was reasonable to have to take to avoid the disadvantage.*

*(5) What, if any, level of compensation should be awarded to the claimant for injury to feelings?”*

### **Agreed Statement of Facts**

8. In advance of the Hearing parties’ representatives lodged an **“Agreed Statement of Facts”** identifying the following Agreed Facts which they confirmed they intended to be binding upon the Tribunal for the purposes of the Hearing unless departed from:-

### **Agreed Statement of Facts**

1. **The claimant has been employed as a Police Constable since 27<sup>th</sup> January 1992.**
2. **Until 1<sup>st</sup> April 2013 he was employed by Lothian and Borders Police, thereafter the Police Service of Scotland (“Police Scotland”).**
3. **The claimant was diagnosed with Parkinson’s Disease in August 2006.**
4. **The claimant was a disabled person in terms of the Equality Act 2010 section 6.**
5. **The claimant transferred to the Operational Support Division (Intelligence) on 9<sup>th</sup> January 2012 in the ANPR Unit in Edinburgh. The claimant remained in that position until his retirement.**
6. **In May 2015 the claimant was off work for a period of sickness.**
7. **As a consequence of the absence, the respondent referred the claimant to Occupational Health in May 2015.**
8. **An Occupational Health Report was completed on 8<sup>th</sup> July 2015.**
9. **The Report advised that the claimant was not fit to carry out normal policing duties involving control and restraint; officers safety training; prolonged beat patrols, working at unprotected heights or in safety critical environments and wearing additional protective clothing.**

10. A number of adjustments were suggested for the respondent to consider. The respondent was aware of the contents of the Report.
11. In 2013 an Access to Work Review and a DSE assessment was carried out.
12. The DSE assessment resulted in; dragon voice recognition software, a programmable mouse, an IT software upgrade (Touchpad) and specialist chair.
13. The claimant was also given access to a first aid room to remove himself from the office that he shared with eight other individuals.
14. In or around August 2015 two PCs retired within the claimant's department.
15. On 26<sup>th</sup> April 2016 the claimant sent a briefing paper to Chief Constable Phil Gormley.
16. This briefing paper highlighted the claimant's concerns regarding the ANPR department procedural processes.
17. In the absence of the claimant's line manager from January 2017 onwards, Chief Inspector Thornton became his line manager. She was based in Dundee. *[In the course of evidence a question arose as to whether Agreed Finding in Fact 17 was compatible or incompatible with the evidence which had emerged. Following discussion, parties' representatives confirmed that what they were agreed on factually in relation to Chief Inspector Thornton's role, post January 2017, was more accurately expressed as follows:- 'In the absence of the claimant's first line manager, from January 2017 Chief Inspector Thornton, his second line manager, additionally assumed*



*responsibility for the discharge of first line manager duties in relation to the claimant. She was based in Dundee.” Agreed fact “17” is accordingly recorded as adjusted in and to the terms set out above.*

18. On 13<sup>th</sup> March 2017 the claimant contacted Chief Inspector Thornton regarding the workload of the APNR Unit due to the absence of the ANPR Data Manager.
19. A meeting was called following this email and the Unit’s duties were discussed to identify any pieces of work that could be undertaken elsewhere. Two such pieces of work were identified by the department. These were stolen vehicle lists and flagging of vehicles.
20. On 13<sup>th</sup> March 2017 Chief Inspector Thornton received concerns regarding the claimant’s ability to drive safely.
21. The claimant met with Chief Inspector Thornton on 14<sup>th</sup> March 2017 where she advised that they would make a recommendation to temporarily revoke the claimant’s authorisation to drive until his fitness to drive police vehicles was reviewed. The claimant’s authorisation to drive vehicles was temporarily withdrawn on 15<sup>th</sup> March 2017.
22. The claimant was seen by Occupational Health on 18<sup>th</sup> April 2017 and a report completed. The claimant was deemed fit to continue to drive Group 1 Vehicles, but that this should be restricted to basic driving only and that the timing of any driving activity should reflect levels of symptom control in relation to medication timings. The respondent was aware of the contents of the report.

23. It was suggested that there was a need to consider ways in which the level of work demand could be matched to the claimant's level of functioning.

24. It was also suggested that additional stressors should be identified and addressed as far as practicable.

25. On 29 May 2017 Chief Inspector Thornton arranged a meeting with the claimant for a health and safety assessment in relation to the claimant's driving.

26. Chief Inspector Thornton decided to recommend to Chief Superintendent Sharon Milton that the claimant's driving authorisation be reinstated subject to medication timing.

27. This recommendation was approved on 4<sup>th</sup> July 2017.

28. A stress risk assessment was also completed on the 29<sup>th</sup> of May 2017.

29. *[This paragraph was left blank in the Agreed Statement of Facts]*

30. On 30<sup>th</sup> August 2017 the claimant emailed Inspector Thornton regarding the volume of emails in some of the ANPR Unit mail boxes.

31. On 11<sup>th</sup> December 2017 the respondent received a letter from the Scottish Police Federation requesting the claimant's referral to the Selected Medical Practitioner for consideration of ill health retiral.

32. work. *[This paragraph contained only the word "work" in the Agreed Statement of Facts and parties were agreed is to be held pro non scripto]*

**33. The SMP's report was dated 13 April 2018.**

**34. The SMP's report confirmed the claimant's diagnosis of Parkinson's Disease causing restrictions on the claimant's police duty abilities for the previous four years which had been accommodated with modified duties.**

**35. The SMP confirmed he was no longer able to carry out the ordinary duties of a police constable and that the claimant could be considered for ill health retirement.**

**36. The claimant retired on the grounds of ill health and his last day was 25 June 2018"**

### **Findings in Fact**

9. On the evidence presented, the Tribunal unanimously made the following additional essential Findings in Fact, restricted to those necessary and relevant to the determination of the Issues.
10. In August of 2006 the claimant was diagnosed with Parkinson's Disease.
11. Parkinson's Disease is a permanent and degenerative condition which is a physical impairment for the purposes of section 6 of the Equality Act 2010.
12. The claimant refers to his condition as "my Parkinson's".
13. The symptoms of Parkinson's can be mitigated and temporarily controlled and lessened by medication.
14. The medication used to mitigate the symptoms of Parkinson's Disease has long term adverse side effects and the period of time during which medication can be

taken in sufficient dose at sufficient frequency to deliver effective mitigation of symptoms, while varying from patient to patient, is typically restricted to a finite period of years.

15. The claimant was a career police officer who aspired to serve for 30 years before retiring. When diagnosed with Parkinson's Disease, he resolved to put off for as long as possible the taking of medication in the hope that the subsequent period during which he would require to rely upon medication but able to serve would be sufficiently long to take him to his aspired to 30 years' service.
16. At, amongst others, the material times for the purposes of his claims, that is in the period 1<sup>st</sup> January 2015 up to and including the date of his retiral on 25<sup>th</sup> June 2018, the claimant was a person possessing the protected characteristic of disability in terms of section 6 of the Equality Act 2010 ("EqA 2010/the 2010 Act").
17. Following his diagnosis with Parkinson's in 2006 the claimant was successively transferred from the role and duties of a Beat Response Officer firstly to those of a Road Traffic Officer and subsequently, on 9<sup>th</sup> January 2012, to those of Intelligence Officer within the Operational Support Division (Intelligence) ANPR Unit (the Automatic Number Plate Recognition unit) within Lothian and Borders Police, located at Fettes in Edinburgh.

### **First Occupational Health Referral**

18. On 30<sup>th</sup> June 2015 the claimant was referred to Occupational Health for the purposes of sourcing advice on his medical condition, fitness to work and guidance on how work place adjustments might assist him in the discharge of his duties. The claimant was assessed on the 8<sup>th</sup> of July 2015 and the Occupational Health Report (initial medical assessment provided by Optima Health which is copied and produced at pages 106 to 110 of the Bundle ("the 2015 Occupational Health Report") was generated.
19. The 2015 Occupational Health Report records:-

- (a) that the claimant was diagnosed with Parkinson's Disease, a chronic neurological condition in 2006, that he was, as at 8<sup>th</sup> July 2015 receiving appropriate medication and continued to attend regular specialist reviews.
- (b) As at that time there had been no significant progression and symptoms remained well under control on his then current medication.
- (c) That since his initial diagnosis with Parkinson's Disease the claimant had been able to cope effectively with all aspects of his role. He had a workplace based assessment in 2012 but needed only minimal adjustment at that time. He had not had any previous period of absence in relation to his condition.
- (d) That over the then preceding six months the claimant had felt that his health had been affected by an increase in workload and demands following the retirement of a work colleague and the requirement to take on additional commitments as a consequence.
- (e) He reported that he had been experiencing progressive fatigue and had felt that symptoms of his recent viral infection had further exacerbated his symptoms of tremor, muscular rigidity. He had found difficulty in managing energy levels and maintaining concentration at work.
- (f) He reported that he had raised his concerns with his then Line Manager and that additional assistance was to be put in place.

20. Under the heading of "Current Functional Capacity and Capability" the 2015 Occupational Health Report records:-

- (a) that the claimant was managing with his current role with the Operational Support Division.
- (b) That Parkinson's Disease is a progressive neurological condition and whilst medication can control symptoms the long term prognosis for the claimant was for progressive functional impairment and that timescales for that were, as at July 2015, unpredictable and that additional treatments were likely to become available in future.
- (c) That as at the date of the assessment, July 2015, the claimant was managing in a sedentary role. His ability to walk distance was reduced and he was easily fatigued by both physical and mental activity.
- (d) That he had reported that while he was usually able to manage his energy levels effectively, recent increases in workload had made this more difficult.
- (e) That symptoms of tremor and muscle rigidity mainly affected his right upper limb, he being right hand dominant.
- (f) That fatigue and muscle strain will exacerbate his symptoms and that this will affect handwriting, keyboard and mouse use.
- (g) That the claimant's vision, hearing, speech, cognitive function were all unaffected as at July 2015.

21. The author of the Report concluded by stating that the claimant was not fit to be carrying out full normal duties involving control and restraint, OST, prolonged beat patrols, wearing additional PPE, working at unprotected height or in safety critical environments.

22. The author of the Report commended consideration by the respondents of a number of identified adjustments which the author thought would be helpful in the claimant's case:-

- “(a) Flexible scheduling, allowing for a self-paced workload and providing for regular short breaks will help in maintaining energy levels, concentration and effectiveness over the course of the working day.
  
- (b) Stress may lead to an exacerbation of symptoms and workplace stressors should be identified and addressed as far as is reasonably practicable.
  
- (e) Change within office environment may be more difficult and challenging to adapt to and this should be borne in mind with your considerations.
  
- (f) Additional time may be necessary to adjust and to learn new responsibilities.
  
- (g) Establish long and short term goals with agreed objectives and realistic, achievable expectations with regard to workload.
  
- (h) Arrange for a mentor or for regular informal one to one meetings with his Line Manager. Will provide an opportunity to review progress, give feedback on performance and to identify and address any difficulties arising.
  
- (i) A DSE (Display Screen Equipment) assessment should be carried out to assess workstation set up and seating to reduce muscle strain and fatigue. Ergonomic keyboard and “mouse” may be beneficial.

- (j) Parkinson's Disease is a progressive condition and a system should be put in place to regularly review the effectiveness of any adjustments in place and the need for additional adjustments to help maintain effectiveness."

23. Under the heading "Suggested Review Arrangements" the author of the 2015 Occupational Health Report Dr James Marshall, stated:-

"PC Wilkinson is currently employed in an appropriate role where adjustments have been accommodated to support him effectively. I do not feel that he needs further Occupational Health review unless there is any significant change to his condition or you require any additional information or guidance."

24. Under the heading "Answers to Specific Questions" Dr Marshall provided, amongst others, the following specific answers to specific questions:-

"2 Is the individual's condition work related? If so how?

Answer: additional workload will have been an additional cause of fatigue and exacerbation of symptoms.

