Case Number: 3332310/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Daniel Gardner	**v**	The Chief Constable of Cambridgeshire Constabulary

Heard at: Cambridge

With Parties on: 26, 27 and 28 November 2019
In Chambers: 3 December 2019
(the decision having been reserved)

Before: Employment Judge Foxwell

Members: Mrs B Handley-Howarth
Mr R Eyre

Appearances
For the Claimant: In person
For the Respondent: Mr R Oulton (Counsel)

RESERVED JUDGMENT

1. The Claimant's claims of indirect disability discrimination and victimisation are dismissed upon withdrawal.

2. The Claimant's claims of direct disability discrimination and discrimination arising from disability, are not well founded and are dismissed.

RESERVED REASONS

1. The Claimant, Mr Daniel Gardner, joined the Cambridgeshire Constabulary, the Respondent to these proceedings, as a Police Constable on 13 February 2013. He relinquished this office in October 2019 when he took early retirement on medical grounds.

2. Having gone through Early Conciliation between 20 July 2018 and 20 August 2018, the Claimant presented claims of disability discrimination to the Tribunal on 26 August 2018. He said that he was disabled within the statutory definition and therefore entitled to make such a claim because of three conditions: anxiety, depression and Post-Traumatic Stress Disorder (PTSD). The claim arose from the Respondent's decision to make a family referral, and the contents of that referral, during the illness which ultimately led to the Claimant's retirement. We explain this in more detail below.

3. The Respondent filed a response disputing the claims on their merits and not admitting disability. Subsequently, however, it conceded that the Claimant was disabled within the statutory definition at the times relevant to his claim because of anxiety and depression. It did not admit, and still does not admit, that the Claimant had current symptoms of PTSD satisfying the statutory definition at the relevant times.

The Issues

4. The issues in the claim were identified by Employment Judge Sarah Moore at a Preliminary Hearing in Cambridge on 8 March 2019. She set them out as follows:

> *Time limits / jurisdiction issues*
>
> *(i) Were the Claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2020 ("EQA")? In this respect the Respondent notes that the date of receipt by Acas of the Early Conciliation notification was 20 July 2018 and that the referral to social services about which the Claimant complains occurred on 15 March 2018. The Respondent submits that any act or omission relied upon by the Claimant in support of his claim which occurred prior to 20 April 2018 is out of time and it would not be just and equitable to extend time. The Claimant submits that the referral constituted a continuing act until the case was closed on 17 July 2018. Also, that in any event, he is complaining about the contents of the referral rather than the fact of the referral itself and he did not have sight of the referral until 26 June 2018. Accordingly, this issue will involve consideration as to whether there was an act that extended over a period of time and beyond 20 April 2018 and / or whether or not time should be extended on a just and equitable basis.*
>
> *(ii) Does the Tribunal have jurisdiction to hear the complaints? The Respondent asserts it does not because the referral to Social Services on 15 March 2018 was not referable to the deemed employment relationship between the parties. In this respect the Respondent asserts that the discrimination alleged does not fall within part 5 of the Equality Act 2010, in particular Section 39(2)(d), because the alleged detriment that the Claimant says he suffered as a result of the referral was not a detriment that was work related*

and was not connected to the fact he is a Police Constable. The Claimant relies on an email from the Council to Cambridgeshire Constabulary on 5 July 2018, which refers to the referral having been made from the Constabulary as his employer rather than as a law enforcement matter. He also relies on the mechanism and the process through which the referral was made and, thirdly, he relies on his allegation that the contents of the referral were exaggerated, false and misleading and intended to cover up the shortcomings in the way in which his case had previously been dealt with by the Respondent.

Disability

(iii) Was the Claimant a disabled person in accordance with the Equality Act 2020 ("EqA") at all relevant times by reason of anxiety and / or depression and / or PTSD?

EqA, Section 13: direct discrimination because of disability

(iv) It is not in dispute that the Respondent made a referral to Social Services in respect of the Claimant on 15 March 2018. The issue of whether or not the fact of and contents of that referral amounted to less favourable treatment because of the Claimant's disability. The Claimant will say that the fact of and contents of the referral did amount to less favourable treatment because it was made deliberately to put him under additional pressure and / or to cover up the shortcomings in the way in which his case had previously been dealt with by the Respondent.

(v) The Claimant relies on a hypothetical comparator who suffers from stress and anxiety falling short of disability and in respect of whom, he says, no referral to Social Services would have been made in otherwise similar circumstances. Alternatively, the Claimant relies on an actual comparator, M, who, the Claimant alleges, was away from work for approximately six months and in respect of whom no referrals to Social Services were made.

EqA, Section 15: discrimination arising from disability

(vi) Did the Respondent treat the Claimant unfavourably because of the behaviour exhibited by the Claimant at the Welfare meetings leading up to the referral to Social Services on 15 March 2018? The Claimant says the fact of and content of the referral was unfavourable treatment. The Respondent does not accept that this amounted to unfavourable treatment but in any event asserts that it was a proportionate means of achieving a legitimate aim. The following particular issues arise:

a. What behaviour did the Claimant exhibit leading up to the referral on 15 March 2018?

b. Was that behaviour something that arose in consequence of his disability?
c. Did the Respondent make the referral to Social Services because of the Claimant's behaviour in those meetings?
d. Did the referral itself, or the content of that referral, amount to unfavourable treatment? and
e. If so, was it a proportionate means of achieving a legitimate aim? Namely, trying to ensure the health, safety and welfare of the Claimant and his family.

EqA, Section 19: indirect discrimination

(vii) The Claimant is no longer pursuing a claim for indirect discrimination.

EqA, Section 27: victimisation

(viii) The Claimant says that he had previously complained about lack of training prior to being required to undertake a rape investigation and that he had also complained about the care and advice received from the Medical Officer while he was off sick. The issues are therefore as follows:

a. Whether and when any such complaints were made;
b. If so, whether any of them amount to a protected act for the purposes of s.27 of the Equality Act 2010; and
c. If so, whether the Respondent subjected the Claimant to a detriment because of it, the alleged detriment being the fact and content of the referral to Social Services.

