EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr E Holden	**- V -**	The Commissioner of Police for the Metropolis

Heard at: London Central **On**: 11-15 November 2019

Before: Employment Judge Baty
Mr GW Bishop
Mr D Carter

Representation:

For the Claimant: Mr M Cobbin (partner)
For the Respondent: Ms C MacLaren (counsel)

RESERVED JUDGMENT

The claimant's complaints of disability discrimination (direct discrimination, discrimination arising from disability, harassment and for a failure to make reasonable adjustments) all fail.

REASONS

The Complaints

1. By a claim form presented to the employment tribunal on 19 April 2018, the claimant brought complaints of disability discrimination (direct discrimination, discrimination arising from disability, harassment and for a failure to make reasonable adjustments). The respondent defended the complaints.

The Issues

2. A preliminary hearing had taken place on 21 January 2019 before Employment Judge Brown at which, amongst other things, the issues of the claim were discussed. Both parties had provided lists of issues and orders were made

for completion of an agreed list of issues which was duly done. The agreed list of issues was submitted to the tribunal on 4 February 2019. The claimant was legally represented at this point (and at the preliminary hearing) although his legal representatives came off the record later in February 2019. The claimant has since represented himself and was represented at this hearing by his partner Mr Cobbin (who is not legally qualified).

3. At the start of this hearing, the judge went through the list of issues with the parties, summarising, at the request of and for the benefit of Mr Cobbin, the law in relation to the four types of disability discrimination complaint which were being brought. The parties agreed that the substantive issues remained the same as set out on the agreed list of issues, barring one formatting change at issue 3.1.4.

4. The judge noted that the single allegation of unfavourable/less favourable treatment throughout most of the various complaints was the decision to dismiss the claimant taken on 24 November 2017, as opposed to the dismissal itself which took effect from 24 December 2017. For the avoidance of doubt, in response to the judge's question, Ms MacLaren confirmed that as far as she was concerned this amounted to the same thing and that the emphasis on the 24 November 2017 decision would not preclude the claimant, if successful in his complaints, from claiming loss of earnings as a result of being dismissed. Furthermore, she agreed that, whether one referred to 24 November 2017 or 24 December 2017, all of the complaints were in time and there were no time related jurisdictional issues. For this reason, it was agreed that the issues in relation to jurisdiction set out in the original list of issues no longer applied and should be deleted.

5. It was agreed that (as envisaged at the preliminary hearing) the hearing should be on liability only. However, at the start of the hearing, before having read all the documents, the judge asked whether it might be useful for the tribunal to determine (as a point which may be relevant to any potential remedies hearing) which of the examples of sickness absence which the respondent maintains it relied on for the purposes of dismissing the claimant were related to the claimant's disabilities and which were not. Following discussion with the parties, however, it was agreed that the instances of absence were not recorded in this way in the records and it may not be possible to reach any conclusion in this respect; in any event, it was not an issue which it was necessary or appropriate for the tribunal to determine at this hearing.

6. The list of issues was, therefore, agreed on this basis and is as set out below. The judge confirmed that these were the issues and the only issues which the tribunal would determine.

The paragraph numbers referenced refer to the paragraph numbers of the Particulars of Claim, unless otherwise indicated.

C is HIV positive which automatically qualifies as a disability under the Equality Act 2010. He also suffers with severe recurring depression and anxiety. R does not dispute having knowledge of C's disabilities at the relevant times.

1 DIRECT DISABILITY DISCRIMINATION – S. 6 &13 EQA 2010

1.1 Did R treat C less favourably by, during a meeting on 24 November 2017, deciding to dismiss C on 24 December 2017 (para 8)?

1.2 Was any such less favourable treatment because of C's disability?

1.3 C relies on a hypothetical comparator.

1.4 What are the relevant characteristics of the hypothetical comparator?

2 DISCRIMINATION ARISING FROM DISABILITY - S.15 EQA 2010

2.1 Did R treat C less favourably by, during a meeting on 24 November 2017, deciding to dismiss C on 24 December 2017 (para 8)?

2.2 Was such unfavourable treatment because of something arising in consequence of C's disability? C relies on his extended sick leave due to his aforementioned disabilities.

2.3 If so, can any such unfavourable treatment be justified as a proportionate means of achieving a legitimate aim? R relies on its need to maintain a satisfactory rate of attendance across its workforce.

3 REASONABLE ADJUSTMENTS – S 20 & 21 EQA 2010

3.1 Did R apply a provision, criterion or practice ("PCP")? C relies upon the PCPs of:

3.1.1 Requiring police officers to attend work without being off on sick leave for longer than the permitted number of days;

3.1.2 Subjecting officers to stage 3 UPP meetings for extended sick leave;

3.1.3 Following the Standard Operating Procedure, applying a 20% 'reasonable adjustment' to the sick leave allowance to allow for a higher level of absence; and

3.1.4 Dismissing police officers if the number of sick leave days taken goes above the permitted threshold.

3.2 The Claimant claims he was placed at a substantial disadvantage in that he was unable to obtain the required levels of attendance at work due to his disability and the implementation of Stage 3 of the UPP process resulted in his dismissal. C claims R should have made the following reasonable adjustments:

3.2.1 To permit C to continue in his role, especially in light of his improved health and return to work;

3.2.2 Not subjecting C to a Stage 3 UPP meeting;

3.2.3 Assess C's individual circumstances and apply a percentage adjustment that is appropriate to his circumstances; and

3.2.4 Considering C's circumstances and alleged improvement in his health, allow him to continue in his role of Police Constable.

3.3 Issues for the Tribunal to determine:

3.3.1 Did the Respondent apply the PCP/PCPs set out in paragraph 3.1 above?

3.3.2 If so, did it place C at a substantial disadvantage as compared to a non-disabled person?

3.3.3 Should R have made the reasonable adjustments set out in paragraph 3.2 above? Were they reasonable? Would they have alleviated the substantial disadvantage?

4 HARASSMENT ON THE GROUND OF DISABILITY – S 26 EQA 2010

4.1 Was C subjected to unwanted conduct, by R, during a meeting on 24 November 2017, deciding to dismiss C on 24 December 2017 (para 8) Was any such conduct related to C's disability?

4.2 If so, did any such conduct have the purpose of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

4.3 Alternatively, did any such conduct have the effect of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for C having regard to his perception, other circumstances of the case and whether or not it is reasonable for such conduct to have that effect?

The Evidence

7. Witness evidence was heard from the following:

For the claimant:

The claimant himself.

For the respondent:

Superintendent Charmaine Laurencin;

Superintendent Ben Clark;

Commander David Musker, who chaired the three-person panel which took the decision to dismiss the claimant on 24 November 2017;

Superintendent Duncan Slade, who also sat on that panel; and

Ms Catherine Euden, an HR manager at the respondent, who also sat on that panel.

8. In addition, the claimant produced a short witness statement from PS Jonathan Flint, the Police Federation representative who accompanied him at the hearing on 24 November 2017 at which the decision was taken to dismiss him. However, he confirmed that PS Flint would not be attending the tribunal. The judge explained that the tribunal would read his witness statement but that, as he was not here to be cross-examined on that statement, it may give less weight to it.

9. An agreed bundle numbered pages 1-680 was produced to the tribunal. Mr Cobbin sought to add an additional document at the end of the bundle; Ms MacLaren did not object and the tribunal agreed that it could be added (as pages 681-691).

10. In addition, an agreed cast list and chronology was produced to the hearing. Ms MacLaren also supplied an opening note on behalf of the respondent and a proposed reading list.