3 Is the individual fit to carry out their normal duties at present?

Answer: advice as above.

7 Is the medical condition likely to be classified as a disability under the Equality Act (2010)?

Answer: yes.

8 Are there adjustments that the employer could make to support the individual at work or help facilitate a return to work?



Answer: as above.”

25. Of the adjustments commended in the 2015 Occupational Health Report for consideration by the respondents, the respondents had already put in place and or put in place, in response to the Report, the following:-

(a) Flexible scheduling (insofar as that may be interpreted as relating to:-

- the start and finish times of shifts worked by the claimant, he being at liberty to adjust those times earlier or later as best suited him from day to day
- allowing the claimant the liberty to self-pace the rate at which he worked; and,
- to take regular short breaks as he considered appropriate in the course of the working day including access to the First Aid Room where there was the facility for him to lie down and rest.

(b) Arranging for a mentor or for regular informal one to one meetings with his Line Manager providing an opportunity to review progress, give feedback on performance and to identify and address any difficulties arising. That adjustment, however, subsisted and remained in place only up until December 2016 when the claimant's then First Line Manager KL who was co-located in the Unit "went off", firstly on compassionate leave and thereafter, on long term sick leave, never returning. From December 2016 up to and including the claimant's retirement in June 2018 this adjustment which had previously been put in place in the person of his embedded First Line Manager KL ceased to be in place.

- (c) The DSE assessment was carried out to assess the claimant's workstation set up and seating provided to reduce muscle strain and fatigue. An ergonomic keyboard and mouse were provided to the claimant who had the freedom to use them to the extent to which he chose.

26. Of the adjustments commended in the 2015 Occupational Health Report the following adjustments were not put in place:-

- (a) The identification of workplace stressors and steps to address the same as far as was reasonably practicable (beyond those emerging from the DSE assessment which had already occurred as at the date of the Report and the making of the recommendation)
- (b) Provision of additional time for the claimant to adjust to and to learn new responsibilities
- (c) The establishment of long and short term roles with agreed objectives and realistic achievable expectations with regard to workload
- (d) Arrangement for a mentor and regular and informal one to one meetings with his Line Manager providing an opportunity to review progress, give feedback on performance and to identify and address difficulties arising in the period January 2017 up to and including the claimant's sick health retirement on 25<sup>th</sup> June 2018
- (e) Arrangements to regularly review the effectiveness of any adjustments in place and the need for additional adjustments to maintain effectiveness; (the same having previously been put in place through the person of the claimant's embedded First Line Manager KL but having effectively ceased in the period end December 2016 up to and including the claimant's retirement on 25 June 2018) with

the exception of the 2017 referral to Occupational health which was prompted by the claimant's temporary suspension from duties

27. Although in February 2018, a few months prior to the claimant's sick health retirement, Andrew Dunsmore began to act up in the position of Team Leader, there was specifically excluded from his responsibilities the personnel management aspects of line management. In particular he had no responsibility for and was given no instruction to monitor the claimant with a view to assessing how he was coping in the light of his disability. Andrew Dunsmore's acting up salary reflected the exclusion of those responsibilities. From January 2017 until the claimant's ill health retirement on 25<sup>th</sup> of June 2018, no other person was charged with that day to day and week to week responsibility in respect of the claimant.
28. The briefing paper prepared by the claimant on 26<sup>th</sup> April 2016 for the Chief Constable and the briefing paper prepared by the claimant on 5<sup>th</sup> of May 2016 containing recommendations for development of ANPR for Police Service of Scotland did not raise concerns about excessive workload or issues which would reduce the workload within the ANPR Unit then based in Fettes. The papers focused, rather, on the advisability of and requirements for the creation of a single "Pan Scotland" national force ANPR function for Police Scotland and, on the tightening up of processes currently being operated across Police Scotland in locations other than within the then Fettes based team. The tightening up of processes as recommended in the papers would not have had the effect of lessening the workload within the Fettes based team.
29. From January 2015 Chief Inspector J Thornton became the officer leading the project which focused on a Scotland wide review and refreshing of ANPR equipment within Police Scotland. The small team led by her was focused on the design of a Pan Scotland system and was engaged in liaison with stakeholders and partner agencies aiming to achieve a standardisation of processes, post the formation of Police Scotland, from out of those previously operating across the

eight legacy Forces, to identify the equipment requirement and to purchase and put in place the necessary equipment.

30. From early in 2015 CI Thornton's work brought her into contact with the former Lothian and Borders ANPR Unit based at Fettes in which the claimant, amongst others, worked.
31. The Fettes based Unit were the subject matter experts in that area of operations and she consulted with them and particularly with the then Development Officer Curtis Muir who had begun to look at standardisation of processes. In September 2016 Chief Inspector Thornton became the Second Line Manager of the ANPR Team. The First Line Manager at that time continued to be KL who, as a member of the Team, concurrently discharged the duties of data manager and processor.
32. Chief Inspector Thornton was based in Dundee but her duties required her to travel widely across Scotland. From September 2016 onwards, Chief Inspector Thornton, in her dual capacity of Project Leader and Second Line Manager of the claimant's Unit, physically called in at the Unit once every four or six weeks and spoke by telephone, with Curtis Muir when he was in appointment, or with the Unit's Data Manager and First Line Manager, KL.
33. In her capacity as Second Line Manager located remotely from the Unit, Chief Inspector Thornton expected the First Line Manager, KL, who was embedded in the Unit to:-
  - (a) Manage the workload
  - (b) Prioritise the work within the Unit
  - (c) Make sure that team members were able to undertake the work
  - (d) Deal with the welfare of team members including the claimant

- (e) Attendance manage the workforce
  - (f) Take opportunities to change processes in order to ease the workload when required
  - (g) Represent the Unit at relevant external meetings
  - (h) Operate as the point of contact for senior and external officers seeking to interact with the Unit,
  - (i) Monitor the claimant and the impact of his condition upon his ability to carry out his duties including ensuring that he took necessary breaks and took his medication at the appropriate times
34. In December of 2016 KL, the Line Manager of the Unit went on special leave from which she transitioned into long term sick leave without ever returning to her duties.
35. The appointment of an embedded First Line Manager for the claimant's team continued to be gapped in the twelve month period from January 2017 until in or about February 2018.
36. On or about February 2018, Andy Dunsmore who had previously held the appointment of Administrative Support Officer to the team but following the retirement of another team member had moved from that appointment to that of Intelligence Officer in October 2016, began to act up in the role of embedded Line Manager.
37. There was specifically excluded from Andrew Dunsmore's acting up responsibilities and role, the elements of personnel management including the conduct of one to one meetings with staff.

38. In particular Mr Dunsmore's temporary duties did not include the particular monitoring of the claimant and or of the impact of his condition upon his ability to discharge his day to day duties nor ensuring that he take appropriate rests, take his medication at the appropriate time or go home at the scheduled end of his shift in circumstances where staying later might serve to aggravate his symptoms and be the cause of stress to him.
39. Mr Dunsmore's duties did not include review, regular or otherwise, of the effectiveness of any adjustments put in place for the claimant or of the need for additional adjustments to maintain their effectiveness.
40. Chief Inspector Thornton did not have available to her within her immediately managed personnel, human resource such as would allow her to put a temporary but embedded First Line Manager into the claimant's team in the period 2017 onwards. She did not consider seeking to source such a resource externally from the wider Police Service or making a request, that such be done, up her own chain of command.
41. With effect from January 2017 Chief Inspector Thornton herself assumed, in addition to her Second Line Management responsibilities, the role of remotely based First Line Manager of the claimant's team. She made telephone contact with the team on average once a week speaking with whoever answered the telephone. She aimed, and for the most part achieved, physical attendance in the Unit once a month, she occasionally updated the whole team on a particular issue by way of conference call. She did not conduct a regular conference call with the whole team but rather used that facility on a task driven basis when there was a requirement to inform team members of a significant matter or development.
42. Chief Inspector Thornton's own duties and the fact that she was located remotely from the team did not allow her to First Line Manage the team, including the claimant, in the same manner that KL had done from her position as an embedded First Line Manager.

- (a) In particular she was not able to engage in detailed management of the workload on a daily or weekly basis,
- (b) nor was she able to prioritise work on a daily or weekly basis,
- (c) nor was she able to make sure that team members were able to undertake the work

43. Chief Inspector Thornton's personnel line management of the team was, of necessity, remote and less hands on than that of KL.

- (a) In relation to the claimant, Chief Inspector Thornton was unable to monitor on a day to day basis the effect of his condition upon his ability to discharge his duties;
- (b) nor was she able to ensure that he took appropriate breaks and took his medication at appropriate times,
- (c) nor that he went home at the scheduled end of his shift when staying on beyond it to complete work would aggravate his symptoms and cause him stress.

Neither was she able to regularly review the effectiveness of adjustments already put in place for the claimant or of the need for additional adjustments to maintain their effectiveness.

44. KL, when in appointment, would regularly monitor all the inboxes through which incoming work was delivered to the Unit in order that she was aware of the state of outstanding work and in particular work which was time sensitive. She would typically come in early every Monday in order to form an overview of the state of work and would in consequence prioritise work allocating particular tasks as required to particular members of the team. She also made herself available within the team to other team members to give guidance and decisions as to, for

example, how much information to provide in response to requests. She engendered confidence in team members including in particular Andy Dunsmore. In her First Line Managerial capacity she was available to the team on a daily basis. She was a significant resource immediately available to other members of the team, including the claimant and Mr Dunsmore, when she was in appointment.

45. In addition to her Line Management duties KL carried out her own substantive work in her dual appointment of Data Manager.
46. Following the commencement of her physical absence from the team in December 2016, there was no locally based substitute management resource for KL. In addition to carrying out between them her Data Manager substantive work, the members of the team required to self-manage the workload.
47. They tended to each check the three inboxes when they came on shift, note what had been taken by others, and take a portion of work that had not yet been taken by another team member. If another team member had started at the top of the SUG statement then they themselves would start at the bottom of the statement each working towards the centre. They would in addition, try to complete work which they had commenced but had not completed on the previous day.
48. While all three Intelligence Officers sought to function in that way, one of the three working in the Unit following KL's departure in December 2016 was FB who was relatively inexperienced. She had joined the Unit in August 2015 as a trainee Intelligence Officer filling a vacancy which had been gapped for most of 2015 following the retirement of other officers. She was being trained and supervised by KL.
49. For the first six months of her time in the Unit FB was only partially effective as she required to learn and become proficient in the operation of various processes. In consequence, an increased burden of the substantive work, which required to be carried out by Intelligence Officers within the team, fell upon Andrew Dunsmore



and upon the claimant. Andrew Dunsmore was conscious of the additional pressure of work and enjoyed the challenge.

50. The additional workload falling on the claimant began to have adverse impact upon his health, stressing him and, as had been predicted in the 2015 Occupational Health Report, exacerbating the symptoms of his Parkinson's.
51. There was a backlog of work within the Department and the claimant became regularly fatigued. He had previously to be told as required by KL who monitored him on a day to day basis when she was in post;
  - (a) to take regular breaks,
  - (b) and to go home at the end of his scheduled shift without working for significant additional time; and,
  - (c) to take his medication at appropriate times.
52. Left to his own devices when the Department was busy the claimant had a tendency to work through rather than take breaks, and to miss taking his medication at the appropriate time and to work on beyond his normal shift end. When she was in post, KL, who monitored the claimant on a day to day basis, was the first to intervene and tell him to stop working and to take a break, and to remind him to take his medication when he had missed doing so, or to tell him to go home at the end of his shift, all as she was able to judge and as and when she judged the same was required.
53. KL had a broader knowledge than the other individual members of the team. Following the commencement of her absence from the team, in December 2016, she was not replaced either in her capacity as Data Manager or as Line Manager. The team required to function on its own resources. Aspects of her substantive work required to be carried out by team members.