5. Part of our Judgment dismisses the claim of indirect disability discrimination which was withdrawn at the preliminary hearing.

6. At the commencement of this hearing, we asked the Claimant to identify the protected acts underlying his claim of victimisation. He raised six matters as follows:

6.1 that he had asked repeatedly for training to assist him as he was aware that he had not obtained the required qualifications;

6.2 he had explained to Detective Sergeant Harbour how he was not suitably trained on his first attachment to the Rape Investigation Team (RIT), however, this was not a concern the second time;

6.3 his discussions with DS Harbour around the investigation which caused his illness, he should not have been given [the investigation], but it was too late as he had already seen the damaging evidence;

6.4 the Occupational Health report dated 14 November 2017, which he says confirmed that his condition was work related;

6.5 an email from a Wellbeing Advisor, Catherine McWhirter, dated 9 January 2018 confirming that his stress reaction was work-related (page 221); and

6.6 an email sent to him on 22 January 2018 suggesting that a quick resolution would be in the long-term interests of the organisation (page 233D3) as if it was better that he was no longer employed by the police. The Claimant acknowledges that this is not an email he sent or saw at the relevant time.

7. Subsequently, during evidence, the Claimant confirmed that he had not done any of the things identified as protected acts in Section 27(2) of the Equality Act 2010 and because of this he withdrew this aspect of his claim which we have also dismissed upon withdrawal.

The Hearing

8. The hearing was listed for four days and was due to begin on Monday 25 November 2019. Due to a lack of judicial resources, this had to be put back to Tuesday, 26 November 2019.

9. The Claimant represented himself in the hearing but was accompanied by a Police Federation representative who was there to support him. The Respondent was represented by Counsel, Richard Oulton.

10. The Tribunal received evidence and submissions over the remaining three days of the original allocation. At the commencement of the hearing we asked whether there were any applications for Orders under Rule 50 of the Tribunal Rules of Procedure (restrictions on reporting). We pointed out that the hearing was a public one and that our Judgment and Reasons, which were likely to be reserved, would be public documents available on-line. Neither party sought any Orders, but it was agreed that the names and ages of the Claimant's children would not be mentioned and that the Claimant's actual comparator for his direct discrimination claim would be referred to simply as 'M'. The Tribunal adopted this approach as any greater level of detail was unnecessary for the public understanding of this case. The Tribunal took the view that this approach respected these individuals' Article 8 rights in a way which did not interfere or interfere significantly with the principle of open justice. A member of the press, Sophie Finnigan, was present and we offered her the opportunity to make representations about this. She said she had no objection to our proposed approach.

11. The Claimant is aware that the history of his mental health problems is central to an understanding of this case and must therefore be set out in some detail in our findings of fact.

12. The Claimant made an application for a Witness Order to secure the attendance of Detective Inspector Gary Webb. DI Webb had not prepared a statement, so we asked the Claimant to prepare a summary of the evidence he thought DI Webb was likely to give. The Claimant did this in letter form, submitted on the first day of the hearing. The nub of DI Webb's evidence, it was suggested, was a disputed comment he is alleged to have made to Chief Inspector (then Detective Inspector) Anderson on the way to a meeting. We dismissed the application for a Witness Order on the basis that this evidence, which concerned DI Webb's alleged opinion, was not probative of the matters we had to decide.

13. The Claimant gave evidence first and was cross examined by Mr Oulton. He also relied on a written witness statement from Dean Calvert, a Community Psychiatric Nurse, who had worked with the Claimant and his family. We have considered this written statement, but the weight we can attach to it is affected by the fact that Mr Calvert was not available for cross-examination.

14. The Respondent called the following witnesses:

14.1 Detective Sergeant Lyndsay Harbour - DS Harbour works in the Rape Investigation Team (RIT) where the Claimant was based at the times relevant to this claim. She became the Claimant's Line Manager in late 2016. DS Harbour has been a Police Officer since 2001 and was a Special Constable for two years prior to that.

14.2 Chief Inspector Kate Anderson – Chief Inspector Anderson was a Detective Inspector at the times relevant to this claim but has since been promoted. She was DS Harbour's Line Manager immediately prior to her promotion. CI Anderson is trained to support officers suffering from poor mental health (a "Wellbeing Champion", formerly known as a "Blue Light Champion"). CI Anderson has been a Police Officer since 2006.

14.3 Detective Constable Nikki Wood – Detective Constable Wood joined the Respondent in 2002 as a Police Constable and was promoted to Detective Constable in 2005. Since 2009 she has worked in the Multi-Agency Safeguarding Hub ("MASH"). MASH is a department for sharing information with partner agencies such as Social Services or schools in relation to child and vulnerable adult protection.

15. The Claimant cross-examined each of these witnesses. It was evident that he had prepared his questions with considerable forethought.

16. In addition to the evidence of these witnesses, the Tribunal considered the documents to which it was taken in an agreed bundle comprising approximately 500 pages. References to page numbers in these Reasons relate to that bundle.

17. Both parties made late additions to the bundle. The Respondent introduced pages 233A–233S on the first day of the hearing and the Claimant

introduced pages 233D1 – 233D4 on the second morning of the hearing. Neither party objected to this late disclosure.

18. Some of the documents produced by the Respondent had been redacted. The principal example of this is a contingency operational plan at pages 233H–S. No objection was raised to the redactions and there were no applications to see unredacted copies or parts of copies. The Tribunal did not consider it necessary to have sight of unredacted versions of documents to understand the parties' cases.

19. Finally, the Tribunal received closing submissions from the parties. Mr Oulton had prepared outline written submissions which we read (these were given to us and the Claimant before the lunch adjournment so the Claimant had this time to consider them). Mr Oulton amplified his submissions orally and the Claimant made his points to us orally, too.

The Legal Framework

20. The Claimant alleges direct disability discrimination and discrimination arising from disability contrary to sections 13 and 15 of the Equality Act 2010. Although disability is conceded by the Respondent because of the Claimant's anxiety and depression, it does not admit that the Claimant's diagnosis of Post-Traumatic Stress Disorder (PTSD) was a qualifying disability at the times relevant to his claim. Additionally, it challenges the Tribunal's jurisdiction on the basis that the alleged discrimination did not arise in the context of work.