11. The tribunal read in advance the witness statements and any documents in the bundle to which they referred together with, to the extent that they were not already referred to in the witness statements, the documents on Ms MacLaren's proposed reading list and her opening note. Mr Cobbin had said at the start of the hearing that there may be some further documents which he wanted to add which the tribunal should read and he duly prepared a short additional list which he handed in on the second morning of the hearing. He agreed that, barring a couple of documents which the tribunal read at that point, the tribunal could read the rest of the documents later on in the day, notwithstanding that the oral evidence would have commenced by that stage, and the tribunal duly did this.

12. A timetable for cross-examination and submissions was agreed between the tribunal and the parties at the beginning of the hearing. This was broadly adhered to.

13. The judge asked if there were any adjustments which the tribunal would need to make in order to enable the claimant in particular properly to participate in the hearing. The claimant said that he may need to request extra breaks whilst giving his evidence and the judge explained that that would not be a problem. As it was, beyond the breaks which the tribunal took in the ordinary course, the claimant did not request any further breaks.

14. During the claimant's evidence, the judge had to interject on a number of occasions to remind the claimant to answer the questions being put to him rather than going off on a tangent.

15. Both parties produced written submissions, which the tribunal read, and the parties then supplemented their written submissions with oral submissions.

16. Immediately prior to the parties commencing their oral submissions, Mr Cobbin made an application to have the witness statements of Commander Musker, Superintendent Slade and Ms Euden struck out. He did so because, whilst in response to questions from him, several of the respondent's witnesses had confirmed that their witness statements were their own, Ms Euden in response to questions from the tribunal, which had remarked upon similarities between many of the passages in the statements from the three individuals who comprised the panel, explained that she had produced her witness statement in conjunction with representatives; there had been a telephone interview where she was asked a number of questions for the purposes of putting together her witness statement; the representatives had then put together a draft of the statement; that had been given to her to confirm its accuracy, and she had then made some amendments to it and then confirmed that she was happy with it. Mr Cobbin said that he assumed that the two other panel members had produced their witness statements in that way, which explained the similarities. Ms MacLaren opposed the application. The tribunal adjourned briefly and, when it returned, gave its decision in relation to this application.

17. The tribunal refused the application. It noted that this sort of method of producing witness statements was common practice and that, indeed, if it were to strike out witness statements based on their being put together in this way, it would have to strike out huge numbers of statements where parties had used representatives to assist them in putting together witness statements. Furthermore, the important thing was that Ms Euden (and the others) were comfortable that the statements which they signed were accurate and attested to the accuracy of those statements at the tribunal when they gave their evidence. Furthermore, the witness statements were only the first part of matters; the subsequent cross-examination of the witnesses and whether they remained consistent in their answers, together with the contemporaneous documents, were if anything more important. The fact that the three individuals were on the same panel and describing the same events meant that it was unsurprising in any event that their statements were the same or similar in many respects. There was certainly no ground for striking those statements out.

18. The tribunal's decision was reserved.

The Law

Direct disability discrimination

19. Under section 13(1) of the Equality Act 2010 (the Act), a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. This is commonly referred to as direct discrimination. Disability is a protected characteristic in relation to direct discrimination.

20. The protected characteristic need not be the only or even the principal ground for the treatment; the employee need only show that the characteristic had a "significant influence" on the outcome. However, the crucial question remains why the alleged discriminator acted as it did.

21. For the purposes of the comparison required in relation to direct discrimination between B and an actual or hypothetical comparator, there must be no material difference between the circumstances relating to B and the comparator.

Discrimination arising from disability

22. Section 15 of the Act provides that 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.

23. However, A does not discriminate if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Reasonable adjustments

24. The law relating to the duty to make reasonable adjustments is set out principally in the Act at s.20-22 and Schedule 8. The Act imposes a duty on employers to make reasonable adjustments in certain circumstances in connection with any of three requirements. The requirement relevant in this case is the requirement, where a provision criterion or practice of an employer 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.

25. A failure to comply with such a requirement is a failure to comply with the duty to make reasonable adjustments. If the employer fails to comply with that duty in relation to a disabled person, the employer discriminates against that person. However, the employer is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know, that the disabled person has a disability and is likely to be placed at the disadvantage referred to.

26. The test of reasonableness is objective. An adjustment which does not confer any benefit on a disabled person will not be reasonable but it is sufficient for the tribunal to find that there would be "a prospect" of the adjustment removing disadvantage. There does not need to be a "good" or "real" prospect of that occurring.

Harassment related to disability

27. Under section 26(1) of the Act, a person (A) harasses another person (B) if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. Disability is a protected characteristic in relation to harassment.

28. In deciding whether conduct has the effect referred to above (but not the purpose referred to above), each of the following must be taken into account: the perception of B; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect.

29. In respect of all of the above provisions, the burden of proof rests initially on the employee to prove on the balance of probabilities facts from which the tribunal could decide, in the absence of any other explanation, that the employer did contravene one of these provisions. To do so the employee must show more than merely that he was subjected to detrimental treatment by the employer and that the relevant protected characteristic applied. There must be something more. If the employee can establish this, the burden of proof shifts to the employer to show that on the balance of probabilities it did not contravene that provision. If the employer is unable to do so, we must hold that the provision was

contravened and discrimination did occur. However, where it is possible to make clear positive findings one way or another, it is not necessary to rely on the burden of proof provisions set out above.

Findings of Fact

30. We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues. During the course of the hearing, we heard evidence and submissions on matters which were not germane to the issues which we had to determine; whilst we make no criticism of this, we want to point out that the reason that they are not addressed in our findings of fact or conclusions is because they are not relevant to the issues which we have to determine.

Background

31. The claimant started work as a police officer for the respondent on 28 August 2001. He remained engaged by the respondent as a police officer until his engagement was terminated with effect from 24 December 2017.

32. The management of sickness absence within the respondent is prescribed by statute. It is governed by the Police (Performance) Regulations 2012 ("the Regulations"), Home Office Guidance on those regulations ("the Guidance") and the respondent's Attendance Management Policy Standard Operating Procedures ("SOP"). The three stages of formal procedure to deal with unsatisfactory performance and attendance which are set out in the Regulations and Guidance are referred to and known as "UPP"s (UPP 1, UPP 2 and UPP 3).

33. Under the Regulations, every police force has a statutory obligation to implement a UPP procedure in order to monitor the absence of police officers and, wherever possible, facilitate a timely return to work. The respondent cannot indefinitely engage those officers who are unable to undertake the duties of a police officer, particularly given the fact that public money is being spent.

34. The SOP provides definitions of "unsatisfactory attendance" and provides guidance on how to manage unsatisfactory attendance. For frequent short-term absences, the respondent defines unsatisfactory attendance as being three absences in a rolling 12 month period. Equally, a total absence of 10 days in a rolling 12 month period will be considered unsatisfactory attendance.

35. The SOP further states:

"3.3.2 Each case is different and, depending on the circumstances, it may be appropriate to move more quickly or, on occasions, more slowly than this, but these are the points at which managers will be expected to account for the decisions they have made previously…

3.3.3 Each case must be dealt with on its own merits and any previous action that has been taken in respect of an individual's absence should be noted, considered and, where appropriate, lead to moving more quickly through the management of the unsatisfactory attendance process.

Managers may treat as unsatisfactory any pattern of absence that reasonably causes him/her to feel unable to rely on a regular pattern of attendance or performance…

3.5 … When considering whether attendance is unsatisfactory, or whether to take or progress [informal management action] or unsatisfactory attendance action… there is no requirement under the Equality Act 2010 to discount periods of disability related sickness absence providing all workplace adjustments that have been agreed to be reasonable have been put in place. First line managers must make prompt decisions regarding requests for workplace adjustments, and ensure that any adjustments are made as soon as practicable. It may be reasonable to allow some leeway (up to 20-25%) when considering disability related sickness absence, and in such cases advice should be sought from HR by raising an "Attendance Management and Health Referral" Service Request…

4.2 Where an individual has a disability, any sickness absence resulting from the disability must be clearly recorded as such on the absence record to enable its differentiation from non-disability related sickness absence and disability related leave. Failure to do so could result in the individual suffering a detriment as a result of their disability."