54. When Andrew Dunsmore was promoted from the role of Clerical Assistant to the vacant role of Intelligence Officer no replacement was sourced to fill the Clerical Assistant's post. In consequence the administrative work previously carried out by the Clerical Assistant was shared between what by that time had become a complement of three Intelligence Officers including the claimant.
55. In addition, there occurred, at or about the same time, an increase in workload. The service provided in respect of sex offenders was now being provided for the whole of Scotland and not just Lothian and Borders. In addition certain "review and weeding" work had been transferred from the west of Scotland along with the transfer of the established Intelligence Officer post to which it was attached, and had been added to the team's routine "review and weeding" work. That work which had been carried out by or under KL's supervision increased significantly, in 2017, by reason of change of policy which required it to be carried out annually rather than every 2 years. These elements resulted in an increase in the workload of the team.
56. Andrew Dunsmore was not trained in weeding and so, following the commencement of the absence of KL, the increased frequency of review and weeding resulted in an increased workload for the claimant and for FB.
57. Likewise, the change in policy resulted in a retrospective backlog in terms of which the movement of cars would be kept on the system for a year only and thereafter be automatically deleted in accordance with the new policy unless the Intelligence logs were updated by the addition of a "key word" to protect the entry from automatic deletion at the 12 month point. A large part of that increased workload which was time sensitive fell upon the claimant.
58. Following the commencement of KL's absence the claimant, assisted by Andrew Dunsmore, required to carry out certain aspects of her substantive work. Because neither the claimant nor Andrew Dunsmore were familiar with the processes involved, and because KL was not available to instruct him, they required to spend considerable time understanding the processes and developing a methodology for

doing the work. That resulted in it taking longer within the team for that substantive work to be processed than it had done when KL was present. That in turn resulted in increased pressure on both Andy Dunsmore and the claimant. The work environment became more challenging. Andrew Dunsmore, for his part, enjoyed the challenge.

59. Andrew Dunsmore observed the claimant, in the face of the increased pressure becoming progressively more stressed and that stress adversely impacting upon him because of his Parkinson's. His physical appearance deteriorated. He looked exhausted. He would fail to take his medication at appropriate times and fail to take breaks. He would stay on beyond the end of his shift in an attempt to complete tasks. He coped only because of his work ethic.
60. Chief Inspector Thornton was based in the Balunie Field Office in Dundee. That fact coupled with her project duties which frequently took her out of office resulted in her being difficult to get hold of. The claimant found that to be an increasingly frustrating circumstance. He would send emails to CI Thornton looking for a decision or direction and would be unable to get a response for one or two days. That frustration resulted in him becoming stressed. In general terms decisions and direction which they would normally expect to receive immediately from an embedded First Line Manager required to be referred to Second Line Management level and in the particular circumstances pertaining, would take one or two days to be obtained.
61. There existed an ethos within the team, as at the material times, which resulted in team members, particularly those who were Police Officers and including the claimant, considering that it was their duty to get through and complete time sensitive tasks on the shifts on which they were commenced by working on beyond shift finish times. The claimant, unless prevented by KL, was inclined to do so, in circumstances where doing so placed him at a particular disadvantage because of his Parkinson's. That ethos was one which operated to the operational benefit of the respondent. It was well known and accepted and expected generally within Police Scotland, including by Officers and Departments, external to the ANPR who

tasked the Unit with work requests including at times of the day when the requested tasks could not realistically be completed before the end of the relative shift.

**The Claimant's email of 13<sup>th</sup> March 2017**

62. At 0900 on 13<sup>th</sup> March 2017, by which time the team had been without an embedded First Line Manager for two months, the claimant sent an email to CI Thornton in the following terms:-

“Good morning Ma’am

Hope you are well, if possible can you advise if Katrina is due back on Wednesday, or has she been signed off for a further 28 days? If she has then can consideration be given with regards to having a meeting about the depts ongoing workload as at present a number of issues are beginning to develop around daily processes etc.

While we have been treading water up to now, a significant number of daily business duties are being missed or not carried out to the high standards the dept tries to achieve and will need to be addressed as a matter of urgency.

Kind regards  
Simon 0131 311 3406.”

63. By 1 pm on 13<sup>th</sup> March the claimant had not received a reply to or acknowledgement of his email. He accordingly made contact with another senior officer, Inspector Jane Taylor, who was not in his direct line management chain but was assisting CI Thornton on her project work.
64. On 10<sup>th</sup> March 2017 Jane Taylor had separately made contact with CI Thornton flagging up staffing and workload issues within the Unit which she identified as a

“high risk area to the organisation that is already under pressure”. CI Thornton and Inspector Taylor subsequently met with the claimant and Andy Dunsmore and identified two areas of work which could be taken from the Unit;

- (a) The first of these was the carrying out of VODS checks which resulted in a saving of about one hour per day to the team.
- (b) The second was the time critical work of “Flagging” which the team had continued to provide to the former Lothian and Border Division’s post the formation of Police Scotland and which following the meeting was given back to E&J Divisions to carry out on their own behalves. That measure resulted in a saving of between two and four hours per day to the team.
- (c) In addition, the ongoing transfer of some of the work which was in the process of being moved from the west of Scotland to the team and which had been associated with the transfer of the IO post previously established in the West, was temporarily put on hold. That measure, while not productive in a direct saving in man hours, had the effect of postponing what would have been a further increase in work load.

65. Notwithstanding the above adjustments to the team’s workload, the claimant, in the absence of embedded First Line Management, continued to experience increasing stress in the discharge of his duties.

66. The ethos, which existed within Police Scotland and in particular within the uniformed officers of “getting the job done regardless of what was required”, had informed the claimant’s whole professional life. He felt obliged to see through to completion tasks which he had undertaken.

67. The claimant considered, in relation to time sensitive work, that he had no option but to complete the same even if it required him to stay beyond his normal shift finishing time. On occasions he would take on flagging requests from the Area

Control Centre at Bilston after 3 pm, in circumstances where there was insufficient time to fulfil the tasks before his end of shift time. He did so because he thought it his duty to do so. He stayed late on such occasions to conclude the tasks. That was an individual decision on his part. No-one told him to do so but he felt under an obligation to do so. On occasions the claimant would decline the offer of assistance from Andy Dunsmore considering it his obligation to himself finish what he had begun. He increasingly failed to take his medication at appropriate times and failed to take necessary breaks both of which exacerbated the symptoms of his Parkinson's which in turn placed him at disadvantage in the conduct of his duties.

68. In the absence of KL, his former embedded First Line Management, no member of the team had been given responsibility for monitoring the claimant and ensuring that he took his medication, took breaks at appropriate times and did not work beyond his shift finishing times.
69. In March of 2017 concerns arose in the minds of a senior officer as to the claimant's capability to drive and in particular the appropriateness of him driving police vehicles standing his condition. The claimant's permission to drive police vehicles in the course of his duties was temporarily suspended.

### **The Second Occupational Health Report (the 2017 Occupational Health Report)**

70. On 22<sup>nd</sup> March 2017 the claimant was referred, on this occasion by CI Thornton to Occupational Health for an updated assessment. The referral was prompted by the temporary suspension of the claimant from the driving of Police vehicles. The assessment proceeded on the 18<sup>th</sup> of April 2017. The assessment proceeded before the same Occupational Health practitioner, Dr James Marshall, who had conducted the 2015 assessment.
71. At page 144 of the Bundle, under the heading "Background to Assessment" the Occupational Health Report issued following the assessment records the content of the statement made by the claimant to Dr Marshall:-

“At work PC Wilkinson feels that there has been no significant change in his ability to manage with all aspects of his role. As previously indicated fatigue is a significant side effect of his condition and his treatment. His current level of work demands have been affected by staff shortages and this has had an impact on his ability to maintain energy levels although he has been able to sustain his concentration and effectiveness in carrying out work tasks.

Symptoms of Parkinson’s Disease include tremor and slowness in movement, particularly when initiating movement. His current medication needs to be taken at regular intervals to control symptoms however the effectiveness of treatment wears off as systemic drug levels diminish. Symptoms will become more apparent as the timing of the next dosage approaches and will take time to improve once medication has been taken. This would account for the level of symptoms witnessed at work and described in his referral.”

72. Under the heading “Current Functional Capacity and Capability”, at page 145 of the Joint Bundle Dr Marshall notes:-

“PC Wilkinson is managing with his current role despite functional limitations due to his medical condition. The level of impairment is well accommodated for in this role with the benefit of current workplace adjustments. .... There has been no significant change in his condition since he was last seen for Occupational Health opinion in 2015. Details provided with my assessment and impact on function remain relevant.”

73. In response to specific questions raised by the respondent in their referral Dr Marshall set out, amongst others, the following:-

**“Question**

**(1) Given the concerns raised by colleagues does the doctor consider that the officer is still fit to drive police vehicles as a basic driver?**

**Answer**

PC Wilkinson is medically fit to continue to drive Group 1 vehicles. The DVLA are aware of his condition and he remains under appropriate neurology specialist review. His specialist, Dr Davenport, is an expert advisor to the DVLA on neurological conditions ....

**(2) Given the medication which Constable Wilkinson is on and the impact that this has on his condition as described above is there anything which management can do to support the officer further?**

PC Wilkinson continues to manage well with his condition and there has been no significant progression in neurological symptoms or level of functional impairment.

He is on appropriate medication for his condition which he needs to take three times daily at regular intervals. The benefits of the medication are wearing off by the time the next dose is due. This will lead to symptoms such as tremor and slowness with movement being more apparent – as witnessed.

PC Wilkinson may benefit from a change to sustained release formulation of his medication that may prevent this and I have asked him to discuss this with Dr Davenport. In the meantime he needs to be able to take his medication at set times and should have access to suitable welfare facilities to facilitate this and allow him sufficient rest and recovery time.



**(3) Given the concerns raised by PC Wilkinson regarding the impact on his health of the workload and absence of his Line Manager is there anything further which management can do to support the officer further?**

I suggest that there is a need to consider ways in which the level of demand at work can be matched with current level of functioning. He may need more personal support from his management team and may need more time to deal with tasks. Any additional stressors should be identified and addressed as far as is reasonably practicable as there is a risk that uncontrolled work demand and perceived stressors may adversely affect the underlying condition.

The exact detail of any arrangements would need to be determined by management in consultation with him but I do feel it is important that management maintain control of level of work demand and ensure that any adjustments made enable him to maintain adequate performance.

**(4) In general terms is there anything further from a medical perspective which management should know regarding Parkinson's Disease which would better allow his managers to support the officer in a working environment?**

In my opinion the recommendations offered previously" [in the 2015 Occupational Health Report] "remain relevant and should be in place to support him in the workplace. Additional information on Parkinson's Disease that you may find helpful is provided by the Parkinson's Disease Society:- ....."

74. At page 147 of the Bundle at paragraph 8 of the 2017 Occupational Health Report in answer to the question "Are there adjustments that the employer could make to support the individual at work or help facilitate a return to work?" Dr Marshall again made reference to and reiterated expressly the adjustments previously

recommended by him in 2015 stating that those remained relevant, as at April 2017 to supporting PC Wilkinson in his role. Those included the following:-

- (a) Flexible scheduling, allowing for a self-paced workload and providing for regular short breaks will help in maintaining energy levels, concentration and effectiveness over the course of the working day.” [Although never expressly directed to do work within particular timescales – the claimant was left unsupervised and to his own devices resulting in him not taking medication, not taking rests and working beyond appropriate shift lengths]
- (b) Stress may lead to an exacerbation of symptoms and workplace stressors should be identified and addressed as far as is reasonably practicable. [– see also Jane Taylor’s email in which she also asks for an additional person to be allocated to assist with the work]
- (c) Change within office environment may be more difficult and challenging to adapt to and this should be borne in mind with your considerations.
- (d) Additional time may be necessary to adjust and to learn new responsibilities.
- (e) Establish long and short term goals with agreed objectives and realistic, achievable expectations with regard to workload.
- (f) To schedule regular informal one to one meetings with his Line Manager to provide an opportunity to review progress, give feedback on performance and to identify and address any difficulties arising [was done when KL was in place – not done from January 17 to EDT following the commencement of her absence in December 16]

- (g) A DSE assessment of workstation. He has been provided with suitable seating, mouse, touchpad and voice recognition software
- (h) Parkinson's Disease is a progressive condition and a system should be in place to regularly review the effectiveness of any adjustments in place and the need for additional adjustments to help maintain effectiveness."