<u>The Tribunal's jurisdiction under the Equality Act 2010</u>

21. Under Part 5 of the 2010 Act, Employment Tribunals have exclusive jurisdiction over claims of discrimination in the field of work (see section 120). They do not have jurisdiction in other fields, such as the provision of services.

22. Section 39(2) of the Act says that an employer must not discriminate against its employee as to the terms of his employment; in the way the employee accesses benefits (such as training); by dismissing him; or subjecting him "to any other detriment". This case, like many, concerns an allegation that the Claimant was subjected to detrimental treatment, it is not about dismissal or access to benefits. In all three cases there is a requirement for <u>treatment</u> of the Claimant (this could be an act or omission).

23. The House of Lords considered the extent of the Tribunal's jurisdiction under Section 39 in *Shamoon v Chief Constable of Royal Ulster Constabulary [2003] IRLR 285*. Lord Hope said as follows at paragraph 34:

> *34. The statutory cause of action which the appellant has invoked in this case is discrimination in the field of employment. So the first requirement, if the disadvantage is to qualify as a "detriment" within the meaning of article 8(2)(b)* [equivalent Northern Ireland legislation]*, is that it has arisen in that field. The various acts and omissions mentioned in article 8(2)(a) are all of that character and so are the words "by dismissing her" in section 8(2)(b). The word "detriment" draws this limitation on its broad and*

ordinary meaning from its context and from the other words with which it is associated. Res noscitur a sociis. As May LJ put it in De Souza v Automobile Association [1986] ICR 514, 522G, the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.

24. The Respondent concedes that referring the Claimant and his family to MASH, and the contents of that referral, was treatment of the Claimant. The first question for the Tribunal is, therefore, whether this treatment arises in the field of work. If so, it must go on to decide whether the treatment amounts to a detriment. Both conditions must be fulfilled for the Tribunal to have jurisdiction.

Qualifying disabilities

25. Section 6 of the Equality Act 2010 provides as follows:

"(1) A person (P) has a disability if:

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

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

26. Further details of the definition are contained in Schedule 1 to the Act but in essence it has four components, which can be broken down into the following questions:

(1) Does the Claimant have a mental or physical impairment? (*the Impairment Condition*);

(2) Does the impairment affect the Claimant's ability to carry out normal day to day activities? (*the Adverse Effect Condition*);

(3) Is the adverse effect substantial? (*the Substantial Condition*) and

(4) Is the adverse effect long term? (*the Long Term Condition*).

27. Guidance issued by the Secretary of State in 2011 (replacing earlier Guidance) supplements this definition. We have had regard to this in deciding whether the Claimant's disputed condition is a disability.

Direct discrimination

28. Section 13 of the Equality Act 2010 provides as follows:

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

29. This provision requires a Tribunal to decide the following:-

(1) Has there been treatment?

(2) Is that treatment less favourable than the treatment which was or would have been given to a real or hypothetical comparator?

(3) Was that difference in treatment because of a protected characteristic?

30. A claim of direct discrimination concerns a comparison between the treatment given to the Claimant and that which a comparator received or would have received. A comparator for this purpose must be the same in all material respects, apart from the protected characteristic, as the Claimant (see section 23 of the Act). The reason for the relevant treatment in some cases will be inherent in the conduct complained of, for example where a race specific comment is used (for another example see *James v Eastleigh Borough Council [1990] ICR 554* which concerned the application of different rules for men and women): close examination of a comparator in these cases will be unnecessary. Furthermore, where a hypothetical comparator is relied on the question for the Tribunal is often better expressed as 'what is the reason why the Claimant has been treated in the manner complained of?' (see *Amnesty International v Ahmed [2009] IRLR 884*). Nevertheless, the requirement creates a particular difficulty in disability discrimination cases following the decision of the House of Lords in *London Borough of Lewisham v Malcolm [2008] IRLR 700* where it was held that a correct comparison involves stripping out disability but not the reason for the treatment: in that case, where it was claimed in defence to possession proceedings that a tenant had unlawfully sublet property because of a mental health condition which was a qualifying disability, the House of Lords held that the correct comparator was a tenant without a mental health condition but who had also sub-let property unlawfully. Such a comparator would also have faced possession proceedings so the reason for the treatment was not disability but unlawful sub-letting.

31. The determination of whether treatment is because of a protected characteristic requires a Tribunal to consider the conscious or sub-conscious motivation of the alleged discriminator. This element will be established if the Tribunal finds that a protected characteristic formed a part of the reason for the treatment even though it may not have been the only or the most significant reason for the treatment (see *Nagarajan v London Regional Transport [1999] ICR 877*). In cases where the less favourable treatment complained of is not inherently related to a protected characteristic it is necessary for the Tribunal to look in to the mental processes of the alleged discriminator in order to determine the reason for the conduct (see *Amnesty International v Ahmed [2009] IRLR 884*).

32. There must be some detriment to the Claimant in any differential treatment and, whilst the threshold for this is low, minor or trivial matters may not cross it (see *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*).

33. The issue whether treatment amounts to 'less favourable treatment' is a question for the Tribunal to decide. The fact that a complainant honestly considers that he is being less favourably treated does not of itself establish that there is less favourable treatment (see *Burrett v West Birmingham Health Authority [1994] IRLR 7*).

Discrimination arising from disability

34. Section 15 of the Equality Act 2010 provides as follows:

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

35. To establish discrimination arising from disability a Claimant must produce evidence consistent with him being treated unfavourably because of "something" arising "in consequence of his disability": a double causation test (see *Basildon & Thurrock NHS Trust v Weerasinghe [2016] ICR 305*). If he does so, the Respondent may still be able to defeat the claim by showing that the reason for the relevant treatment was wholly unconnected with disability or that it was not known that the Claimant was disabled at the time or by establishing the defence of "justification".