36. The Regulations provide for a limited range of outcomes at the UPP 3 stage, namely dismissal, reduction in rank, redeployment to alternative duties and, only where the panel hearing the UPP 3 are satisfied that there are "exceptional circumstances" which justify it, an extension of the final written improvement notice ("FIN") issued at the UPP 2 stage.

37. In relation to extending the improvement period in a FIN, the Guidance states:

"3.88 On the application of the police officer or otherwise…, the appropriate authority may extend the "specified" period if it considers it appropriate to do so. This provision is intended to deal with situations that were not foreseen at the time of the issue of the improvement notice. For example, where the police officer has not had sufficient time to improve due to an emergency deployment to other duties.

3.89 In setting an extension to the specified period, consideration should be given to any known periods of extended absence from the police officer's normal role e.g. if the police officer is going to be on long periods of pre-planned holiday leave, study leave, or is due to undergo an operation. The extension should not lead to the improvement period exceeding 12 months unless the appropriate authority is satisfied that there are exceptional circumstances making this appropriate. The circumstances should be recorded."

38. The claimant was diagnosed as HIV positive in 2004. He has also suffered from anxiety and depression for many years. The respondent accepts that at all material times he was disabled, both by reason of being HIV positive and suffering from anxiety and depression, and that it was aware of his disabilities.

39. The claimant has also over the years had serious problems with alcohol dependency, which he maintains is linked to his depression. We have seen numerous medical documents in the bundle referencing his alcohol problems. In those, it was identified as being "problematic" as early as 1 June 2007.

40. In addition, there were times when the claimant's alcohol-related problems appeared to have improved, only for them to return later. These are referenced in a medical note of 25 April 2012, which states that he had reduced his alcohol intake and had several alcohol free days per week; and an

occupational health medical report of 24 May 2016 (which we refer to again below) which references that his "depression and panic attacks have lifted and so [have] his alcohol problems".

41. The claimant's rank was that of police constable. Prior to 1 June 2015, the claimant was based in the London Borough of Newham. On 1 June 2015, in conjunction with his application for promotion to the rank of police sergeant, he was posted to the Hackney Borough Occupational Command Unit ("BOCU") as a temporary police sergeant under a work-based assessment scheme ("WBA"). Part of the reason for this was to enable the claimant to manage teams of other police constables in order to assess his ability in the post of police sergeant. Ultimately, he did not pass the WBA and, from 11 January 2017, reverted to being a police constable.

42. For many years, including prior to his transfer to Hackney, the claimant's attendance was unsatisfactory. His absences on an annual basis were, from 2010 through to the termination of his employment on 24 December 2017, as follows:

2010: 22 days

2011: 33 days

2012: 63 days

2013: 1 day

2014: 23 days

2015: 41 days

2016: 138 days

2017: 270 days

43. The reasons for these absences were various, although it is accepted by the respondent that many of them were caused by the claimant's disabilities, including absences for depression and, for example, absences due to conditions such as pneumonia or chest infections which are likely have been to have been caused or exacerbated by the effect that his HIV positive status had on his immune system. The claimant spent a lot of time at this tribunal arguing that some of the other reasons for his absences, for example alcohol dependency, were linked to his depression and the fact that he was HIV positive and the medical evidence is not clear as to whether depression led to alcohol dependency or the other way round or whether all these conditions are so interlinked that it is impossible to separate them. Similarly, the claimant spent a lot of time arguing that the reasons set out for his sickness absences on the respondent's records were not always accurate or had not been accurately recorded. However, none of this is relevant to the questions that the tribunal has to determine because, when applying the 20% percentage leeway referred to

above by way of an adjustment, the respondent applied it to the whole of the claimant's sickness absence and did not seek to distinguish between what absence was disability-related and what was not; in other words, the claimant got the benefit of the doubt in this respect, to his advantage. Whilst we make no finding as to whether or not the reasons for the claimant's absences were in any respect incorrectly recorded, the claimant could not have suffered any detriment due to any incorrect recording (for the purposes of 4.2 of the SOP quoted above) as the percentage leeway was applied to the whole of his absences and not to selected parts of it; in other words, the only outcome of incorrect recording could have been to the claimant's advantage.

44. A UPP had been instigated in relation to the claimant whilst he was at Newham as a result of his high level of sickness absence. In the course of that UPP procedure, the claimant was issued with a FIN. However, the claimant's attendance improved over the validity period of the FIN and the UPP procedure was therefore concluded in February 2015.

UPP 1

45. As noted, the claimant then transferred to Hackney on 1 June 2015.

46. However, the claimant then accumulated a total of 27 days absence over four separate absences from August to October 2015, well in excess of the levels of absence considered satisfactory under the SOP.

47. On 11 December 2015, Inspector B invited the claimant to a first sickness monitoring meeting and referred him to occupational health. The claimant was reported to have a combination of physical and psychological issues and it was recommended that he be placed on recuperative duties, avoiding certain confrontational tasks.

48. Inspector B and an HR professional conducted a stage one UPP meeting in respect of the claimant on 3 February 2016. The claimant was by then on sick leave again and did not attend or make representations in relation to this meeting. The claimant's attendance was held to have been unsatisfactory; by that stage he had had 68 days sickness absence in total over the previous rolling 12 months, comprising eight separate periods of sickness absence. A UPP 1 written improvement notice ("WIN") was duly issued. The UPP 1 notice notes that the claimant may fall within the Equality Act 2010 provisions and applies a 20% variation accordingly, but notes that even with that variation, the claimant was well over the levels of absence permitted (indeed, it would take an adjustment of several hundred percent for the claimant to be within the level of absence permitted).

49. The WIN provided that: the claimant had to reduce his sickness to within policy standards over the next three months, i.e. by 2 May 2016 ("the specified period"); and that the UPP would remain valid for 12 months, i.e. until 2 February 2017 ("the validity period").

50. The notice advised the claimant of his right to submit any comments regarding the notice in writing and of his right to appeal. The claimant did not do either.

51. The claimant suggested at this tribunal that he was not in a position to respond to documents at the time (although he accepted that he would have received them); however, there is no evidence that he informed the respondent of this when he got back to work or at any stage thereafter. (He returned to work on 5 February 2016, i.e. only two days after the WIN was issued.)

UPP 2

52. On 16 February 2016, the claimant commenced a further period of sickness absence, certified to be by reason of an eye operation (this was the start of a period of sickness absence lasting 69 days).

53. Inspector B again referred the claimant to occupational health. An occupational health report dated 15 March 2016 was produced. It stated that the claimant was "suffering from depression with significant panic attacks", from "bilateral cataracts" and that he had "relapsed with his alcohol problem and will be attending for further treatment for this". It stated that he was not fit to return to work and required treatment for his alcohol dependency and psychological problems. It stated that "I believe that management have been providing reasonably good support".

54. Although the claimant was not fit for work, a case conference took place on 31 March 2016, during which the claimant was advised that should he struggle using his computer (given his eye issues), Microsoft accessibility software was available.

55. The claimant returned to work on 25 April 2016. By that stage, he had, in addition to the absences referenced in the UPP 1 WIN (which were still within the previous 12 months up to that point), accumulated three further periods of absence totalling 107 days between December 2015 and April 2016.

56. A further occupational health assessment of the claimant took place by telephone on 4 May 2016.

57. In the light of his extensive absences, the claimant was informed on 19 May 2016 that his improvement was unsatisfactory and that he would be required to attend a UPP 2 meeting.