75. On the 29<sup>th</sup> of May 2017 the claimant's Second and acting First Line Manager, CI Thornton, conducted an individual stress risk assessment with the claimant with a view to producing an Action Plan. The assessment, its content and decided courses of action were recorded on Police Scotland form "Individual Stress Risk Assessment Checklist And Action Plan". Copies of the pages of that document are produced at pages 150 to 153 of the Bundle inclusive. On page 1 of the assessment under the heading "Summary Of Circumstances" CI Thornton records as follows:-

"Constable Wilkinson works within the Unit ... his Line Manager has been absent from duty since the 3<sup>rd</sup> of January 2017, Wilkinson has been absent from duty for three weeks."

76. The subsequent pages set out a number of Issues (concerns/requirements) identified from the dialogue with the claimant and steps identified to address them. These included:-

- (a) Unfamiliarity with some job plans
- (b) Unpredictable workload
- (c) Long term absence of First Line Manager

- (d) Lack of clarity/communication regarding OSD Intel Review and ANPR Project/Bureau creation

77. Possible actions (steps) identified to resolve the issues/concerns included:

- (a) Asking of colleagues for help,
- (b) Allowance of sufficient time to become familiar with task,
- (c) Line Managers to monitor workload
- (d) Develop Job Description, PDC, Line management,
- (e) Regular updates regarding Project and any decisions impacting on the claimant's role.

78. Under the heading "Issues Identified" there was noted amongst others the "long term absence of First Line Manager" under the correlative heading "Possible Actions":- "Consider a temporary replacement to cover line management responsibilities; weekly telephone conference, monthly personal visit, undertake PDC with Line Manager.

79. No timescales were set by CI Thornton for the putting in place of the measures identified. With one exception, the above steps had not been put in place by the time of the claimant's retirement. In February 2018 Andrew Dunsmore had begun to act up as the Unit First Line Manager, but there was excluded from his duties the personnel management aspects of the job. He had no responsibility for conduct of PDCs or for monitoring the claimant and or the impact of his condition on his work and vice versa.

80. No Action Plan was ever prepared by CI Thornton.

81. The issue of the claimant's unfamiliarity with certain tasks which he was being required to undertake following in his Line Manager's absence was identified "Individual Stress Risk Assessment" and the suggested course of action noted were "Ask colleagues for help, allow sufficient time to become familiar with task".

82. Under the heading "Controls Unpredictable Workload", the suggested action to address the same which are noted were:-

"Line Managers to monitor workload, report excessive workloads to Line Managers. Line management and staff to be involved in work design and construction process, flexible attitude to working hours/ability to take time out".

83. The above identified measures, with the exception of flexibility as to working hours and the ability to take time to take rest breaks, were not put in place.

84. The combination of the absence of embedded First Line Management, the gapped administration post, and the substantial workload which did not reduce further following the removal of the two items of work in March 2017, progressively adversely impacted upon the claimant. That impact was manifested, amongst other ways, in the claimant not taking his medication at appropriate times, failing to take necessary breaks and working beyond his normal shift end times to complete outstanding work which he considered himself duty bound to do. These occurrences in turn exacerbated his symptoms (including tremor and slowness in movement, particularly with initiating movement). In the absence of embedded First Line Management and of the recommended regular monitoring and review of the effectiveness and operation of the adjustments then in place, these symptoms increased in intensity and the periods of time during which they were less controlled, or not controlled, by his medication increased in frequency, due to his not always taking his medication at the correct time and not always taking appropriate breaks and rests.

85. On 30<sup>th</sup> August 2017 the claimant sent an email to his Second (acting remote) First Line Manager, Cl Thornton which he set at a “high” importance level. The email was in the following terms:-

*“Morning Ma’am*

*Hope you are well, unfortunately there is no easy way to approach the subject with regards to my condition. You may recall from Occ HR in April.*

*‘I suggest that there is a need to consider ways in which the level of demand at work can be matched to his current level of functioning. He may need more personal support from his management team and may need more time to deal with tasks. Any additional stressors should be identified and addressed as far as is reasonably practicable as there is a risk that uncontrolled demand and perceived stressors may adversely affect the underlying condition.*

*The exact detail of any arrangement would need to be determined by management in consultation with him but I do feel it is important that management maintain control of level of work demand’*

*At present I find that the workload is affecting my condition (this is not just this week it is becoming an issue as we are still without Kat etc), which then becomes a downwards spiral as it annoys me that I cannot deal with the workload, which aggravates my symptoms even more. As you are aware we are still both staff down and without direct supervision in the office, this coupled with work requirements etc is having an adverse effect on my health.*

*I therefore enquire are these being addressed (Staff) by the organisation to resolve the situation, which may in some way alleviate the aggravators*

*of my condition, especially in light of the recommendations of my OH review.*

*Submitted for your consideration and comment.*

*Simon”*

86. The respondents were aware and separately ought reasonably to have been aware from at the latest 8 July 2015 (the date of the first OH Report), of the particular impact which the circumstances pertaining, in the period from at latest 30 June 2015 to the date of his ill health retirement, were having upon the claimant’s health in the context of his disability. The respondents were also aware and separately, ought reasonably to have been aware following December 2016, of the increasing adverse impact upon the team which resulted from the continuing gapping of the appointment of and the absence of an embedded supervisory First Line Manager and of the particular impact that the same was having upon the claimant in the context of his disability.
87. The 2017 OH Report re-iterated at length the continuing relevance of the recommended adjustments included in the 2015 Report and a number of which subsequent to the Report had been put in place and implemented and operated through the person and function of the embedded First Line Manager KL. That reiteration was made on 18 April 2017 by which time the embedded First Line Manager had already been absent for 5 months and the operation and implementation of those previously put in place adjustments had ceased with effect from end December 2016.
88. The PCP applied, by the respondent to the claimant to, amongst others the claimant and founded upon by the claimant for the purposes of giving rise to a section 20 EqA 2010 duty was that of “requiring the claimant to satisfactorily perform the workload given to him by the respondent in the circumstances pertaining during the period from May 2015 up to and including 25<sup>th</sup> June 2018”.

89. The applied PCP included a requirement in the period from or about end December 2016 to in or about end February 2018, that the members of team satisfactorily perform the workload given to them in the absence of embedded First Line Management (that is a First Line Manager based with the team at Fettes) and including in relation to the claimant, in the period end December 2016 to the date of his retirement 25 June 2018 in the absence of;

- (a) monitoring, on a day to day basis of the effect of his condition upon his ability to discharge his duties,
- (b) any mechanism to ensure that he took appropriate breaks and took his medication at appropriate times,
- (c) to ensure that he went home at the scheduled end of his shift when staying on beyond it to complete work would aggravate his symptoms and cause him stress,
- (d) in the absence of any regular review of the effectiveness of adjustments already put in place for the claimant, or of the need for additional adjustments to maintain their effectiveness; and
- (e) in the period from in or about the end of February up to and including 25<sup>th</sup> June 2018 in the continuing absence of such adjustments in relation to the claimant, notwithstanding the appointment, in or about end February 2018, of Andrew Dunsmore as a locally based acting up First Line Manager.

90. The PCP so applied in the period from or about end December 2016 up to and including 25<sup>th</sup> June 2018 put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled and accordingly, gave rise to a duty (to make adjustments) on the part of the respondents, in terms of section 20 of the Equality Act 2010.



91. In the relevant periods the respondent knew of the claimant's disability and, in the circumstances pertaining knew or ought reasonably to have known that the claimant was likely to be placed at a substantial disadvantage by the PCP so applied.
92. The claimant's comparators were his non disabled colleagues.
93. The substantial disadvantage caused to the claimant was that he suffered stress as a result of having to carry out his workload in the circumstances pertaining in and during that period including amongst others the absence of an embedded First Line Manager and of monitoring and supervision of himself and of the impact of his disability upon the performance of his duties etc and which had a more serious effect on his health and wellbeing given his disability when compared to his non disabled colleagues.

### **Application for Ill Health Retirement**

94. On 11<sup>th</sup> December 2017, in consultation with the Scottish Police Federation, the claimant decided to make application for consideration for ill health retirement.
95. Further to the claimant's Scottish Police Federation relayed request, the claimant was examined, on 13<sup>th</sup> of April 2018 by Dr David Watt the Selected Medical Practitioner ("SMP") to the Scottish Police Authority and accredited specialist in occupational medicine. On 19<sup>th</sup> April 2018 Dr Watt reported to the respondent's corporate services HR advisor in the following terms regarding the claimant:-

"I saw Mr x at your request on the 13/04/2018 to give consideration to his medical situation under the terms of the Police Pension Regulations 1987. I was supplied with an occupational health record that contained an FMA report and correspondence with Mr x's general practitioner. Mr x's general practitioner supplied copies of hospital records and reports.

BACKGROUND

The medical evidence indicates an underlying diagnosis of Parkinson's Disease which has affected Mr Wilkinson since 2006. The illness has caused restrictions in his police duty abilities for the last four years and he has been accommodated with modified duties. Mr Wilkinson's symptoms include abnormalities of movement and disabling tremor. Coping with these illnesses symptoms is very debilitating. I observed signs of Parkinson's Disease and the diagnosis is confirmed by reports from the Western General Hospital, Edinburgh.

#### CONCLUSION

Mr Wilkinson is no longer capable of the ordinary duties of a Police Constable and can be considered for Ill Health Retirement. He is not fit for any type of employment and he will remain on sick leave until his pension entitlements are settled. I enclose a pension certificate, SMP report and capability checklist.

#### CONSENT

Mr Wilkinson has requested to see a copy of this report before it is provided to you, so that they are aware of the contents. It has been explained to them that if there are errors as to fact (such as dates etc.) then this can be amended but it is not expected that the report will be reworded, expanded, reduced or the options changed. If you have any questions about what I have written, please contact me.

Yours sincerely etc"

96. The decision of the selected medical practitioner is set out at page 170 of the Bundle in the following terms:-

"Following my consideration I certify that:

1. The officer is disabled from performing the ordinary duties of a member of the police force.

2. The disablement is likely to be permanent. \*If permanent delete
3. The officer is permanently disabled in respect of the following condition(s):

Parkinson's Disease ICD 10 G20

The decision is dated 19<sup>th</sup> of the 4<sup>th</sup> 2018"

97. A supplementary report on capability provided by Dr Watt is copied and produced at page 172 of the Bundle and is dated 19<sup>th</sup> of April 2018. In that report the doctor identifies as permanently affected all of the key capabilities for ordinary duties which were set out at paragraph 2 of the notes to his report produced at page 171 of the Bundle.

98. At paragraph 3 of the supplementary report on capability at page 172 of the Bundle there is posed and answered by the doctor the following question:-

"3. In the case of the capabilities which are permanently affected which would the officer be capable of carrying out provided adjustments were made by management, and what adjustments would be involved?

- NIL"

99. As at 19<sup>th</sup> of April 2019 the claimant's condition had progressed to the state at which he was no longer fit to carry out his duties. As at 19<sup>th</sup> April 2018 there were no adjustments, including adjustments which the respondent had put in place previously and adjustments which, although recommended the respondent had not put in place or which having put in place the respondent had allowed to lapse, which would have had the effect of removing the particular disadvantage such as to enable the claimant to continue to serve as a police officer beyond his subsequent early retirement date of 25<sup>th</sup> June 2018.