36. Unfavourable treatment because of something arising in consequence of the Claimant's disability will be justified only if the employer shows that it was a proportionate means of achieving a legitimate aim. The test to be applied by a Tribunal in considering this is an objective one and not a band of reasonable responses approach (*Hardy & Hansons plc v Lax [2005] IRLR 726*, *CA*). Furthermore, a Tribunal must not conflate the issues of the existence of a legitimate aim and proportionality: they are separate and require separate consideration.

37. What amounts to a legitimate aim is not defined in the Equality Act and is a question of fact for the Tribunal. The measure in question must pursue the aim contended for but it is not necessary for this to have been specified in those terms at the time, an *ex post facto* rationalisation is possible (see *Seldon v Clarkson Wright and Jakes [2012] IRLR 590*). An aim which is itself discriminatory cannot be legitimate; an example (in the context of age discrimination) might be a trendy fashion store having a policy of employing young people only.

38. The principle of proportionality requires a Tribunal to strike an objective balance between the discriminatory effect of a measure and the reasonable needs of the employer's business. Once again, the Equality Act provides no guidance on what is proportionate and, therefore, this is something the Tribunal must assess. In general terms however, the greater the disadvantage caused by the unfavourable treatment, the more cogent the justification for it must be.

39. Some evidence is required to establish the defence of justification but Elias P explained the function of Tribunals in this context in *Seldon v Clarkson Wright and Jakes [2009] IRLR 267*, *EAT* as follows (paragraph 73):

> *"We do not accept the submissions … that a tribunal must always have concrete evidence, neatly weighed, to support each assertion made by the employer. Tribunals have an important role in applying their common sense and their knowledge of human nature… Tribunals must, no doubt, be astute to differentiate between the exercise of their knowledge of how humans behave and stereotyped assumptions about behaviour. But the fact that they may sometimes fall into that trap does not mean that the Tribunals must leave their understanding of human nature behind them when they sit in judgment."*

The burden of proof under the Equality Act

40. Section 136 of the 2010 Act provides as follows:

> *"(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision".*

41. These provisions require a Claimant to prove facts consistent with his claim: that is facts which, in the absence of an adequate explanation, could lead a Tribunal to conclude that the Respondent has committed an act of unlawful discrimination (see *Royal Mail Group v Efobi [2019] EWCA Civ 18*). 'Facts' for this purpose include not only primary facts but also the inferences which it is reasonable to draw from the primary facts. If the Claimant does this then the burden of proof shifts to the Respondent to prove that it did not commit the unlawful act in question (*Igen v Wong [2005] IRLR 258*). The Respondent's explanation at this stage must be supported by cogent evidence showing that the Claimant's treatment was in no sense whatsoever because of disability.

42. We have borne this two-stage test in mind when deciding The Claimant's claims. We have also borne the principles set out in the Annex to the judgment of Peter Gibson LJ in *Igen v Wong* firmly in mind. Save where the contrary appears from the context however we have not separated out our findings under

the two stages in the Reasons which appear below. In any event detailed consideration of the effect of the so-called shifting burden of proof is only really necessary in finely balanced cases.

The drawing of inferences in discrimination claims

43. An important task for a Tribunal is to decide whether and what inferences it should draw from the primary facts. We are aware that discrimination may be unconscious and people rarely admit even to themselves that such considerations have played a part in their acts. The task of the Tribunal is to look at the facts as a whole to see if they played a part (see *Anya v University of Oxford [2001] IRLR 377*). We have considered the guidance given by Elias J on this in the case of *Law Society v Bahl [2003] IRLR 640* (approved by the Court of Appeal at *[2004] IRLR 799*): we have reminded ourselves in particular that unreasonable behaviour is not of itself evidence of discrimination though a Tribunal may infer discrimination from unexplained unreasonable behaviour (*Madarassy v Nomura International plc [2007] IRLR 246*).

44. A Tribunal must have regard to any relevant Code of Practice when considering a claim and may draw an adverse inference from a Respondent's failure to follow the Code.

The time limit for claims under the Equality Act

45. The Respondent concedes that the Claimant has brought his claims within the time limit contained in Section 123 of the 2010 Act so we have not set out the relevant legal principles here.

The scope of our findings

46. The Tribunal heard a substantial amount of evidence over 3 days. Issues were tested and explored by the parties and the Tribunal through their questions. We have not attempted to set out our conclusions on every question or controversy raised in the evidence but we have considered all of that evidence in reaching the conclusions set out below. The findings we have recorded are limited to those we consider necessary to deal with each of the issues raised by the parties. We have made our findings unanimously and on the balance of probabilities. In doing so we have borne in mind that unlawful discrimination can be subtle and may not be consciously motivated. We have considered whether inferences can and should be drawn from the primary facts in deciding whether the Respondent has engaged in unlawful conduct contrary to the Equality Act 2010.

Findings of Fact

47. The Claimant is a married man with three children under 18. On 16 March 2018, CI Anderson made a referral to the Respondent's Multi-Agency Safeguarding Hub ("MASH") concerning his family. The Claimant learned of the referral when he and his wife were contacted by Cambridgeshire Social Services on 27 March 2018 and he saw the documents which had initiated this process

(pages 240–241) in July 2018. The Claimant inferred from the referral that the Respondent considered him to be a risk to the safety of his family. The Claimant alleges in this context that the making of this referral was unfavourable treatment of him because of disability or direct disability discrimination. He alleges that the referral was misleading and that he was not and never had been a risk to his family. He alleges that it had been constructed to convey an exaggerated picture of his state of health by, for example, referring to historical matters without making this clear. His case is that, far from being a step intended to help him, this was part of a plan to retire him from the Force on medical grounds or somehow otherwise push him out. He also alleges that CI Anderson was simply concerned to protect her own position and promotion prospects. The background to this referral is as follows.

48. The Claimant began working as a Police Constable in February 2013. In December 2015, he was transferred to the RIT based at Parkside Police Station in Cambridge. This was not a voluntary move but one imposed, it was said, for operational reasons. In April 2016, the Claimant was posted to the Crime Investigation Team (which is known as "the Burglary Squad") but on 1 August 2016 he returned to the RIT.