58. An occupational health report dated 24 May 2016 was produced. It referenced that the claimant's eyesight was "improving after his first cataract surgery"; that "his depression and panic attacks [had] lifted and so [had] his alcohol problems"; that he was "significantly improving" and that it was "hoped by the end of September he could be returning to full duties"; but advised that for now there should be restrictions on his duties including that he should be limited to "nonconfrontational duties".

59. On 16 June 2016, the claimant commenced a further period of sickness absence by reason of depression, which would last 51 days.

60. On 15 July 2016, the claimant was invited to the UPP 2 meeting, to take place on 28 July 2016.

61. The UPP 2 meeting took place on 28 July 2016. It was held by Superintendent Clark (Chief Inspector Clark as he was then) with Inspector B and someone from HR in attendance. The claimant did not attend and did not make representations. Again, the claimant maintained at this tribunal that at the time he was not in a state in which he was capable to respond to documentation (although he accepted that he would have received the documents); however, the respondent was not aware of this assertion at the time and there is no evidence that the claimant informed the respondent of this on his return to work (10 days later on 8 August 2016) or at any time in the immediate aftermath.

62. Superintendent Clark concluded that the claimant's attendance was unsatisfactory. Applying a 20-25% adjustment to the entirety of the absence would make no difference; an adjustment in the thousands of percent would need to be made to bring the absence levels within the previous 12 months within the guidance.

63. Superintendent Clark therefore issued a FIN, dated 28 July 2016. This provided that the claimant must return to work when his current medical certificate expired (8 August 2016) ("the specified period"); and that he was then to maintain attendance in line with the SOP for the period of 12 months from the date of the UPP 1 notice, in other words until 2 February 2017. He was advised that, if this did not happen, he risked being referred to a UPP 3 meeting.

64. The FIN advised the claimant of his right to appeal against the decision. The claimant did not appeal.

<u>UPP 3</u>

65. The claimant returned to work on 8 August 2016, thereby fulfilling the first condition set out in the UPP 2 notice.

66. The claimant maintained good attendance for the next five months.

67. On 10 January 2017, however, the claimant commenced a further 10 days' sick leave, certified to be by reason of depression. This took place within the "validity period" of the UPP 2 notice. It also followed on from the claimant failing his WBA; he reverted to the rank of police constable on 11 January 2017.

68. At the end of the validity period, Superintendent Clark reviewed the claimant's sickness absence in accordance with the FIN. The claimant had not maintained the improvement required under the FIN. After consulting with a number of other officers who had line management responsibilities for the claimant, Superintendent Clark in accordance with the SOP decided to progress

to UPP 3 because of the claimant's unsatisfactory levels of sickness absence. This was confirmed by letter of 2 February 2017.

69. On 3 February 2017, the claimant commenced another period of sickness absence. This was to last for eight months until the claimant returned to work on 20 October 2017.

70. On 13 February 2017, a telephone assessment of the claimant by occupational health took place.

71. On 18 February 2017, Superintendent Clark put together a detailed report on the claimant's attendance; the purpose of this was to provide relevant information and recommendations to the UPP 3 decision-making panel.

72. Within the report, he outlined the current situation, the timeline of relevant events and the impact that the claimant's poor attendance had had on Hackney Borough. He noted that whilst the claimant had been undertaking his WBA and working as a sergeant with staff to manage, it had been necessary for the Borough to arrange for another supervisor to assist and manage claimant's team during the claimant's periods of absence. The supervisor was based on a different location with his own team to manage. He therefore had to manage his own team and the claimant's team from almost a mile away. He was stretched and unable to support the staff under his line management (at a time when the respondent in general terms was seriously under resourced in terms of staffing anyway). Superintendent Clark also noted the difficulty that the claimant's frequent absences posed with respect to planning and effectively managing the work that the claimant was involved in and that this had also resulted in crime reports not being properly supervised, with a consequential impact on victim confidence and satisfaction.

73. He also set out the support that the claimant had received since moving to the Borough including continuous and long-term support from occupational health; recuperative duty plans; counselling; a dedicated welfare officer in his line manager; and other interventions; and the adjustments the Borough had made, including terms and duties.

74. It is a requirement in such reports to put forth recommendations to the panel. Superintendent Clark explained the options available to the panel and went through them. However, the option that he recommended was dismissal; he explained that the claimant had been given multiple opportunities and support to maintain a satisfactory pattern of attendance but that he had failed to make the necessary improvements; he set out the far-reaching detrimental impact that the claimant's continued absences had had on the respondent and noted his belief that these would continue were the claimant to remain a police officer.

75. On 24 May 2017, Superintendent Laurencin and another of the claimant's managers, Inspector R, carried out a "home visit" with the claimant at a small cafe near his home. The claimant explained that he was still feeling depressed.

76. On 26 July 2017, a case conference meeting took place attended by Superintendent Laurencin, an HR representative and the claimant. The purpose of the meeting was to look at ways to support the claimant's return to work and explore any reasonable adjustments that could be made to his role to help him. The claimant admitted at this meeting that he was suffering from alcohol dependency and that he wished to seek help and treatment for this.

77. Unknown to the respondent, the claimant had been unable to access certain areas of help through the health service because of his alcohol dependency and the NHS policy not to treat depression if someone is drinking. The claimant and his partner therefore decided that they would have to pay to attend private treatment at the "Priory" in Chelmsford to get the type of support which his condition needed. They attended an assessment and felt that the claimant would benefit from detox and a four-week rehabilitation programme with full psychological support in the Priory's residential unit. It cost £18,000, which the claimant and his partner funded, borrowing to do so. The claimant underwent the programme for four weeks in August/September 2017. The claimant had no contact with his family for the first two weeks of the programme and there was no guarantee of success. The programme helped the claimant. He detoxed and learnt new techniques about how to manage his mental health. He also entered Alcoholics Anonymous to support his continued recovery.

78. On 20 September 2017, Inspector R emailed the claimant to ask him how things went at the Priory. There was then further email contact between them. The claimant indicated that he was looking to return to work. On 6 October 2017, the claimant proposed that he would return to work on 20 October 2017 (which he duly did).

79. By letter of 18 October 2017, the claimant was invited to attend a UPP 3 meeting on 24 November 2017. The invitation noted that, as at 30 August 2017, the claimant had had a total of 413 calendar days' sickness absence in the last three years. It set out the various options open to the panel, including that the claimant could be dismissed.

80. Noting that the claimant had been first informed of the UPP 3 in February 2017, the judge specifically asked some of the respondent's witnesses whether it was policy to wait until an individual was back at work before carrying out a UPP 3 meeting. They replied that it was not; one of the reasons that it often takes a long time to set up a UPP 3 meeting is that the individuals on the three-person panel for it are very senior and it takes a long time to get a date which works for everyone; furthermore, there were issues with the HR systems at the time which caused delay; it was coincidence that the meeting did not take place until the claimant was back after his eight-month sickness absence and there would have been nothing stopping the respondent from carrying out the UPP 3 meeting whilst the claimant was still absent sick. Indeed, both the UPP 1 and UPP 2 meetings in relation to the claimant took place when he was absent. Notwithstanding the lengthy delay in setting up the meeting and the fact that the meeting invitation was only sent out just before the claimant was due to come back to work, therefore, we accept the evidence of the respondent's witnesses

and find that it was only coincidental that the return of the claimant to work and the UPP 3 meeting dovetailed.