100. The claimant wished to complete 30 years of police service before retiring. He believed that but for the respondent's breach of duty in failing to put in place/maintain in place relevant adjustments, he would have been able to complete 30 years of police service notwithstanding his diagnosed condition of Parkinson's Disease.
101. The claimant explained in evidence that the injury which he felt and experienced included injury to feelings arising from his belief that but for the respondent's failure in duty and or their unfavourable treatment of him he would have realised his ambition of completing 30 years of police service.
102. The claimant commenced his service as a Police Officer on 27<sup>th</sup> of January 1992. As at the date of his retirement the claimant had completed 26 years of police service and would have required to serve a further 4 years in order to achieve his 30 year aspiration.
103. The claimant was first diagnosed with Parkinson's Disease, which is a permanent and degenerative condition, in August of 2006. The disease first began to impact upon the claimant's ability to carry out the unrestricted duties of a Beat Response Officer in the latter part of 2011.
104. By a series of adjustments, made by the respondents, to his duties, roles and working conditions the claimant was assisted in continuing in his employment and service as a Police Officer in the period from 9<sup>th</sup> January 2012 when he was transferred from the role and duties of a Beat Response Officer to other roles and duties until his retirement on 25<sup>th</sup> June 2018, a period of 11 years.
105. The claimant was 58 years of age and had completed 26 years of service as at the date of his retirement on 25<sup>th</sup> June 2018.
- As at the date of his retirement his gross weekly earnings were £717 per week.

- His net weekly earnings were £519.46 per week. He is currently in receipt of his full pension to which he was entitled as at 25<sup>th</sup> June 2018.

106. Notwithstanding the respondent's lack of criticism of the claimant in the material periods the claimant, in his own consideration, was not satisfactorily performing his workload to the appropriate high standard normally achieved by him, as stated in his email of 13 March 2017 to CI Thornton by the ANPR.

### **Summary of Submissions**

107. Each party's representative furnished the other with and handed up, a note of written submissions to which in turn they each spoke in oral submission. Those helpful written submissions were extensive and are accordingly not reproduced *ad longum* but rather, are only summarised here. The Tribunal makes clear that in the course of its deliberation it fully considered, in their entirety, each of the party's written and oral submissions.

### **Summary of Submissions for the Claimant**

108. Under reference to:-

- (a) his note of written submissions,
- (b) the factual scenario set out in the narrative of the paper apart to the ET1 and the claimant's Further and Better Particulars, which he invited the Tribunal to find established in fact,
- (c) the agreed Statement of Facts; and,
- (d) to the relevant statutory provisions,

Counsel for the claimant confirmed that the complaints advanced were those of discrimination because of the protected characteristic of disability; in terms of sections 20 and 21 of the Equality Act 2010 (Failure in a Duty to make

Adjustments); and, in terms of section 15 of the 2010 Act, of subjecting the claimant to unfavourable treatment because of something arising in consequence of his disability.

109. Under reference to the authority of **Environment Agency v Rowan** [2008] ICR 218, counsel for the claimant submitted as follows:

- (a) Section 39(5) of the Equality Act 2010 provides that the duty to make reasonable adjustments applies to employers. Paragraph 20 of Schedule 8 to the 2010 Act provides, in summary, that the duty to make reasonable adjustment arises only in circumstances where the employer knows or ought reasonably to know of the disabled person's disability and that the disabled person is likely to be placed at a substantial disadvantage
- (b) In the case of **Environment Agency v Rowan** [2008] ICR 218, the Employment Appeal Tribunal held that an Employment Tribunal considering a claim for breach of duty to make reasonable adjustments must identify:-
  - (a) the provision, criterion or practice (PCP) applied by the employer, or
  - (b) the physical feature or premises occupied by the employer,
  - (c) the identity of non-disabled comparators (where appropriate) and
  - (d) the nature and extent of the substantial disadvantage suffered by the claimant

- (c) Confirmed that the PCP relied upon by the claimant that identified, as refined and recorded at paragraph 7(3) above namely “requiring the claimant to satisfactorily perform the workload given to him by the respondent in the circumstances pertaining in and during the period May 2015 to 25<sup>th</sup> June 2018”. Under reference to the Equality and Human Rights Commission Code of Practice on Employment (“the EHRC Code”) he submitted that “PCP” which is not defined in the EqA 2010 Act should, in terms quoted from the Code, “be construed widely so as to include, for example, any formal or informal policies, or roles, practices, arrangements or qualifications including one of decisions and actions.” (para 6.10) and that the requirement so applied to the claimant in the circumstances pertaining and during that period constituted a PCP for the purposes of giving rise to a duty to make adjustments in terms of section 20 of the 2010 Act.
- (d) The claimant’s comparators were his non-disabled work colleagues.
- (e) The substantial disadvantage caused to the claimant was that he suffered stress as a result of having to carry out his workload in the circumstances pertaining during that period and that this had had a more serious effect on his health and wellbeing given his disability when compared to his non-disabled colleagues. The same being supported by the evidence of Andrew Dunsmore which was to the effect that while everybody, in the team, was working in a stressful environment, the workload and conditions took its toll particularly on the claimant.
- (f) Regarding the requirements of “substantial” the term was one defined in section 212(1) of the 2010 Act as something which was “more than minor or trivial”. That that was a low threshold and one that was met, in the case of the claimant, was, he submitted supported by the EHRC Code which stated, at paragraph 6.16:-

*“The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly – and unlike direct or indirect discrimination – under the duty to make adjustments there is no requirement to identify a comparator or comparative group whose circumstances are the same or nearly the same as a disabled person’s”.*

110. In relation to relevant “knowledge” Mr McGuire submitted that it was not in dispute that the respondents knew, at the material times, of the claimant’s disability. He further submitted that the Tribunal should, on the evidence presented, hold that the respondent knew or ought reasonably to have known that the claimant was likely to be placed at a substantial disadvantage by the PCP as so applied. Viz:-, amongst other sources of evidence relied upon he identified,

- The initial medical assessment carried out in July 2015 [pages 106-110 of the Bundle]
- The initial medical assessment carried out in April 2017 [pages 144-9]
- The Memorandum from Chief Inspector Jennifer Thornton to Chief Superintendent Sharon Milton dated 21<sup>st</sup> June 2017 [154-8] and
- The email from the claimant to Chief Inspector Jennifer Thornton of 30<sup>th</sup> August 2017 [166-7]

111. On the basis of the above Mr McGuire invited the Tribunal to find in fact and in law:-

- (a) that the respondents were under a duty, arising in terms of section 20 of the Equality Act 2010 to make “reasonable adjustments”.



- (b) That the initial medical assessments referred to set out a number of matters which constituted and should be considered to be reasonable adjustments within the meaning of the 2010 Act.
- (c) Further reasonable adjustments included the putting in place of a permanent, which failing a temporary First Line Manager based within the claimant's team at Fettes with the ability and responsibility of monitoring the claimant with a view to ensuring that
  - (i) he took his medication at appropriate times,
  - (ii) took appropriate rests;
  - (iii) did not stay working beyond his shift finish times in circumstances which would adversely impact upon his health,
  - (iv) monitoring on a day to day and ongoing basis the effectiveness of adjustments in place, and,
  - (v) to consider the need for/appropriateness of further adjustments
- (d) (see Memorandum from CI Thornton dated 21<sup>st</sup> June 17 – *“in relation to the individual stress assessment questionnaire the main cause of stress was identified as the long term absence of PC Wilkinson’s Line Manager KL who has been absent since 3<sup>rd</sup>/01/2017. Whilst I have regular telephone contact with all staff and occasional personal visits to Fettes, he would prefer to have a Line Manager on site to run things past. I will consider the points raised further and advise an Action Plan.”* (Pages 154-158 of the Bundle; and elsewhere CI Thornton’s notes in which she indicates she will consider a temporary placement to cover line management (email page 166).

112. Mr McGuire invited the Tribunal to hold, on the evidence presented, that the respondent had breached its section 20 duty to make adjustments in relation to, amongst other matters, those set out in the medical assessments and in the individual risk assessment and in their continuing failure in the period from end December 2016 to late February 2018 to put in place any permanent, which failing temporary/acting locally based First Line Manager and management of the claimant's team and, notwithstanding the temporary appointment of Andrew Dunsmore in that capacity in late February 2018 the continuing failure up to the date of the claimant's retirement 25 June 2018 to deliver, through that appointment the day to day supervision and monitoring of the claimant and his condition, of its impact upon his ability to satisfactorily perform the workload given to him, the implementation of the recommended adjustments, the assessment of their effectiveness and consideration of the need for and appropriateness of further adjustments; and that the respondent had accordingly discriminated against the claimant in terms of section 21(2) of the Equality Act 2010.

113. He further submitted that in consequence of the respondent's breach, the claimant had suffered injury to feelings in respect of which he was entitled to be compensated in damages.

#### **Summary of Submissions for the Claimant Section 15 EqA 2010**

114. Under reference to the provisions of section 15 of the Equality Act 2010 Mr McGuire submitted that the respondent's failure, variously, to put in place and maintain in place the adjustments contended for separately constituted unfavourable treatment because of something arising in consequence of the claimant's disability because of the aggravated levels of stress and negative impact upon his health which resulted from the failures had upon him by reason of his Parkinson's Disease.

115. In summary Mr McGuire submitted that the same conduct relied upon in respect of the section 20/21 EqA 2010 claim separately constituted discrimination in terms of

section 15 of the 2010 Act. In relation to section 15(1)(b) he submitted that his understanding of the respondent's position was that they no longer sought to argue that such treatment, let it be assumed that the Tribunal considered that it did otherwise constitute section 15 discrimination, was treatment which constituted a proportionate means of achieving a legitimate aim. He separately noted that if he were wrong in that understanding, the respondent's representative had not really argued that it would, in those circumstances be treatment which fell within the terms of section 15(1)(b) of the 2010 Act. He submitted that the treatment did not constitute a proportionate means of achieving a legitimate aim.

116. In relation to remedy and:-

- (a) under reference to the claimant's Schedule of Loss produced at page 193 of the Bundle and to the fact that unfavourable treatment and concurrent breach of section 20 duty fell to be regarded as having subsisted since July of 2015 which failing at the very latest from end December 2016, when the respondents failed to replace the locally based First Line Manager following KL's absence, until the date of his retirement 25<sup>th</sup> June 2018 (a period of 18 months);
- (b) Mr McGuire, while recognising that there should not be duplication of compensation, submitted that damages for consequential hurt to feelings suffered by the claimant and which was caused by both of the statutory delicts would be appropriately quantified in the sum of £20,000; with interest at the judicial rate applied to the award of damages made, from the date of the relevant discriminatory act/acts, to the date of judgment.

### **Summary of Submissions for the Respondent**

117. In relation to the asserted duty said by the claimant to arise in terms of section 20 the respondent's representative, Dr Gibson, submitted as follows:-

- (a) The terms of the PCP relied upon, even as narrowed in response to the Tribunal's request for clarification in the course of the hearing, were such that, properly construed, it did not fall to be seen as a PCP which placed the claimant at a substantial disadvantage. At a preliminary hearing of 7<sup>th</sup> November 2018 the respondent had submitted the further specification of the PCP was required as in its then advanced terms it was too wide. The claimant, although given the opportunity to consider whether further specification was required did not do so providing, in terms of an email of 5<sup>th</sup> December 2018 the explanation which had been broadly reiterated by the claimant's Counsel in his submissions.
- (b) While the PCP had been somewhat narrowed, in the course of the hearing, to the imposition of the requirement to satisfactorily perform the workload given to the claimant in the period from May 2015 to 25<sup>th</sup> June 2018, Dr Gibson submitted, under reference to submissions to be made by him in respect of the section 15 EqA 2015 claim, that consideration of the application of the PCP should be further restricted to the period between 13<sup>th</sup> March 2017 and 25<sup>th</sup> June 2018. He so submitted on the basis that following the putting in place by the respondent of certain of the adjustments recommended during medical assessment which proceeded on 8<sup>th</sup> July 2015, the claimant had continued to discharge his duties in the workplace without the respondents making any criticism of him in relation to his satisfactorily performing his allocated workload and without he, the claimant, raising any further issues about any adjustments to be made to reduce stress and adverse impact on his health, until 13<sup>th</sup> March 2017

118. In Dr Gibson's submission the application of the PCP to the claimant did not put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled:- viz

- (a) At no time was the claimant put under any performance management programme or put at risk of a warning of dismissal in relation to the performance of his workload
- (b) The respondent did not criticise the claimant in respect of any failure to perform his role and thus did not subject him to stress
- (c) *Per contra*, the respondent's position was that they considered that the claimant and his colleagues in the ANPR Unit were satisfactorily performing the workload given to them
- (d) Any serving Police Constable, regardless of disability, would be required to satisfactorily perform the workload given to them. If they did so, as, in the respondent's submission, the claimant was doing then they also would not be subjected to any substantial disadvantage of stress and anxiety.