49. The Claimant had not been given his own case load of criminal investigations during his first stint in RIT but when he returned in August 2016 he was given his own cases to investigate. The Claimant was hoping to pass the Board and examination to achieve the rank of Temporary Detective Constable which would in turn have led to the rank of Detective Constable. One of the cases assigned to the Claimant concerned a victim who lived in the same village as him.

50. DS Harbour became the Claimant's line manager in December 2016. The case involving a victim from the Claimant's village had already been assigned to him by her predecessor. DS Harbour asked the Claimant whether he was comfortable with this and he confirmed that he was. However, in February or March 2017, when it was decided to charge the suspect, the Claimant told DS Harbour that he was no longer comfortable being the officer in the case given the possibility that he might have to go to court and see the victim and perpetrator. He also expressed concern about things he had read in a diary kept by the perpetrator. In the event the perpetrator pleaded guilty and it was unnecessary for the Claimant to attend court but this case appears to have had a profound impact on him.

51. In June 2017, the Claimant consulted his GP concerning his mental health. He complained of anxiety, stress and poor sleep (page 420). He referred to his work as *"stressful"*. The Claimant had a history of mental health problems going back to 2001 when he was a serviceman in the RAF. We note from the Claimant's records that he received a provisional diagnosis of PTSD on 31 August 2001 (page 340) but this was described as *"not confirmed"* in August 2002 (page 343). In 2004, he was seen for anxiety and depression (page 349) and there was a similar diagnosis in 2006 (page 355).

52. On 13 July 2017, CI Anderson and DS Harbour met the Claimant to discuss his health and wellbeing. This meeting was arranged after DS Harbour

had expressed concerns to CI Anderson about how the Claimant was coping at work. This had been remarked on by some of the Claimant's colleagues. One matter of concern was that the Claimant had told a colleague that he had purchased a length of rope and the implication was that he was a suicide risk.

53. CI Anderson and DS Harbour describe the Claimant as appearing *"obviously unwell"* in this meeting and this is consistent with the Claimant's own account of his mental state at that time. The Claimant's manner was agitated and appeared aggressive. He later apologised for this to CI Anderson. The Claimant told us that he was having suicidal ideas at this time, although he did not intend to kill himself, and had begun to self-harm as well.

54. The Claimant owns shotguns and CI Anderson and DS Harbour were sufficiently concerned by his condition in the meeting that they arranged for these to be removed by the Respondent's Firearms Unit that evening. They accompanied the Claimant to his home and stayed with him until this was done. The Claimant was unhappy about his guns being taken away as he enjoyed shooting, but accepted that this was done for the right reasons given his mental state at the time.

55. On the following day, 14 July 2017, DS Harbour referred the Claimant to Occupational Health. The Claimant was shown the referral before it was submitted and approved it (page 166). DS Harbour said as follows, in the body of the referral,

> *"…*
>
> *Dan has, over the past few weeks, been displaying signs of stress such as change in diet, sleep pattern and general well-being.*
>
> *Dan took on advice and has sought the assistance of his GP, who has diagnosed him with stress and anxiety symptoms. Dan has been prescribed citalopram and is currently on his second week of this course. The medication has caused episodes of almost manic behaviour followed by lows. Dan has expressed that he feels like he is 'hazy' when he has taken his meds. This is being managed by taking at times when he is not working or driving.*
>
> *Dan has historically been diagnosed with PTSD from his time in the military. His recent stress symptoms appear to have coincided with the tragic and sudden death of a friend (police colleague).*
>
> *I think that Dan could do with some talking therapy and / or EMDR. Both would benefit him hugely. EAP has been considered, however, due to the circumstances, I do not think that this would be beneficial to him at this stage."*

56. On the same day CI Anderson offered to arrange face-to-face counselling for the Claimant through the Respondent's Employee Assistance Programme (EAP) as well as a referral to the Police Federation (page 171). The Claimant agreed to this. It is evident that he valued both women's support at this time; a

point he reiterated in evidence to us. In fact, he took the opportunity of this case to thank DS Harbour and CI Anderson for what they had done for him.

57. On 18 July 2017, CI Anderson carried out a stress risk assessment under which the Claimant's workload was to be limited (pages 173–177).

58. On 30 July 2017, the Claimant was signed off work by his GP because of his symptoms. He was never to return to work, although no one could have predicted this at the time.

59. The Claimant underwent an occupational health safety and wellbeing assessment on 14 August 2017, carried out by Catherine McWhirter a Wellbeing Advisor (pages 186–187). Ms McWhirter recommended assessment by an occupational health adviser after further information was provided by the Claimant's GP.

60. DS Harbour held a welfare support meeting with the Claimant on 28 September 2017 (page 189). At this meeting the Claimant said that he was happy with the support he was receiving from his managers but was concerned that he had not had the occupational health appointment suggested in August. DS Harbour made a further occupational health referral on 3 October 2017 (pages 192–194). By that stage, the Claimant was on medication for anxiety.

61. The Claimant was seen by an occupational health assessor, Dorothy Dlamini, on 20 October 2017 (pages 197–199). Ms Dlamini reported that the Claimant had severe symptoms of depression and anxiety and was unfit for work. She recommended that he be seen by the Force Psychologist, Victoria Plant.

62. The Claimant was seen by Ms Plant on 14 November 2017. She diagnosed him as suffering from moderate to severe symptoms of anxiety and depression (pages 202–203), describing him as suffering from a *"complex stress reaction in relation to several work-related incidents"*: two sudden deaths at work in December 2014; two sexual abuse cases he had worked on; and the sudden and unexpected death of a colleague and friend. Ms Plant stated that the Claimant had no current suicidal intentions or ideations. She recommended *"in house trauma treatment"*. This report was provided to the Claimant and his line managers.

63. CI Anderson and DS Harbour had a further welfare meeting with the Claimant on 21 November 2017 (pages 204–208). It was noted that the Claimant remained signed off work, but there was a discussion about a phased return to work, possibly in a different area of the Force, when the Claimant was certified fit to return. They made another occupational health referral.