81. Occupational health carried out a telephone assessment of the claimant on 18 October 2017 and produced a report of the same date. The report contained the following:

"Emmet Holden has undergone intensive treatment at a specialist inpatient hospital which he has paid for privately. He feels better now than he has for some years. He has gained significant advice which has altered his lifestyle to the extent that he is now proactively managing his health with positive lifestyle interventions. Cognitively he is functioning well with good concentration and memory. He will however need to attend various appointments to maintain recent positive changes. It is vital that he attends four appointments a week to maintain this. It is hoped that Emmet will be able to manage this around work however you may wish to offer some flexibility as his working hours may conflict with this."

82. The report recommended certain adjustments, including: working five hours a day increasing by an hour every two weeks; an office-based role for four weeks; and carrying out a stress risk assessment on his return. These were adhered to by the respondent.

83. Finally, the doctor stated in the occupational health report that, in terms of prognosis, "I feel longer term he will progress well".

84. As noted, the claimant returned to work on 20 October 2017. He had no further absences for the remainder of his employment.

85. On 8 November 2017, the claimant sent in written submissions dated 7 November 2017 for the purposes of the UPP 3 meeting, in response to Superintendent Clark's report of 18 February 2017. The submissions run to some 12 pages. In them, he accepts that his "performance/attendance has been unsatisfactory". He then goes to set out what he considers extenuating circumstances in mitigation. He places a lot of emphasis on the return of his confidence and his improvement following his treatment at the Priory and cross-references his current position physically and mentally as summed up in the occupational health report of 18 October 2017.

86. Inspector R put together a document outlining his line management of the claimant (which went before the UPP 3 panel). In his covering email of 9 November 2017 in relation to that document, he noted:

"The turnaround I have witnessed from when I first met him to now has been very noticeable.

The fact that he has sought help and recognised he had a problem and the treatment he has received at great expense is admirable."

87. Within the body of the document, Inspector R stated:

"Since his return, Emmet's demeanour and appearance is much more positive. He admitted that he needed help and finally found the courage to seek it at a great expense to him.

He has returned to work every day when expected to do so and his CARMS compliance has been exemplary.

Emmet clearly recognised his difficulties and sought to address these. Although he still has counselling sessions to complete and the rehabilitation continues, his all-round health has improved considerably. The biggest step was to recognise that he had a problem and to positively address this….

There has certainly been a great turnaround in Emmet that I have witnessed in the past year. The major hurdle was recognising the problem and seeking assistance."

UPP 3 hearing

88. The panel for the UPP 3 hearing comprised Commander Musker, Superintendent Slade and Ms Euden (an HR professional).

89. In advance of the hearing, the panel was provided with relevant documentation. This included the report prepared by Superintendent Clark on 18 February 2017, the claimant's own submissions of 7 November 2017, the report provided by Inspector R, the occupational health reports and a great deal of other relevant documentation. The panel read and considered this material in advance.

90. The hearing took place on 24 November 2017. The claimant attended the meeting and was represented by PC Jonathan Flint of the Police Federation. Both were given every opportunity to address the panel.

91. The panel was also advised by independent counsel at the hearing.

92. Superintendent Clark also attended for part of the hearing to present his report recommending the claimant's dismissal and set out the negative effects of the claimant's poor attendance (as set out in that report and referred to above).

93. The hearing was recorded (and a transcript provided to this tribunal).

94. At the hearing, the claimant accepted that his attendance was unsatisfactory. He then went through mitigating factors, including explaining his HIV diagnosis, struggles with depression and the associated drinking and the recent action he had taken in attending the Priory and the benefits which he considered that that brought about, stating that he had not felt as physically and emotionally well for years.

95. Superintendent Clark acknowledged that the claimant was much improved since his return to work and that he was "forming a productive role". However, he also expressed concern that it was not possible to predict whether this attendance and productivity would continue or whether the claimant would have further bouts of extended absence. There was no dispute that the claimant's underlying conditions (HIV and depression) remained.

96. The hearing then adjourned for the panel to discuss amongst themselves what they had heard so far. At this stage, Superintendent Slade was of the view that dismissal would be the appropriate option. Commander Musker and Ms Euden were considering whether the claimant should be given a further

six months to demonstrate that he was capable of returning as an effective officer despite his previous extensive absences; to do so, they would need to be satisfied that there were, in accordance with the statute, "exceptional circumstances". Although they regarded the claimant's decision to attend the programme at the Priory (and its associated time and cost) as positive action personally taken by the claimant to address his issues, they did not consider that that in itself amounted to "exceptional circumstances" such as to justify an extension. They wanted to give the claimant a further opportunity to explain to the panel what he believed the exceptional circumstances were and to ask him what he would do with the extra six months if it was given to him. Commander Musker gave evidence at the tribunal that, in other cases, individuals with long term sickness absence had, for example, put together plans of action as to what they would do with any additional time; whereas an individual simply saying that he or she was committed to the service, as anyone could (and indeed was likely to) do in that situation, was not enough. In short, they were looking for an adequate demonstration of commitment rather than simply just someone saying that they were committed. Commander Musker, who has considerable experience in this respect, has asked this open question about what the next six months hold in other comparable situations and gave evidence that answers to it often provide an invaluable insight into how an individual is really thinking.

97. Superintendent Slade also gave evidence at this tribunal that he felt that the fact that someone chose to pay a substantial sum of money for private treatment at a late stage following extremely large amounts of sickness absence should not be a precedent for what amounted to "exceptional circumstances". He noted that the sum of £18,000 had been mentioned quite a lot at the hearing and that, whilst the sum in itself was exceptional (as it was a large sum of money), he did not consider that the fact that that amount had been spent meant that that should necessarily bring someone within the "exceptional circumstances" category; in other words, the fact that after such lengthy periods of sickness absence, someone could choose to spend a significant sum of money should not automatically entail an extension to a UPP 3; he felt that that would be a bad precedent to set (it obviously puts those with the means to pay such sums at an advantage) and said that he felt quite strongly about that.

98. The meeting reconvened and the panel explained that they would need to be satisfied that there were exceptional circumstances if they were going to consider an extension. In response, the claimant and PC Flint referenced the treatment at the Priory.

99. Commander Musker said that he needed to be clear what the next six months looked like and what would happen between then and June. The claimant referenced his ongoing treatment. When pressed again, the claimant thought, mistakenly, that he was being asked to guarantee that he would never be off sick over the next three months and said that he felt like he was being pushed to say that he wouldn't go sick. Commander Musker was clear to him that that was not what he was saying at all. The claimant said that he didn't know and couldn't say that he wouldn't be sick and that no one could say that. He was agitated at this point. He said that things "can only improve". PC Flint asked for an adjournment which was granted.

100. When they returned, PC Flint asked for a 30% leeway over the next six months rather than the 20% leeway under the policy which had been applied. The claimant also apologised and said that he had misunderstood what he had been asked previously.

101. Whilst the claimant had said that he wanted to remain a police officer, he had not provided any further details beyond that and certainly nothing by way of a plan of what he was going to do with the next six months.

102. The hearing then adjourned for the panel to consider what it had heard.

103. Of the four options open to them under the statute, the claimant could not be demoted as there is no rank below that of police constable. Furthermore, during the hearing PC Flint and the claimant had indicated that redeployment was not something that they wanted. The panel therefore discounted these two options. The only two options remaining were, therefore, dismissal or an extension of the FIN if there were "exceptional circumstances".

104. The panel considered the following matters, a lot of the essence of which is reflected (albeit in summary form) in the subsequent outcome rationale which was produced the same day and read out to the claimant once the decision was taken.

1. The claimant's sickness absence over a three-year period from 31 August 2014 to 31 August 2017 amounted to 413 days. Even taking into account the 20% reasonable adjustment, the level of sickness absence was not only "unsatisfactory" in terms of the policy, as the claimant himself had accepted, but it was way over acceptable levels over an extended period. (Even if the 30% adjustment suggested by PC Flint going forward was applied to historical absences, those absences were still way over the limit.)