119. Dr Gibson submitted that it should be borne in mind that the PCP relied upon did not define the requirement as the carrying out of "an excessive" workload. To the extent that the claimant may now be seeking to argue that the workload was excessive, a bald assertion to that effect, whether express or implied and absent specification of what it was about the workload that caused the claimant more stress and anxiety in comparison with persons who were not disabled, should not be a basis upon which the claim should be allowed to succeed.

120. Dr Gibson's primary conclusion, with which he invited the Tribunal to concur, was that in the circumstances averred and presented in evidence, no duty incumbent upon the respondents to make reasonable adjustments arose in terms of section 20 of the 2010 Act.

121. In the alternative, let it be assumed that the Tribunal considered that a section 20 duty did arise, in Dr Gibson's submission the respondent should be regarded as having fully discharged the duty.

122. The respondent's representative firstly made the point that no reliance upon a failure to make adjustments prior to those recommended in the July 2015 medical assessment/Occupational Health Report was pled by the respondent and that accordingly reference to circumstances pertaining prior to July 2015 should be regarded as irrelevant for the purposes of the claims before the Tribunal. In relation to the July 2015 recommended adjustments the respondent's representative then submitted as follows:-

- (a) The claimant had been allowed flexibility with his scheduled start time and there was evidence of him frequently operating that adjustment. Further, of him having been given access to the First Aid Room to take time out as and when required and of him likewise doing so; and, of the claimant being given additional time off for medical related appointments and or being allowed to travel early to other appointments so that he could drive at an optimum point in time in relation to the cycle of his medication. The respondent's representative submitted that the above amounted to flexible scheduling and the implementation of the recommended adjustments.
- (b) In relation to the identification of workplace stressors, Dr Gibson submitted that it was self-evident from the evidence that the ANPR Unit was a busy office and that the workload being, in his submission the claimant's sole issue, that that should be regarded as sufficient identification of workplace stressors.
- (c) In relation to "bearing in mind that change within the office environment it may be more difficult and challenging to adapt to", Dr Gibson submitted that the Tribunal had not heard evidence as to any significant change to the office environment which the claimant had found difficult or challenging to adapt to, his sole issue being workload and that a change in workload was not what was being

alluded to by the Occupational Health Practitioner in making that recommendation.

- (d) In relation to “establishing long and short term goals with agreed objectives and realistic achievable expectations with regard to workload”, the respondent’s representative submitted that the Tribunal had heard evidence that no-one in the team was expected to work late, that no-one was given targets to achieve and that no-one was criticised about work not getting done. The Unit was busy but there was no evidence of anyone telling the claimant to do any more than he could get done within the hours he was required to work.

123. Separately, there had been a number of adjustments made by way of the provision of auxiliary aids, including Access to Work Review and DSC Assessment, which resulted in the provision of a Dragon Voice Recognition Software, a programmable mouse and an IT software update (touch pad) and a specialist chair. These, submitted the respondent’s representative, were highly relevant as they in effect alleviated physical difficulties the claimant was experiencing. The claimant had appeared in the course of his oral evidence to suggest that none of these auxiliary aids were of much use. There was no evidence that he had at any time prior to the hearing expressed such a view to the respondents or had complained that the software was not working. He submitted that in relation to workload the claimant’s evidence should be regarded as evidence which sought to “over egg the pudding” in relation to the extent of workload when compared with the evidence of FB and or Andrew Dunsmore.

124. In relation to the 2017 medical assessment (Occupational Health Report recommended adjustment) the respondent’s representative relied upon the statement contained within that Report to the effect that “*The level of impairment is well accommodated for in this role with the benefit of current workplace adjustments*” and that “*There has been no significant change in his condition since he was last seen for Occupational Health opinion in 2015*”, as evidence of his proposition that, as at 2017, sufficient reasonable adjustments were in place and

as illustrated by the fact that the claimant had continued to perform his role (impliedly satisfactorily).

125. In relation to the balance of recommendations in and content of the 2017 medical assessment the respondent's representative submitted that comparison of the action taken by the respondents on the one hand with the terms of that Report should lead to the conclusion that there had been no breach of duty to make appropriate adjustments. The claimant had already had put in place adjustments to facilitate the taking of his medication at set times and to take rest and recovery time as appropriate by reason of his having been given access to the First Aid Room. There had also been a stress assessment completed and he was provided with written guidance regarding "weeding" and CI Thornton had allowed him the opportunity to report if his workload was excessive.
126. Regarding the level of workload the respondent's representative submitted that the Tribunal should consider that this had been reduced to an extent which was reasonable.
127. In relation to the absence of an embedded First Line Manager he submitted that the Tribunal should regard the solution delivered by the respondent namely the assumption by the Second Line Manager CI Thornton, on a remote basis, of the First Line Management duties previously performed by KL as an embedded First Line Manager, was all that the respondents could possibly do, was reasonable and should be regarded as sufficient in the circumstances to discharge any such duty. He submitted further that the Unit should be regarded as being adequately staffed throughout the material time period.
128. The respondent's representative submitted that it would not be a reasonable adjustment for the respondent to reduce the workload of the ANPR Unit in Fettes. The workload was what it was and it comprised work which required to be done, the respondents not being a private enterprise could not simply do less work if they chose to nor could the work be transferred somewhere else. The entire ethos of the office was that "*you did what you could and you went home for the evening*".



That was very much the evidence of FB and Andrew Dunsmore. While he acknowledged that they had identified occasions when they had had to stay late to deal with an urgent query that was only on the odd occasion and, insofar as the claimant chose to do otherwise he was in effect author of his own misfortune. When the issue of the build-up of non-urgent emails had been identified CI Thornton acted to rectify it.

129. Separately and in any event, following the meeting in March of 2017 steps were taken to reduce the workload of the claimant and of FB with some 2.5 to 4.5 hours being removed from their current workload in consequence.
130. As already mentioned, auxiliary aids had been provided to assist the claimant on an individual basis with the performance of his workload.
131. There was a tension between allowing the claimant flexibility and time out on the one hand and the requirements of the workload on the other.
132. The claimant was never criticised in relation to his performance, no pressure was placed on him to complete workloads at any point. He was never performance managed, he was not expected to work overtime or during his lunch break and he should not have done so if it caused him stress and thus he, and not the respondents, was responsible for any stress arising in those circumstances.
133. The respondent's representative submitted that the breach of duty case was substantially undermined by the claimant's sought for and delivered ill health retirement assessment. In particular he submitted that the claimant's plea assertion that "had the respondent made adjustments the claimant would have continued in his role as a Police Officer", (impliedly for another 4 years to complete 30 years of service,) was wholly undermined by the medical opinion and assessment which expressed him to be eligible and meeting the criteria for ill health retirement, in April of 2018. (page 172 of the Bundle)).

134. As at the 19<sup>th</sup> of April 2018 Dr Watt had assessed the claimant as permanently incapacitated to perform the key capabilities for ordinary duties of a Police Officer and that no reasonable adjustments could be made to rectify that situation. The claimant had made an application on the 11<sup>th</sup> December 2017 to be considered for ill health retirement and so, submitted the respondent's representative, it might be reasonably inferred that his condition was already such in December of 2017. That, submitted the respondent's representative was a diagnosis and assessment which was always going to have occurred. There was nothing in the assessment which supported the proposition that the claimant's medical condition, as at the point of assessment, resulted from him having been exposed previously to high stress levels. In short the claimant's proposition that had the respondents not failed in a duty to make adjustments, as alleged, the claimant would have continued in his role as a Police Officer beyond 19<sup>th</sup> April 2018, the date of Dr Watts' assessment, was simply not supported by that medical opinion.
135. Dr Gibson further submitted that there was a direct conflict between his assertion that if further adjustments had been put in place the claimant could have stayed in work, on the one hand, and his having applied for and accepted ill health retirement, on the other, in circumstances where part of the eligibility test for ill health retirement is an assessment and finding that there are no reasonable adjustments which could be put in place to sustain him in employment. The claimant could not, as Dr Gibson put it "*have his cake and eat it here*".
136. In conclusion, the respondent's representative submitted that the respondents should be viewed as having done all that he could to sustain the claimant in employment. Sadly, given the nature of the claimant's physical impairment there simply came a point where the reasonable adjustments which had been put in place were no longer capable of removing any sort of disadvantage associated with requiring the claimant to satisfactorily perform the workload given to him. That point should, unquestionably in the light of Dr Watts' assessment, be viewed as having arrived as at the 19<sup>th</sup> of April 2018 the date of that assessment. To put it another way – "*How could it be said that the respondent failed to make reasonable adjustments when, as at the 19<sup>th</sup> of April 2018 in the opinion of the relevant*

*medical expert, there were no adjustments which would have rendered the claimant capable of performing his role?"*

137. Reminding the Tribunal that the claimant, by reason of his applying for and accepting ill health retirement must be regarded as agreeing with and accepting that medical assessment, the claimant's claim at its highest, had to be viewed as one restricted to stress caused to him during the performance of his role. The fact that he was unable to complete his aspiration of achieving 30 years of service in his role was not something which could be laid at the door of the respondent. At the end of the day, the claimant had left his role and was to be seen as having chosen to and to cease to perform his role, on medical grounds; that is to say through the vehicle of ill health retirement the eligibility criteria for which he was assessed to have met as at 19<sup>th</sup> April 2018.

#### **Summary of Submissions for the Respondent – Section 15 EqA 2010 Discrimination**

138. The respondent's representative first confirmed that having heard the evidence and submissions made on the claimant's behalf, he apprehended that the unfavourable treatment relied upon by the claimant in support of his section 15 complaint was in essence the same conduct of/failure to act on the part of, the respondent which was relied upon for the purposes of the section 21(2) complaint that is to say his understanding was that the alleged unfavourable treatment was a failure to make reasonable adjustments. In his submission, that led to a circular argument in respect of both complaints.

139. Under reference to the case of **Williams v Trustees of Swansea University Pension and Assurance Scheme and another** [2018] UKSC65, Dr Gibson submitted that the Tribunal had to ask and answer the questions:-

(a) what was the relevant treatment; and,

(b) was it unfavourable to the claimant?

140. In the instant case the relevant treatment averred and founded upon or given notice of as founded upon was that of “not providing the claimant with any satisfactory response to his repeated requests for adjustments”;-

- (a) That treatment could only be unfavourable if it was first found to have occurred
- (b) There was no concession from the respondent that such treatment had occurred
- (c) It was clearly the case that the claimant had received a response from the respondent in regards to adjustments and to the 2015 and 2017 medical assessment/Occupational Health Reports and, under reference to and incorporation of submissions made by him/to be made by him in relation to the section 21(2) complaint, he submitted that such responses as were made by the respondent fell to be regarded as wholly satisfactory

141. There was prayed in aid of that submission the fact that following on from the 8<sup>th</sup> July 2015 medical assessments, the claimant continued in the workplace without raising any further issues regarding adjustments to reduce the stress which was/might be having an adverse effect on his health by reason of exacerbating his Parkinson’s Disease symptoms, until the 13<sup>th</sup> of March 2017.