64. The Claimant was seen by Ms Dlamini 2017 for a second time on 1 December (pages 217–219). Ms Dlamini noted that the Claimant remained unfit for work but described this as temporary. She recommended that he be referred for therapy as advised by the psychologist.

65. A controversy which arose in the evidence is whether Ms Dlamini showed the Claimant a different version of Victoria Plant's report to that in the bundle.

The Claimant suggested that the version he was shown somehow ascribed blame for his symptoms to the Respondent. We were not shown an alternative version. The Claimant was confused in his evidence about when this alternative version was shown to him: he suggested originally that he had been sent a copy after he had complained about not seeing the report but changed this in evidence to being shown a copy in the meeting with Ms Dlamini. We consider it unlikely that there was a second version of Ms Plant's report as the Claimant alleges and find that he has misremembered this passage of events.

66. The Claimant's next welfare meeting with CI Anderson and DI Harbour, took place on 24 January 2018 but there was substantial informal contact between the Claimant and DS Harbour by text before then (see pages 319–321). It is clear from these messages that the relationship between the Claimant and his line-manager was positive and that she was supportive of him.

67. We accept DS Harbour's evidence that she was concerned about what the Claimant said to her when they met up or in text messages and the fact there seemed to be no improvement in his condition. For example, in an informal meeting on 3 January 2018, he told DS Harbour that he felt that, if someone said the wrong thing to him, he might *"slit their throat"*. The Claimant's recollection was that he said, *"punch in the throat"* on this occasion but we prefer DS Harbour's account; she was an impressive witness and we found her evidence reliable; we considered the Claimant to be an honest historian, but that his recollection of events was less reliable. By way of further example, in a text message sent on 9 January 2018 the Claimant wrote that he had had *"a shit four to five days but still alive"*, implying that he was a suicide risk. In another text he described feeling alone despite being *"surrounded by people who care"*.

68. At the meeting with CI Anderson and DS Harbour on 24 January 2018, the Claimant reconfirmed that he was happy with the support they were giving him. He said there was little sign of improvement in his condition, however. He told them that he was self-harming by picking his hands until they bled and the officers could see this for themselves as the Claimant was picking his hands in the meeting; CI Anderson had to give him tissues to clean the blood when his hands began to bleed. The Claimant also told them of obsessive behaviours: he had been purchasing large amounts of goods on-line, particularly Disney merchandise and survivalist equipment. His on-line purchases included a knife, ration packs and a military-grade rope bracelet which could be extended into a cord of some length. The Claimant also said that he was constructing a bunker in his back garden. He mentioned watching an American television series called 'Dexter', which concerned a forensics expert taking the law into his own hands by killing suspects he believed had *"got away with it"*.

69. DS Harbour was sufficiently concerned in the meeting to mention the emergency mental health line (111, option 2). The day after the Claimant texted her saying that he had been on that line for over an hour and had since been referred for a psychiatric appointment. He concluded his message as follows,

> *"She was the first person I felt I could open up to. I know I have you but I don't want you to worry about some of the things that I'm thinking.*
> *Thank you so much xxx"*

70. Later that day the Claimant texted DS Harbour to say that he had been prescribed anti-psychotic drugs.

71. One matter raised on 24 January 2018 was the possibility of ill-health retirement. Documents produced by the Claimant in the hearing at pages 233D3–233D4 show that CI Anderson had made some preliminary enquiries into this before the meeting. CI Anderson accepted this; she told us that she anticipated that the Claimant would have questions about this possibility and therefore had made relevant enquiries. The Claimant suggested that this showed that CI Anderson wanted to get rid of him. We accept CI Anderson's evidence.

72. In January and February 2018, the Claimant underwent EMDR (eye movement desensitising and reprocessing) therapy to treat his symptoms. The treatment was unsuccessful and only served to make his symptoms worse. The Claimant subsequently told DS Harbour that the counsellor providing the treating had felt threatened by him in these sessions (page 233O).

73. Stepping back, the evidence shows a significant deterioration in the Claimant's condition at the beginning of 2018 with the apparent onset of suicidal ideation, self-harming and violent thoughts despite increased medication, which had not been apparent at the time of Ms Plant's assessment in November 2017.

74. The Respondent had become sufficiently concerned about the Claimant's presentation by this time to have compiled a contingency operational plan should police action in respect of the Claimant become necessary (pages 233H–233S). We heard, and accept, that this was a 'living document', that is one which is updated as new information was received.

75. The Claimant was referred to the Force Medical Advisor on 21 February 2018; this is a necessary step towards medical retirement.

76. CI Anderson and DS Harbour held a further welfare meeting with the Claimant on 8 March 2018. The Claimant's condition had not improved. He was continuing to self-harm, once again even doing so in the meeting. He also began lifting the chairs either side of him as he sat with his managers. The Claimant is a well-built man who had entered strongman competitions in the past. The Claimant told us, and we accept, that there was nothing threatening about this aspect of his behaviour, rather it was simply a means of relieving tension. Nevertheless, it was unusual behaviour consistent with a continuing agitated state.

77. The Claimant said that he wanted his guns returned in the meeting and, when it was suggested that there were concerns about this, he said that he had no intention of shooting anyone. He stated however, that he had had thoughts of beating suspects. The Claimant disclosed that he was substantially in debt but had kept this from his wife. He denied that he was suicidal but referred to feeling stressed and said that his wife would put one of his children on his knee to calm him down. He also said that another of his children was having problems at school. The Claimant confirmed that he was interested in medical retirement.

78. The report of Dr Imtiaz Yusuf, the Force Medical Advisor, is dated 9 March 2018 (pages 232–233). He diagnosed serious anxiety, depression and Post Traumatic Stress and said that the Claimant's mental function was substantially impaired. He noted that the Claimant was self-harming. He confirmed that the Claimant was unfit for work.