2. The panel acknowledged the claimant's representations regarding his HIV positive diagnosis and significant depression and alcohol dependency.

3. It also acknowledged that the claimant self-funded an intensive period of residential treatment at the Priory and that the early signs were that this had made a difference to his health and well-being (as stated by the claimant and evidenced by Inspector R and Superintendent Clark).

4. Although the evidence about how the claimant was on his recent return was positive (both from Inspector R and Superintendent Clark and occupational health), this represented a period of a few weeks in the context of significant levels of sickness absence going back many years. The claimant still had the underlying conditions and there was certainly no certainty that significant and unacceptable levels of absence would not re-occur.

5. The panel took into account the detrimental effects that the claimant's extensive absences had had on the service.

6. It did not consider that self-funding the treatment at the Priory in itself amounted to "exceptional circumstances".

7. Had the claimant demonstrated at the hearing a sufficient level of commitment, this may have amounted to "exceptional circumstances". However, the panel considered that despite giving the claimant several opportunities to express this, the claimant struggled to give a straight answer; the panel had wanted the claimant to express passion and commitment but his responses lacked conviction and failed to convince them that he had genuinely turned a corner. They did not consider that, despite support, he had helped himself over the years (up until the point when he had registered himself at the Priory); his continued and lengthy absences had put further strain on a Borough that was already stretched very thin; his colleagues had to pick up the slack and struggled to main the efficiency of the Borough as a result; morale was understandably low; this, together with the claimant's attendance record and the evidence presented by all involved led to the panel agreeing unanimously that there was insufficient evidence of exceptional circumstances and that there was therefore no scope for them to extend the FIN. Therefore, they considered that they were left with no option but to dismiss the claimant. In relation to his stay at the Priory, the panel considered that, in the light of the claimant's history of extensive absences over a number of years, this was effectively "too little too late" and the panel did not believe that it was in the public interest to extend the claimant's FIN.

105. The panel therefore decided to dismiss the claimant with 28 days' notice, such that his employment terminated with effect from 24 December 2017. As noted, the panel read out the rationale for the decision to the claimant subsequently on 24 November 2017.

106. We have had the benefit of seeing the transcript of the hearing. Whilst we appreciate that this necessarily will not evidence every nuance which one might have been aware of had one been present at the hearing, the transcript does evidence that Commander Musker and the other panel members asked reasonable questions and does not give any indication that the content or tone of the meeting were anything other than reasonable and appropriate. There was only one point, when Commander Musker asked the question about expectations for the next six months and the claimant thought (incorrectly) that he was being pushed into saying that he would not go sick at all, when, as Ms Euden states in her evidence, the claimant appeared to respond aggressively to Commander Musker. After the subsequent break, the claimant then apologised, which is further indicative that his response to Commander Musker was, albeit based on a misunderstanding of what was being asked of him, aggressive, and we therefore accept that it was.

Appeal

107. The claimant appealed against his dismissal on 19 January 2018. His appeal was heard on 30 November 2018 by a panel comprising an independent barrister (a QC), the Assistant Chief Constable for West Yorkshire and a retired police officer. Both the claimant and the respondent were represented by counsel at that hearing. The panel dismissed the appeal and confirmed its decision by letter of 5 December 2018.

108. Since the claimant's discharge from the Priory, he has had only one bout of illness which would have prevented him from attending work, has not taken any medication for his depression and is managing his anxiety well. This fact was, obviously, not known at the point of the hearing of 24 November 2017 at which the claimant was dismissed (at which point, he had only been back at work for just over a month following his most recent (8 month) period of absence).

Conclusions on the issues

109. We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

Direct disability discrimination

110. The respondent has admitted that the claimant was disabled by reason of his HIV positive status and his depression and anxiety and that it was at all material times aware of these facts. Furthermore, it admits that the alleged act of direct discrimination, the claimant's dismissal, was an act of less favourable treatment.

111. The claimant relies on a hypothetical comparator. We accept, as Ms MacLaren submits, that the appropriate hypothetical comparator would be a non-disabled officer with a similar attendance record to the claimant who contributed as the claimant did at the UPP 3 stage. There is no evidence that such a comparator would have been treated any differently from the claimant.

112. Furthermore, it has not even really been suggested that the respondent dismissed the claimant because of his HIV positive status or his anxiety/depression, nor is there any evidence to suggest that this was the case or which might go anyway to shifting the burden of proof to the respondent. By contrast, all of the evidence shows that the reason for the claimant's dismissal was his extensive sickness absence and we therefore find that that was the reason for his dismissal; we find that as being clearly the reason for dismissal without needing to apply the burden of proof provisions.

113. As the claimant was not dismissed because of either of his disabilities, the direct discrimination complaint fails.

114. Whilst it was not clear whether or not the claimant was belatedly seeking to posit an actual comparator when, during Commander Musker's evidence, Mr Cobbin picked up on a paragraph in Commander Musker's statement which gave

evidence about how Commander Musker approached matters in certain circumstances in relation to another individual, the tribunal made clear that it was not acceptable to nor would it permit the claimant to change the issues at that late stage by introducing an actual comparator. In any event, there was nothing to suggest that the individual in question might be an appropriate comparator as very little was known about that individual's circumstances. When Mr Cobbin sought to ask questions about that individual, Commander Musker was unwilling to reply in open court given what he said was the personal nature of the wider circumstances that related to that individual. Ms MacLaren confirmed that, from what she knew of the background, it was indeed a sensitive case which the respondent would be very unwilling to discuss in open court. The tribunal ruled that it was not appropriate to introduce a further comparator at this stage because: it was a very late stage in the proceedings (in fact, it was late in the hearing itself) to change the issues; there was nothing in the evidence seen so far to indicate that this person might realistically be an appropriate comparator for the purposes of this claim; it was likely to require further evidence to find out what the circumstances of this individual were in order to assess whether there was any chance of that individual being an appropriate comparator; and, in these particular circumstances, there was a particular issue about the sensitivity of the details relating to the individual.

Discrimination arising from disability

115. The respondent admits that the claimant's dismissal amounted to unfavourable treatment and that his dismissal (because of his absences) was at least in part because of "something arising" from his disabilities of being HIV positive and depression/anxiety. The remaining issue for the tribunal is therefore whether or not the respondent can establish the justification defence.

116. In terms of establishing that the respondent had a legitimate aim, the claimant accepted in evidence that the respondent did have a legitimate aim in maintaining a satisfactory rate of attendance across its workforce. We also consider that it is self-evident that for an employer to aim to maintain a satisfactory rate of attendance across its workforce is a legitimate aim. No employer can reasonably be expected to allow unlimited absences, given the impact that that has on the employer's business, its ability to provide a service and on other employees who have to pick up the slack when their colleagues are absent; in the case of the respondent, there is the additional consideration that it is public money which is being used to provide its service, to train officers and to pay them and which, in the case of employees with significant periods of absence, is then wasted. Accordingly, the respondent has shown that it had a legitimate aim in seeking to maintain a satisfactory rate of attendance across its workforce. We go on, therefore, to consider the issue of proportionality.

117. First, in terms of the procedure itself, we accept that it is proportionate in seeking to achieve that aim to use the three stage UPP procedure to manage attendance. The claimant himself accepted in evidence that it was "in part" a proportionate means of achieving that end and that, in the most serious cases, that process would entail dismissal. Furthermore, we consider that, for the following reasons, using the UPP procedure in itself was proportionate. It is

prescribed by statute; in other words, the respondent doesn't have any choice but to use it. More importantly, this three stage procedure which gives absent employees the opportunity to improve attendance over time and which specifically incorporates the suggested percentage adjustments which it does where absences are as a result of disabilities is one which is objective, enables the employer to take an individual officer's particular circumstances into account, and is fair and reasonable to employees whilst at the same time enabling the respondent to manage significant absences.