142. The respondent’s representative invited the Tribunal to infer from that fact that the response provided by the respondent had, up until that point at least, been satisfactory because had it not been the claimant would have been unable to continue to perform his role for that 18 month period without further issue.

143. In relation to the briefing note of 26<sup>th</sup> April 2016 generated by the claimant, the respondent’s representative submitted that a consideration of the terms of that note made abundantly clear, contrary to the claimant’s evidence/averments, that it

did not raise issues pertaining to adjustments to be made to reduce stress and adverse effect within the ANPR Unit and thus stress and adverse effect upon the claimant's health. Rather, he submitted, its focus was in its term, upon improving the quality and efficiency of the method in relation to parallel activities carried on elsewhere across Police Scotland and not in the ANPR Unit. Dr Gibson invited the Tribunal to regard that briefing note as irrelevant to the issues before it.

144. In relation to his email to CI Thornton of 13<sup>th</sup> March 2017 (page 135 of the Bundle) in which, the respondent's representative conceded the claimant raised issues of and requested action in respect of workload in consequence of stress, Dr Gibson submitted the claimant had palpably received a satisfactory response;

- (a) A meeting had been arranged by CI Thornton that same week and reductions in the team's workload, resulting in the removal of 2.5 to 4 work hours per day across the team including in relation to some work carried out by the claimant, were initiated.
- (b) Separately, a referral to Occupational Health had been arranged for 22<sup>nd</sup> March in any event due to concerns regarding the claimant's ability to drive and a report received on the 18<sup>th</sup> of April.
- (c) That report had focused a need to consider additional ways in which the level of demand at work could be matched to his current level of functioning.
- (d) That the claimant might need more personal support from management and more time to deal with tasks.
- (e) That the exact details of any arrangements would need to be determined by management in consultation with him.
- (f) The above in turn had resulted in a stress risk assessment designed to lead to an Action Plan being initiated in consultation with the claimant.

- (g) It was simply not true, on the facts, that the claimant had not received “any satisfactory response from the respondent” in relation to asking management for adjustments to be made to reduce the stress being experienced by him and the adverse effect of that on his health.

145. Finally and in any event, regardless of whether the respondent was treating the claimant unfavourably in the manner alleged, which was denied, prior to December 2017, which failing April 2018, which further failing 25<sup>th</sup> June 2018, there came a point when such treatment could no longer be regarded as unfavourable because,

- (a) as at one, which failing the other, which further failing the last, of those dates, the claimant’s medical condition had become and remained such that he was eligible for ill health retirement; The same by reason of being permanently incapacitated and unable to perform the key capabilities for ordinary duties of a Police Officer in respect of which there were no reasonable adjustments which could be made in order to rectify that position.
- (b) As at 19<sup>th</sup> April 2018 he had been so medically assessed; and,
- (c) As at 25<sup>th</sup> June 2018 had been offered and had accepted ill health retirement.

146. Lastly, let it be assumed that the Tribunal had concluded that the respondent had otherwise treated the claimant unfavourably in terms of section 15 of the 2010 Act, the respondent’s representative invited the Tribunal to hold that discrimination had not occurred by reason of holding that the responses that were given by the respondent to the claimant’s requests constituted a proportionate means of achieving a legitimate aim.

- (a) The legitimate aim was to have the claimant attend work and perform his role without being placed under undue stress.

- (b) In the respondent's representative's submission that which the Tribunal found in fact was done by way of response to the claimant's requests should be regarded as constituting a proportionate means of achieving that legitimate aim.
- (c) Although not clear as to whether the same was being advanced, if it be the case that the claimant was arguing that ill health retirement itself was unfavourable treatment then that too was denied. Particularly so in circumstances where the claimant had himself, through the agency of his own Federation, asked to be assessed and considered for ill health retirement and in circumstances where the appropriate senior and independent medical practitioner appointed for the purposes of so doing, had assessed and certified the claimant as being no longer capable of the ordinary duties of a Police Constable and further, that there were no reasonable adjustments capable of being put in place which would rectify the same.
- (d) In Dr Gibson's submission in the face of such an argument, if one was indeed being advanced on the claimant's behalf, the Tribunal should self-evidently hold that ill health retirement was, in those circumstances a proportionate means of achieving a legitimate aim.

147. On the above basis the respondent's representative invited the Tribunal to dismiss the complaints of both section 15 and section 21(2) EqA 2010 Discrimination.

### **Applicable Law**

148. The statutory delicts complained of are defined in terms of sections 20 and 21(2) (Breach of Duty to make Adjustments) and section 15 (Discrimination arising from Disability) of the Equality Act 2010.

149. The relevant provisions of section 20 and section 21 of the 2010 Act provide as follows:-

***“20 Duty to make adjustments***

- (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
- (2) The duty comprises the following three requirements.*
- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
- (4) The second requirement is a requirement, where a physical feature 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.*
- (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.*
- (6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take*



*include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.*

*(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.*

*(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.*

*(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—*

*(a) removing the physical feature in question,*

*(b) altering it, or*

*(c) providing a reasonable means of avoiding it.*

*(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—*

*(a) a feature arising from the design or construction of a building,*

*(b) a feature of an approach to, exit from or access to a building,*

*(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or*

*(d) any other physical element or quality.*

*(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.*

*(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.”*

150. Section 21 of the 2010 Act is in the following terms:-

***“21 Failure to comply with duty***

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

*(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.*

*(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.”*

151. Section 15 of the 2010 Act is in the following terms:-

***“15 Discrimination arising from disability***

*(1) A person (A) discriminates against a disabled person (B) if—*

*(a) A treats B unfavourably because of something arising in consequence of B's disability, and*

*(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

*(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”*

152. The Tribunal did not find there to be substantial conflict in respect of essential issues of fact, as between the evidence of witness all of whom the Tribunal considered in general terms to be credible. In particular the Tribunal found the evidence of Andrew Dunsmore both as to the scope of and exclusions from his duties when acting up in the First Line Management Role and as to his factual observation of the impact of the circumstances pertaining in the material time period upon the claimant which evidence the Tribunal accepted.

**Discussion and Disposal**

153. In relation to the section 21(2) complaint the Tribunal considered, and has found in fact:-

(a) that the provision, criterion or practice of requiring the claimant to satisfactorily perform his workload in circumstances pertaining during the period May 2015 to 25<sup>th</sup> June 2018, being circumstances which included amongst other matters the absence, in the period end December 16 to 25<sup>th</sup> June 18, of an embedded First Line Manager

with responsibility to supervise and monitor the claimant in respect of his disability and its impact was a PCP which placed the claimant at a substantial disadvantage in comparison with his work colleagues who were not so disabled.

- (b) That the substantial disadvantage caused to the claimant was that he suffered stress as a result of having to carry out his workload in the circumstances pertaining in and during that period and that that had had a more serious effect upon his health and wellbeing given his disability, when compared to his non-disabled colleagues.
- (c) That at the material times the respondent had and separately ought reasonably have had relevant knowledge for the purposes both of section 20/21 and section 15 EqA 2010.

154. The Tribunal had no hesitation in holding, on the evidence, that the low threshold triggering the descriptor “substantial” had been met and that, accordingly, the respondents were, in the period March 2015 to 25<sup>th</sup> June 2018 under a duty, arising in terms of section 20 of the 2010 Act to take such steps as it was reasonable to have to take to avoid the disadvantage.

155. In relation to compliance with the duty, the Tribunal accepted the respondent’s representative’s submission that such steps as the respondents had taken in response to the claimant’s first requests and in light of the recommendations contained in the first Occupational Health Report completed on 8<sup>th</sup> July 2015, did all fall into the category of steps that it was, in the circumstances, reasonable to take i.e. that their putting in place by the respondent did amount to making the relevant reasonable adjustments in partial performance of the duty.

156. While the Tribunal has found in fact that not all of the recommendations set out in the July 2015 Occupational Health Report were implemented or given effect to by the respondents, the Tribunal considered that there was merit in the respondent’s representative’s submission that such response as had been made by the

respondent should be regarded as a satisfactory response and as a sufficient performance of their section 20 duty in the period from May 2015 up to and including end December 2016 on which latter date the team's First Line Manager through whom certain of the adjustments with material impact upon the disadvantage were delivered commenced a period of absence from which she did not return.

157. In relation to the period from in or about end December 16 up to and including the date of the claimant's retirement on 25<sup>th</sup> June 2018 the Tribunal, as it has found in fact, considered that the respondent had failed to take a number of steps, all as set out in its Findings and, the same being steps which it was reasonable to take for the purposes of section 20(3) of the 2010 Act, and variously;

- asked for by the claimant,
- recommended in the 18<sup>th</sup> April 2017 Occupational Health Report, which included reiteration of the July 2015 recommendations some of which though previously put in place had ceased to be in place from end December 2016;
- identified by CI Thornton in the individual stress assessment carried out by her; and
- including the failure to replace, on either a permanent or temporary basis the embedded First Line Manager following the commencement of KL's absence.

158. The Tribunal separately considered that that continuing failure simultaneously constituted unfavourable treatment in terms of section 15 of the Act which, in the circumstances pertaining, did not constitute a proportionate means of achieving a legitimate aim.

159. Material in that failure in duty, and or unfavourable treatment, was the respondent's failure, on either a permanent or a temporary basis, to replace the embedded First Line Manager within the ANPR Unit who like KL would be co-located with it at

Fettes and would be charged with the continuing delivery of section 20(3) adjustments in relation to the claimant including without exclusion of others,

(a) Monitoring and supervision of the claimant with a view to ensuring:-

- (i) that he took his medication at appropriate times
- (ii) that he took appropriate rests or
- (iii) did not stay working beyond his shift finish times in circumstances which would adversely impact upon his health

(b) Monitoring on a day to day and ongoing basis the effectiveness of such adjustments as were in place; and,

(c) considering on an ongoing basis the need for/appropriateness of further adjustments

160. The Tribunal considered that those failures, in that period, resulted in a breach of section 20 duty and separately resulted in the respondent's response to the claimant's request not constituting "a satisfactory response to the claimant's repeated requests for adjustments" for the purposes of section 15, EqA 2010]

161. Additionally, as set out above, the Tribunal found that steps identified by or to the respondent which fell within the category of the section 20 EqA 2010 Act duty but which were not taken/put in place by the respondent included:-

- (a) The identification of workplace stressors and steps to address the same as far as was reasonably practicable (beyond those emerging from the DSE assessment which had already occurred as at the date of the 2015 Report and as at the date of the making of the recommendation)
- (b) The provision of additional time for the claimant to adjust to and to learn new responsibilities

- (c) The establishment of long and short term goals with agreed objectives and realistic achievable expectations with regard to workload
- (d) In the period end December 16 to 25<sup>th</sup> June 18, arrangement for a mentor and regular and informal one to one meetings with his Line Manager providing an opportunity to review progress, give feedback on performance and to identify and address difficulties arising
- (e) Arrangements to regularly review the effectiveness of any adjustments in place and the need for additional adjustments to maintain effectiveness (the same having previously been put in place through the person of the claimant's embedded First Line Manager KL having effectively ceased in the period end December 2016 up to and including the claimant's retirement on 25<sup>th</sup> June 2018
- (f) The provision of more personal support from his management team
- (g) The identification of additional stressors and the addressing of these as far as is reasonably practicable

162. Following the individual stress risk assessment carried out by CI Thornton with the claimant, an Action Plan addressing the issues (concerns/requirements) identified in the assessment and the putting in place of the steps identified to resolve those issues, which was to be part of its output was never prepared. No Line Manager was monitoring the workload and the impact of the claimant's condition upon his ability to carry it out, following KL's commenced absence in December 2016. Although from end February 2018 Andrew Dunsmore began to act up in the position of First Line Manager, there was excluded from his duties the monitoring of the claimant and the impact of his condition upon his ability to carry out his work and the supervision of the claimant in relation to matters such as the regular taking

of his medication, the taking of regular breaks and his not working beyond his end of shift times.