79. On 15 March 2018, CI Anderson referred the Claimant and his family to MASH. She said that her main reasons for the referral were (page 236),

> *"- We need to ensure that partners who are supporting Dan and his family are aware of the risk that he may pose.*
>
> *- That the children involved are effectively safeguarded. I am specifically concerned about the need for school to ensure that they know to report if all of the children do not turn up at school, and that* [redacted] *is receiving counselling at present, reportedly (from Dan) as a result of what she is being exposed to at home. Both Dan and* [redacted] *are mentally unwell, and I just want to ensure that the kids are getting appropriate support."*

80. CI Anderson's motivation for making this referral is an issue in this case. In his statement, the Claimant suggested that she did it: to protect herself and her chances of promotion; to hide or to deflect attention from the Respondent's responsibility for his condition; and to manage him out of the Force through early retirement. In support of this, he asserted that his mental health had been far worse in the summer of 2017 when no referral to MASH was made. He also contrasted his treatment with that of M, another Officer on long-term sick leave. It is common ground that 'M' was not referred to MASH.

81. Apart from the fact of long-term sickness absence, the Claimant has failed to adduce evidence from which the Tribunal could conclude that his comparator M's circumstances were either the same or substantially the same as his own. There is no evidence, for example, of any grounds for considering M to be a risk to himself or others. We do not find that M is a proper comparator in this case.

82. We accept CI Anderson's evidence that her referral of the Claimant's family to MASH was because of genuine concerns about the Claimant's mental health in March 2018. The evidence shows that his condition had worsened despite increased medication (the Claimant had texted DS Harbour on 9 March 2018 to tell her that his dose of anti-psychotics had just been doubled). The Claimant now talked of suicide or of violence to others even if he had no intention of doing either thing. The Claimant was asking for the return of his guns. There was also evidence that the wellbeing of his children was being affected, either because of problems at school or by being used as a calming mechanism. All of this created genuine and legitimate concerns.

83. We accept CI Anderson's evidence that the referral had nothing to do with her promotion, which had been confirmed in December 2017 and was simply waiting to be implemented. We find that CI Anderson was motivated not only by

concern for the Claimant but also by the possible need to protect the wider public should his decline continue. This was consistent with her duty as a police officer.

84. Prior to making her referral, CI Anderson sought advice from Detective Superintendent Brunning, who is Head of Public Protection at the Respondent and is also the Wellbeing Lead. We note that CI Anderson is herself a Wellbeing Champion. These factors are consistent with her having a legitimate concern for the Claimant's health and the wellbeing of his family.

85. The Claimant was not told of the referral to MASH when it was made.

86. CI Anderson's request for a MASH referral was assigned to DC Wood to deal with. DC Wood had worked in MASH for almost 9 years and is an experienced officer in this field. She drafted a referral based on the contents of the contingency operational plan (pages 233H–233S) and submitted this to CI Anderson for approval on 16 March 2018. Once CI Anderson had done so, DC Wood submitted the final version to MASH later that day.

87. The Claimant is critical of the referral prepared by DC Wood and approved by CI Anderson. He alleges that it exaggerated his symptoms and made it appear that things which had happened in the summer of 2017 were still current. He was taken through the contents of the referral (pages 240–241) by Mr Oulton in cross examination and confirmed that almost all of it was accurate: he disputed that he had begun self-harming in January 2018, saying that he had started this much earlier; he also disputed an inference that he might have used his motor cycle's engine in a closed garage to asphyxiate himself. In contrast, he did not dispute reporting stress, difficulties in managing anger, thoughts of driving his car off the road and talking of suicide notes.

88. We find that the referral was an accurate summary of the Respondent's concerns. Furthermore, its purpose was simply to begin the MASH process under which decision making is done at a multi-disciplinary meeting later in the process and following some investigation.

89. Once the MASH referral had been made, a child strategy meeting was convened on 19 March 2018. The Claimant was unaware of this at the time. Minutes of this meeting are exhibited to his witness statement at Appendix A. CI Anderson and DS Harbour attended on behalf of the Respondent and representatives from Social Services and the children's school were present. CI Anderson and DS Harbour are recorded as saying that the Respondent's biggest concern was the wellbeing of the children. The conclusion of the meeting was that an assessment followed by a further meeting were required.

90. Subsequently, on 27 March 2018, there was a disagreement between CI Anderson and Cambridge Social Services about whether the children should be spoken to before their parents were informed of the referral. Social Services' view was that the parents should be informed of, and involved in, any assessment of potential harm to the children. CI Anderson was concerned that, if the Claimant was alerted to the referral in advance, he would regard it as a breach of trust and that this could undermine his confidence in DS Harbour and his willingness to share information with her. Much of the information provided to

MASH had come from DS Harbour. These concerns reflected CI Anderson's duty to protect the wider public as well as her duty of care to her officers. At the very least, CI Anderson wanted the Respondent to have the opportunity of telling the Claimant of the referral before anyone else did.

91. Despite this, it appears that Social Services took a unilateral decision to convene a meeting with the Claimant, his wife and their children on 27 March 2018 without giving CI Anderson an opportunity to inform the Claimant in advance. The Claimant had no prior notice of the meeting and, no doubt, it came as a shock. The Claimant exchanged a series of texts with DS Harbour (known as "Flimz") about this on the morning of 27 March 2018, as follows (page 325),

Dan Gardner:	*"Have you put a referral in against me? Got social services coming around this afternoon? Not angry just want to know where it has come from x"*
Flimz:	*"I'll ring you in a bit. Can't talk at the min x"*
Dan Gardner:	*"Ok thanks x"*
Flimz:	*"To put you at ease, I do know about it. There is nothing at all to worry about (I promise) and please trust that we have you back…. I mean that x"*
Dan Gardner:	*"I trust you with my life just not sure on anyone else. I'll give you a call later and see if you are about to drop my doctors note in. Thanks x"*
Flimz:	*"Please trust me. I would never do anything that I didn't think would offer support that you need or otherwise x"*
Dan Gardner:	*"I know. Thank you x"*

92. The evidence shows that the Claimant and his wife found the referral to be helpful and even questioned why it had not been made sooner. Nevertheless, it is clear from the minutes of a meeting on 4 May 2018 that the Claimant was unhappy not to have been told of the referral and why it had been made when it was originally presented to MASH (page 270).