118. Secondly, we turn to the issue of whether the way the respondent applied the UPP procedure in taking the decision to dismiss the claimant at UPP 3 was a proportionate means of achieving its legitimate aim.

119. First, the panel's decision not to demote the claimant (because that was not possible) or to redeploy him (because he and his representative had indicated that that was not what he wanted) was, for these reasons, entirely reasonable and proportionate. Under the procedure, that left the options of either dismissal or extending the FIN (it was not and has not been argued that there were any other options which the panel could or should have taken).

120. In terms of the correct application of the procedure, the panel was absolutely right, therefore, to consider whether or not there were exceptional circumstances which might lead them to grant an extension. Furthermore, the panel was justified under the procedure in concluding that there were not. First, the extract from the Guidance quoted in our findings of fact above, and the example given there, are of a very different nature to the circumstances of the claimant's case; the provision is intended to deal with situations that were not foreseen at the time of the issue of the FIN (which was not the case in the claimant's case, as he continued to be absent and to be absent for similar reasons to the reasons for his absences which led to the FIN) and the example given was where a police officer had not had sufficient time to improve due to an emergency deployment to other duties, which is a reason of an entirely different nature to the reasons which the claimant gives in maintaining that his circumstances were exceptional.

121. Furthermore, we also considered that the panel's decision not to accept that the fact that the claimant had undergone expensive inpatient treatment at the Priory amounted to exceptional circumstances was reasonable and proportionate. On a practical level, the treatment made no difference to his underlying HIV status and the claimant admitted that he would remain vulnerable to bouts of depression for the rest of his life; those conditions remained there and those were the conditions to which the claimant attributed his previous extensive sickness absence. Whilst the initial signs were that the treatment had helped (that much was evident from what the claimant said, what the October 2017 occupational health report said and what Inspector R and Superintendent Clark said), this was based on a brief period of a few weeks in the context of years of unsatisfactory attendance, including 413 days absence in the last three years. In the context of the whole picture as at 24 November 2017, it would be reasonable and proportionate to conclude that the absence problems had not suddenly

resolved themselves and that there was a reasonable chance that the absences would recur.

122. We also note Superintendent Slade's reasonable view about it being inappropriate to set a precedent whereby someone at a very late stage after considerable sickness absence could pay a large amount of money and thereby gain an extension and that this favoured those who could or were prepared to make such payments.

123. More fundamentally, we accept the panel's view that, particularly in the light of the guidance, "exceptional circumstances" is more about an individual's commitment to the job and his or her determination to maintain a satisfactory rate of attendance in future. We accept the rationale for Commander Musker's evidence that anyone faced with the prospect of ill-health dismissal is likely to promise to do better in the future. However, we also accept Commander Musker's evidence that, in his considerable experience, answers to the open question about "what the next six months looks like" provide an invaluable insight into how an individual is really thinking. The claimant struggled to answer this question at all; such answers as he did give were all about his health and treatment; the answer that PC Flint gave after the adjournment was simply about changing the reasonable adjustments from 20% to 30%; the claimant said nothing of the substance of his work or the level of service that he hoped to be able to offer in future and certainly did not set out any plan of action or proposal in terms of what he would do with the next six months in relation to his work. We accept, therefore, that there was nothing exceptional about his response.

124. Furthermore, whilst it was certainly a positive step for the claimant to have taken to address his drinking and mental health problems by seeking treatment at the Priory, he did so more than 10 years after his use of alcohol was first described as problematic, after a number of false dawns (in terms of hopes of improvement in the medical note of 25 April 2012 and the occupational health report of 24 May 2016) and only six months after he failed to meet the requirements of the FIN and was notified that UPP 3 would be implemented (and, it should be noted, he was also absent due to sickness for the entirety of those six months after he was notified that UPP 3 would be implemented). We therefore accept Ms MacLaren's submission that, absent any convincing evidence of commitment to the job, it was too little, too late.

125. In terms of the policy, therefore, we find that the panel's decision that "exceptional circumstances" had not been established and that therefore dismissal was the only other alternative was both a correct application of the policy and reasonable and proportionate.

126. Leaving the policy and the "exceptional circumstances" exemption aside, and assuming that the panel was not constrained by the policy, we still consider that the decision to dismiss was a proportionate means of achieving the respondent's legitimate aim. In this respect, we refer to a lot of the conclusions set out in the paragraphs above. However, in carrying out the balancing exercise, the points in the claimant's favour are that he did take action, at considerable cost, to try and sort out his alcohol dependency and mental health

issues at the Priory; this did appear to have had some benefits in terms of the fact that he had come back to work and that in the few weeks during which he was back at work, he felt he was in a good place and Inspector R and Superintendent Clark observed that he appeared to have improved greatly; and the October 2017 occupational health report similarly noted the improvement, stating that "I feel longer term he will progress well.".

127. By contrast, the amount of historical sickness absence which he had had was not merely unsatisfactory in terms of being outside the limits set in the policy but was considerable; unsatisfactory absences had dated back many years and in the last three years, he had 413 days absence, which is vast by anyone's standards. Furthermore, the respondent did (reasonably) apply a 20% adjustment, which made no difference to the fact that the claimant's absences were way in excess of the limits set in the policy (as would be the case if a 30% adjustment was applied); rather, an adjustment in the thousands of percent would have been needed to bring his absence within the policy. The impact of the claimant's absences on the service was real and considerable and in this respect we cross-reference the findings we have made above about the various ways the absences negatively impacted upon the respondent which were set out in Superintendent Clark's report. The claimant had been given lots of support from the respondent over the course of his absences. He only took the action in relation to the Priory at a very late stage, long after he had been notified that his absences were already at the stage where UPP 3 should be triggered. Moreover, the claimant had only been back at work for a few weeks and it was proportionate to consider this positive attendance in the context of years of significant sickness absences, especially over the last three years. There had been a number of false dawns where it was noted that he had improved, only for the problems to recur and further considerable absences to happen. Furthermore, he still had the underlying conditions which he said were the cause of his absences; viewed from the point of view of 24 November 2017, and notwithstanding the positive feedback from occupational health and Inspector R and Superintendent Clark, it was reasonable to assume that there was a reasonable chance that significant absences would re-occur. In the light of all this, and notwithstanding the positive period of the few weeks prior to the UPP 3 hearing, it was therefore entirely proportionate and reasonable for the respondent to dismiss the claimant.

128. The respondent has, therefore, established that its decision to dismiss the claimant was a proportionate means of achieving a legitimate aim and the justification defence is accordingly made out. The complaint of discrimination arising from disability therefore fails.

Reasonable adjustments

PCPs

129. Four PCPs are relied on for the purposes of the reasonable adjustments complaints. As the respondent accepts, the first two of these are established, namely: the respondent did require police officers to attend work without being off

on sick leave for longer than the permitted number of days; and it did subject officers to stage 3 UPP meetings for extended sick leave.

130. However, the other two are not established.

131. The claimant submits that it was a PCP that the respondent, following the SOP, applied a 20% reasonable adjustment to the sick leave allowance to allow for a higher level of absence. However, we accept Ms MacLaren's submission that this is not a PCP; rather it is an adjustment made to the standard position under the SOP. Put another way, this provision in fact puts disabled people at an advantage compared to those who are not disabled and, we accept, it cannot therefore found a complaint of discrimination by way of failure to make reasonable adjustments.