163. No job description was developed. Line management and staff were not involved, as recommended, in work design and construction processes. The Tribunal considered that all of the above identified, reiterated and recommended measures were measures reasonably and proportionately within the capability of an organisation the size of Police Scotland to put in place.
164. While the Tribunal accepted CI Thornton's evidence that she did not have, within the team directly managed by her, the human resource to put in place a temporary Line Manager to fulfil KL's function, they also noted CI Thornton's evidence which was to the effect that she had not really considered the issue of a temporary replacement, her preference and long term aim being to secure a full time replacement by the movement of the whole team into a different management chain. She accepted in evidence that she could have but did not consider asking the wider chain of command to assist in the provision of a temporary replacement First Line Manager pending the achievement of her longer term goal. The respondent led no evidence to suggest that the provision of that human resource for that temporary purpose, from the respondent's wider organisation would have been impossible or even impracticable.
165. The Tribunal was satisfied, on the evidence, that the respondent did, in the period from end December 2016 up to and including the date of the claimant's retirement 25<sup>th</sup> June 2018, fail in its section 20 EqA 2010 duty and thus discriminated against the claimant, in that period, in terms of section 21(2) of the 2010 Act.
166. The Tribunal were separately satisfied that in so failing in their section 20 duty the respondent also treated the claimant unfavourably in terms of section 15 of the 2010 Act.
167. While, at the end of the day, there was a lack of clarity as to how firmly, if at all, the respondent's representative continued to stand upon his *esto* contention that such



treatment, all other things being equal, should be regarded as a proportionate means of achieving a legitimate aim, the Tribunal unanimously rejected that submission there being available to the respondent on the evidence, less discriminatory means of achieving the legitimate aim given notice of namely the aim:-

*“To have the claimant attend work and perform his role without being placed under undue stress”.*

168. The less discriminatory means available to the respondent included, materially, the putting in place of a temporary and embedded First Line Manager whose duties included the duty of delivering the adjustments in relation to the claimant, which had previously been delivered by KL.

169. While the Tribunal have not understood the claimant’s representative to have argued that “ill health retirement” in itself amounted to section 15 Unfavourable Treatment, for the avoidance of doubt the Tribunal makes clear that it would not have sustained such a contention and separately would have considered, in the circumstances pertaining, that the claimant’s ill health retirement did, in those circumstances, constitute a proportionate means of achieving a legitimate aim.

## **Remedy**

170. The remedy sought by the claimant in respect of the asserted discrimination claims is one of compensation (*solatium* – damages for injury to feelings).

171. The Tribunal’s power to make such an award is contained within section 124 of the Equality Act 2010 which provides variously at sub-section (2)(b) and sub-section 6 as follows:-

**“124 Remedies: General**

(1) This section applies if an Employment Tribunal finds that there has been a contravention of a provision referred to in section 120(1).

(2) The Tribunal may –

(a) ...

(b) Order the respondent to pay compensation to the claimant; ....

(6) The amount of compensation which may be awarded under section (2)(b) corresponds to the amount which could be awarded by [the County Court] or the Sheriff under section 119.”

172. Section 129 of the 2010 Act provides, at sub-paragraphs (3) and (4) as follows:-

**“119 Remedies**

*(1) This section applies if [the County Court] or the Sheriff finds that there has been a contravention of a provision .....*

*(3) The Sheriff has power to make any order which could be made by the Court of Session -*

*(a) In proceedings for reparation; .....*

*(4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).”*

173. The principles of the Scots law of reparation, including that of causation, regulate the award of damages to be made; that is to say, that the damages awarded for injured feelings should relate to the injury which properly falls to be regarded as having been caused by the delictual (in this case discriminatory) act.

**“The Vento Guidelines”**

174. In 2002, the English Court of Appeal attempted to set out guidelines, in relation to the quantification of damages for injury to feeling in unlawful discrimination cases, in the case of **Vento v Chief Constable of West Yorkshire Police**. The Court set out three bands for compensation dependent on the seriousness of the claim. Although Tribunals have discretion as to what they award, Employment Tribunals have had regard to the Vento guidelines in subsequent cases on the basis that they provide a useful yardstick against which to measure quantification made through application principles of the law of reparation. Those bands have been periodically increased with inflation;

- (a) firstly in the case of “**Da’Bell**” in September 2009,
- (b) on 26 July 2016, in the case of **Simmons v Castle** where an increase of 10% on the September 2009 band levels became applicable to cases raised from April 2013 onwards.
- (c) Presidential guidance has been subsequently issued in both the Employment Tribunal (Scotland) and the Employment Tribunal (England and Wales) respectively:-
  - (i) Addendum 1, in relation to claims presented in the period 11 September 2017 to 6 April 2018, then;
  - (ii) Addendum 2, in relation to claims presented on or after 6 April 2018 and most recently in relation to claims presented on or after 6 April 2019.

- (d) The claimant's complaints were first presented to the Employment Tribunal on 2 September 2018 and accordingly fall within the Presidential Guidance 1<sup>st</sup> Addendum for the application of the "Vento" bands of compensation.

175. The Tribunal considered it appropriate, and neither party's representative submitted to the contrary, that the relevant and updated *Vento* bands (reflecting the **Simmons v Castle** 10% uplift) which were applicable, by way of yardstick to complaints which have succeeded in the instant case, are as follows:

	<b>Presidential Guidance 1<sup>st</sup> Addendum</b> <i>(Claims presented on or after 6<sup>th</sup> April 2018)</i>
<b>Top Band</b> For the most serious cases such as where there has been a lengthy campaign of harassment. Awards can exceed this only in the most exceptional cases.	£25,700 to £42,900
<b>Middle Band</b> For serious cases which do not merit an award in the highest band	£8,600 to £25,700
<b>Lower Band</b> For less serious cases, such as a one-off incident or an isolated event	£900 to £8,600

176. In the instant case, the Tribunal has upheld both the complaint of section 21(2) and that of section 15 EqA 2010 Discrimination. The acts or omissions of the respondent which constitute the former are, however, also the unfavourable treatment which constitutes the latter. In those circumstances the claimant is entitled, in broad terms, to be compensated only once. There should not be duplication of compensation. Counsel for the claimant, in accepting that general principle had placed the quantification of damages (in the sum of £20,000) at the

bottom of the top quarter of the middle band of the applicable *Vento* scale. The same, in his submission, being an appropriate level of damages for hurt to feelings caused by the breach of duty/unfavourable treatment in the three year period from in or about May 2015 up to and including the date of the claimant's retirement 25<sup>th</sup> June 2018.

177. The Tribunal accepted the respondent's representative's submission that the period May 2015 up to end December 2016 fell to be excluded from the period during which the respondent should be regarded as having discriminated against the claimant under either section. That period of exclusion ended however at the end of December 2016 and in the period which followed with the respondent's continuing failure to replace the absent embedded First Line Management and beyond end February 2018, the date of Andrew Dunsmore's commencing acting up, to the date of the claimant's retirement in circumstances where there was excluded from Andrew Dunsmore's responsibilities the relevant duties in relation to the claimant and his disability.
178. The Tribunal considered the breach of duty/unfavourable treatment to have subsisted therefore across a period of approximately 18 months, that is one half of the period asserted by the respondent, the same being a factor to be weighed and taken into account in the quantification of damages.
179. The Tribunal also considered that it was within that second 18 month period that the greater part of the hurt to feelings described by the claimant in evidence was suffered by him and was characterised by the fact that the breach of duty and unfavourable treatment persisted throughout that period in circumstances where in the Tribunal's consideration breach could reasonably have been purged and the unfavourable treatment could reasonably have been discontinued.
180. The Tribunal accepted that the breach of duty/unfavourable treatment was/were omissions/treatment which "led to" the termination of the claimant's employment through ill health retirement in the sense that they hastened the claimant's progression to a point at which he felt constrained to apply for ill health retirement.

181. The Tribunal recognised that discrimination which leads to the loss of employment, in the sense that it can be said to have **caused** (the Tribunal's emphasis) the loss of employment, would normally attract compensation which sits in the middle band of the *Vento* scale.
182. The Tribunal accepted the respondent's representative's submission that the primary cause of the termination of the claimant's employment was in fact his Parkinson's Disease which is a progressive neurological condition in respect of which the long term prognosis for the claimant was that of progressive functional impairment; and that such breach of duty to make adjustments/unfavourable treatment as the Tribunal has found established on the part of the respondent could not be regarded as causative of the claimant's inability to continue to serve as a Police Officer beyond 25<sup>th</sup> June 2018 the date of his ill health retirement.
183. The Tribunal rejected the respondent's representative's contention that they should infer that the claimant's medical fitness to perform his duties had ceased to exist at the earlier date of December 2017. There was no medical evidence to support the contention for that earlier cut off date.
184. While recognising that his medical unfitness to continue in service was assessed on 19<sup>th</sup> April 2018 the respondent, notwithstanding that assessment, had allowed the claimant to continue and the claimant had continued in service up to the date of his ill health retirement on 25 June 2018.
185. On balance, the Tribunal considered that latter date, that is the date of ill health retirement to be the date which fell to be regarded as the operative date cut off of causation of injury to feelings; and that the same was a factor to be taken into account in the quantification of damages.
186. In evidence, the claimant attributed hurt to feelings experienced by him partly and firstly to the ongoing day to day stress suffered by him and its collateral aggravation and acceleration of his symptoms and the resultant impact of that

upon his ability to perform his duties to the standards he aspired to; and partly and secondly, and not insubstantially, to the emerging realisation and ultimate acceptance by him that he would be unable to achieve his aspired to 30 years of service as a Police Officer.

187. The Tribunal were satisfied that hurt to feelings first categorised by the claimant at paragraph (186) above was properly attributable to the section 21(2) and section 15 Discrimination which it has established. The Tribunal did not so consider that the hurt to feelings as secondly characterised by the claimant at paragraph 186 above was so attributable.

188. In the light of the general evidence before it regarding the nature of Parkinson's Disease and its impact upon the claimant, including the claimant's evidence which it accepted, the Tribunal considered that the claimant had established, on the balance of probabilities, that the discrimination which it has found occurred did contribute to an acceleration of the claimant's ill health retirement. The Tribunal also considered that the totality of the supportive measures taken by the respondents in the period prior to December 2016 had, on balance, contributed to decelerating the claimant's ill health retirement.

189. In the absence of medical evidence to support the same, however, the Tribunal did not consider that the claimant had established, on the balance of probabilities, that absent the breach of duty and unfavourable treatment, his functional impairment would have progressed at a rate which would have allowed him to serve for a further 4 years beyond his ill health retirement date of 25<sup>th</sup> June 2018, thus allowing him to complete 30 years of service as a Police Officer; nor that the disappointment and hurt to feelings which he experienced in consequence of not achieving his aspiration to serve for 30 years was caused by the established discrimination. The Tribunal considered the same to be a factor to be taken into account in the quantification of damages.

190. Stepping back and looking at the matter in the whole, including taking account of the identified factors and the issue of causation, the Tribunal considered that an

award of damages in the circumstances presented by the instant case properly sits in the bottom quarter of the middle band of the applicable *Vento* scale, in the sum of £10,000; and orders the respondent to make payment to the claimant in that amount, together with interest thereon at the judicial rate of 8% per centum per annum from 1<sup>st</sup> January 2017 up to the date of judgment.

**Date of Judgement: 4<sup>th</sup> October 2019**

**Employment Judge: J d'Inverno**

**Date Entered in Register: 4<sup>th</sup> October 2019**

**And Copied to Parties**