93. The Claimant's service as a Police Officer came to an end on his ill-health retirement in October 2019. Retirement was originally refused, but his appeal against that decision succeeded. He had not returned to work in the period since 30 July 2017.

Conclusions

94. In this section of our Reasons we set out our conclusions on the claims based on the legal principles and findings of fact set out above.

Does this claim fall within part 5 of the Equality Act 2010?

95. We find on the evidence that there is a sufficient connection with work for the Tribunal to have jurisdiction in this case, notwithstanding, that part of the reason for the relevant treatment, referral to MASH, was the Respondent's role as a police authority protecting the public.

96. The facts on which the decision to refer was based were gathered through the relationship of 'employer' and 'employee' (we use these terms broadly, acknowledging that the Claimant was an office-holder and not an employee): the information came from welfare meetings, occupational health reports and informal contact as colleagues and line-managers. It was not the same as an arms-length police investigation.

97. We are also satisfied that the treatment constituted, or could constitute, a 'detriment' within the meaning of Section 39(2)(d) of the 2010 Act. While the MASH referral proved to be a positive development for the Claimant and his family, he was distressed that it had been made without his knowledge and by the implication that he might be a risk to his children. We find that these are matters which a reasonable worker might consider themselves to be disadvantaged by in the circumstances in which they had thereafter to work. Put more simply, and as CI Anderson feared, the making of a referral affected the Claimant's trust in the Respondent and, therefore, his ability to speak openly with it once it had been made.

Did the Claimant have PTSD and is it a qualifying condition within section 6 of the Equality Act 2010?

98. This question is academic as the Respondent concedes disability because of anxiety and depression, but it remains an issue identified by the parties in the case and we have, therefore, addressed it.

99. An Employment Tribunal cannot diagnose medical conditions and our conclusion on this issue is one reached on the balance of probabilities and with limited evidence only.

100. We find that the Claimant had PTSD at the times relevant to this claim. We also find that the symptoms of this condition were co-extensive, so as to be indistinguishable from, his symptoms of depression and anxiety. Our conclusion is based on the reports of Victoria Plant and Imtiaz Yusuf: Ms Plant referred to the Claimant as suffering from *"complex traumatic stress"* and Dr Yusuf described him as having *"continuing post-traumatic stress"*. We find that this evidence is more consistent than not with the Claimant having PTSD.

101. As the symptoms of this impairment are indistinguishable from those of the admitted disabilities, we find that it had a substantial adverse effect on the Claimant's ability to undertake normal day to day tasks. The evidence also supports a finding that the impairment was long-term on the balance of probabilities, in the sense that it was either a recurring condition (first diagnosed

in 2001) or had lasted or was expected to last at least a year. Accordingly, this aspect of the Claimant's claim succeeds.

Direct Discrimination

102. We reject the Claimant's claim of Direct Disability Discrimination based on a comparison with M. M is not an appropriate comparator within section 23 of the Equality Act 2010 for the reasons explained at paragraph 81 above.

103. We do not find that a hypothetical comparator exhibiting the same behaviours as the Claimant, but without his condition, would have been treated differently from him: the reason for the Claimant's treatment was the way in which his conditions were manifesting themselves, not the conditions themselves, and a hypothetical comparator must be one presenting in the same way. Accordingly, the claim of direct disability discrimination fails on the facts.

Discrimination Arising from Disability

104. Unfavourable treatment The first question which arises in respect of this head of claim is whether the Claimant was treated unfavourably? Unfavourable treatment under section 15 of the Equality Act 2010 is not the same concept as detriment under section 39, although the evidence relating to both will often overlap, (see: Williams v The University of Swansea [2018] IRLR 306). Unfavourable treatment concerns what the putative discriminator actually said or did or omitted to say or do; it does not concern their motivation (T-Systems Limited v Lewis [2015] UK EAT0042) or what a claimant felt because of the treatment. It is not a comparative test such as in direct discrimination, but requires a measurement against an objective sense of what is adverse as opposed to beneficial.

105. Applying this test, in our judgment the referral to MASH was not unfavourable treatment. The evidence shows that it was beneficial to the Claimant and his family and we find it was necessary, given everything the Respondent knew at the time of the referral. We do not find that the contents of the referral were unfavourable treatment of the Claimant either; the document was sufficiently accurate to achieve its purpose fairly, which was simply to instigate a MASH referral.

106. Our findings that the treatment relied on was not 'unfavourable' within section 15 disposes of the claims under that section, but we make the further findings set out below in case we are wrong in our conclusion on this.

107. Causation The Respondent concedes, correctly in our judgment, that the reason for its referral, the Claimant's behaviour, arose from his condition. Accordingly, the treatment complained of was because of something arising from disability, so this aspect of the claim is established.

108. Knowledge We find that the Respondent had knowledge of the Claimant's condition at all relevant times since the summer of 2017, and that it was, or was likely to be a disability within section 6 of the Equality Act 2010. The

Claimant had been the subject of significant occupational health and specialist investigation by the Respondent and the impact of his conditions on his ability to manage tasks of daily living was manifest.

109. It follows that the essential components of a claim of discrimination arising from disability would have been present had the treatment in issue been unfavourable. Whether this treatment was unlawful would then turn on whether the Respondent could establish the defence of justification.

110. Justification The legitimate aim contended for by the Respondent is seeking to ensure the health, safety and welfare of the Claimant and his family. We accept that this is a legitimate aim.

111. Judged objectively, we find that the Respondent's means of achieving this aim was proportionate; in fact, the Claimant acknowledged to DS Harbour on 27 March 2018, that the Respondent would have had to have made a referral to MASH for a member of the public in similar circumstances to his own. MASH referrals exist as the mechanism for raising child welfare concerns. In our judgment, therefore, if this treatment had been unfavourable, it would nevertheless have been objectively justified and, therefore, not have been unlawful.

Summary

112. For these reasons, the Claimant's claims of direct disability discrimination and discrimination arising from disability are not well-founded and are dismissed.

_____
Employment Judge Foxwell

Date: …12.12.19…….

Sent to the parties on: ..20.12.19.....

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For the Tribunal Office