132. The final alleged PCP is "dismissing police officers if the number of sick leave days taken goes above the permitted threshold". However, this is not the case. The respondent does not automatically dismiss police officers whose sick leave exceeds the permitted threshold. There is no such absolute rule in the Regulations, the Guidance or the SOP. On the contrary, it is part of the purpose of the UPP to allow proper consideration of an officer's individual circumstances; sometimes this may lead to dismissal and on other occasions it may not.

Substantial disadvantage

133. The respondent accepts that the two PCPs which have been established placed the claimant at a substantial disadvantage because his disabilities meant that he was less able than non-disabled staff to provide the level of attendance required by the respondent's SOP and was thus more likely to be subjected to a UPP 3.

Adjustments

"To permit the claimant to continue in his role, especially in light of his improved health and return to work"

"Considering the claimant's circumstances and alleged improvement in his health, allow him to continue in his role of police constable"

134. We accept that these two alleged reasonable adjustments are essentially the same and we therefore deal with them together. Our analysis of them is essentially the same as our analysis of the justification defence for the purposes of the discrimination arising from disability complaint above; we therefore cross-refer to our conclusions in that section and do not consider it necessary to repeat them all here. For all of the reasons set out in that section, however, and in particular the huge levels of historic absence coupled with the lack of any clarity or indeed probability as to whether the situation would be adequately remedied going forward, allowing the claimant to continue in his job was not a reasonable adjustment.

"Not subjecting the claimant to a stage 3 UPP meeting"

135. The decision to move the claimant to UPP stage 3 was taken by Superintendent Clark, having discussed the matter with others, in February 2017. Although the claimant had had only one significant period of absence (of 10 days) in the five months immediately prior to that decision, he had by February 2017 accumulated 120 days absence in the preceding 12 months. He was, therefore, well in excess of the limits, even applying the 20% adjustment. He was therefore outside the second stipulation in the FIN. We accept Ms MacLaren's submission that the suggestion that the respondent should simply ignore this level of sickness absence and decline to proceed to the next stage of the SOP is entirely unreasonable. We do not, therefore, consider that not proceeding to UPP 3 would have been a reasonable adjustment.

"Assess the claimant's individual circumstances and apply a percentage adjustment that is appropriate to circumstances"

136. This suggested adjustment falls into two parts. First, the panel clearly did assess the claimant's individual circumstances, as is evident from the findings of fact we have made above and as is catered for within the bounds of its policies. This adjustment was therefore made and so cannot form the basis of a successful claim for a failure to make reasonable adjustments.

137. The second part relates to applying a percentage adjustment that is "appropriate to the circumstances". As noted above, the 20% adjustment made no difference to the fact that the claimant was well in excess of satisfactory attendance for the purposes of the procedure. Furthermore, the 30% adjustment which PC Flint argued for going forwards would not have made any difference if applied to the claimant's historic absences. If 30% is what the claimant is arguing for at this tribunal, then it cannot be a reasonable adjustment because the adjustment would be ineffective in avoiding the disadvantage complained of; in other words, even if 30% was applied, it would make no difference as the claimant's attendance would still have been unsatisfactory.

138. As noted, in order for the claimant to escape the definition of unsatisfactory attendance, the adjustment to the leeway contained in the SOP would, earlier on, have had to have been in the hundreds of percent and, by November 2017, in the thousands of percent. We entirely accept Ms MacLaren's submission that such an enormous deviation from the ordinary standard of acceptable attendance would be wholly unreasonable for any organisation. This would not, therefore, be a reasonable adjustment.

139. Therefore, in summary, none of the reasonable adjustments alleged by the claimant were in fact reasonable. The complaints of a failure to make reasonable adjustments therefore fail.

<u>Harassment related to disability</u>

140. The respondent accepts that the claimant's dismissal amounted to unwanted conduct for the purposes of the definition of harassment.

141. Ms MacLaren has submitted, however, that it is denied that the dismissal was "related to" the claimant's disability in that the claimant was dismissed because of his sickness absence and not because of his HIV status or depression. However, we disagree with this submission. The definition of harassment does not use the formulation "because of" as is the case in a direct disability complaint; had it used that formulation, we would unhesitatingly have accepted that the claimant was not dismissed "because of" his disabilities. However, the words "related to" are wider than that. The claimant was dismissed because of his sickness absence but that sickness absence was because of the claimant disabilities; we do, therefore, consider that the dismissal was "related to" the claimant disabilities and is therefore within the definition of harassment. The unwanted conduct of dismissal was therefore "related to" the claimant disabilities.

142. We turn, therefore, to whether the conduct had the prescribed "purpose or effect".

143. We note that the allegation of unwanted conduct, as set out in the list of issues, is specifically the decision to dismiss the claimant as opposed to the wider conduct of the 24 November 2017 UPP 3 meeting. Our scope is therefore limited to that allegation. Ms MacLaren has made submissions as if the conduct of the meeting in general were also in scope as part of the "unwanted conduct" and, for completeness, we address those too; however, they are not strictly part of our remit.

144. First, we note our findings in relation to the meeting where we had the benefit of the transcript. As we have found, there was nothing untoward in the behaviour of the panel (nor was it suggested by the claimant or PC Flint either at the time or in the immediate aftermath that there was anything untoward in the behaviour of the panel, which is surprising if they considered that there was). We also note that no allegations of bullying or intimidation at the meeting were put to any of the three members of the panel at this hearing and they were certainly never asked if it was their intention to violate the claimant's dignity or create a harassing environment for him, either in the conduct of the meeting or in their decision to dismiss. We therefore accept Ms MacLaren's submission that it would not in those circumstances, and in the absence of any evidence, be open to us to conclude that it was the panel's purpose, either in terms of the conduct of the meeting or the decision to dismiss the claimant, to violate the claimant's dignity or create a harassing environment for him. Accordingly, we find that that was not their purpose.

145. As to "effect", whilst the claimant has stated that he did not like Commander Musker's question about how the next six months would look, it was he who reacted aggressively to Commander Musker when he was asked this question and he then apologised for his reaction to it later at the meeting. We are not, therefore, even clear whether the claimant considers that the asking of this question or anything else in the meeting had the effect of violating his dignity or creating the harassing environment (and we remind ourselves of the reasonably high bar which these words (violating dignity, intimidating, hostile, degrading, humiliating and offensive) by their very nature create. Certainly, from

our reading and understanding of how the meeting was conducted, it would not be reasonable for it to have that effect. Therefore, for all these reasons, we do not find that the conduct of the meeting had this effect and a harassment claim founded on that basis would therefore fail. We would also add that we do not consider that the question about the next six months asked by Commander Musker was in anyway inappropriate; it was a perfectly reasonable question to ask.

146. As to the decision to dismiss itself (which is specifically what is said to be the harassing conduct for the purposes of this complaint), again it is not clear whether the claimant's case is that the decision to dismiss him (albeit it was one with which he disagreed) had the effect of violating his dignity or creating a harassing environment for him and we do not therefore find that it did. Furthermore, and in any event, we do not consider that it would be reasonable for the decision to have this effect; even though the claimant did not want that decision and disagreed with it, it was a reasoned and proportionate decision on the evidence and it would not, therefore, be reasonable for it to have that effect. Furthermore, it would be a strange conclusion if we were to find that every unwanted decision had the effect of passing the threshold in creating the harassing environment and that is not what the statute says; rather, the issue of whether a decision is "unwanted" is a separate part of the definition from the issue of whether or not the unwanted conduct creates the harassing environment. We therefore find that the decision to dismiss did not have the harassing effect.

147. The harassment complaint therefore fails.

Conclusion

148. In summary, all of the claimant's complaints of disability discrimination (direct discrimination, discrimination arising from disability, harassment and for a failure to make reasonable adjustments) fail.

Employment Judge Baty

Dated: 22 Nov 2019

Judgment and Reasons sent to the parties on:

25/11/2019

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For the Tribunal Office