EMPLOYMENT TRIBUNALS

Claimant: **Ms J Joynes**

Respondent: **The Chief Constable of Gloucestershire Constabulary**

Heard at: **Bristol** **On:** **18, 19, 20, 21, 22, 25, 26, 27, 28 November 2019 (afternoon of 25 and whole of 26 and 27 November 2019 involved panel discussion and preparation of notes for the extempore Judgment delivered on 28 November 2019)**

Before: **Employment Judge R Harper MBE**
Members Mr E Beese
Mr H Launder

Representation
Claimant: **Mr D Stephenson, Counsel**
Respondent: **Mr J Arnold, Counsel**

JUDGMENT

1. The Tribunal has jurisdiction to hear complaint C as it formed part of an act continuing over a period the last of which acts was/were in time.

2. No adjudication is made on the claim of direct disability discrimination in relation to complaint C as a result of the application of section 212 (5) Equality Act 2010.

3. The claims of disability discrimination arising from disability in relation to complaints C, D and H succeed.

4. The claims of disability discrimination – reasonable adjustments – in relation to complaints A, B, D, E, F, G succeed.

5. The claim of disability discrimination – harassment – in relation to complaints C and D succeed.

6. The complaint I does not succeed in relation to any of the discrimination claims.

7. There will be a one day remedy hearing before the same panel if possible on 4th February 2020.

REASONS

1. The claimant was "employed" between the 6th December 1998 and the 12th of December 2018. The ET1 was filed on the 28th August 2018. The ACAS A date was 28th June 2018 and the ACAS B date was 28th July 2018. The claimant claims disability discrimination and makes nine areas of complaint referred to as complaints A – I.

2. The respondent accepts that the claimant had the following disabilities as defined at the relevant times: a mental impairment of generalised anxiety disorder (page 816), Systemic Lupus Erythmatosus, and Raynauds Syndrome.

3. The respondent accepts knowledge of the physical disabilities. The effects and knowledge of the mental disability of anxiety remained in issue.

4. The Tribunal reminded itself of section 136 of the Equality Act 2010 relating to the burden of proof and considered and applied the guidance in **Igen v Wong** and **Madarassy v Nomura International**. The Tribunal also considered **section 212 (5)** of the Equality Act with regard to the findings of direct discrimination and harassment. That is relevant in relation to complaint C. This case involved a claim of direct discrimination under **section 13** of the **Equality Act** relating to complaint C. The case involved a claim of discrimination arising from disability under section 15 of the Act for which no comparison is required. This allegation referred to the complaints C, D, H and I. The case involved claim of a failure to make reasonable adjustments having regard to **section 20 and section 21 of the Equality Act** and that refers to complaints A, B, D, E, F, G I. This case involves a claim of harassment under **section 26 of the Equality Act** regarding complaints C, D, I. For the sake of clarification there is now no claim of victimisation.

5. The Tribunal note that most of the respondent's witnesses had had no, or very little, Equality Act training.

6. There have been two case management hearings. The first one on 9th January 2019 before Employment Judge Goraj and the second one on 18th October 2019 before Employment Judge Livesey at which there was an agreed list of issues which was attached to his Order.

7. On day one of the hearing the claimant was permitted to amend her case in relation to complaint H to the following: proposed three month return to work plan on 18th July 2018 as a condition of returning to work in the FIB. The difference between that and the original was that it had referred to the three month development plan not the return to work plan. On day one of the hearing the claimant was not permitted to amend paragraph 17.4 of the list of issues in relation to PCP two. The reason for that is that the case management hearing had been very recent, both Counsel attending the final

hearing also attended that hearing, and that was the time and the place for the list of issues to be agreed rather than for amendments to be made at the beginning of this present hearing.

Cases

8. The cases set out below have been specifically considered and applied in relation to the facts as found in this case. They include:

- **Homer v Chief Constable of West Yorkshire Police 2012 UKSC 15**
- **Chapman v Simon 1994 IRLR 124**
- **Chandhok v Tirkey 2015 IRLR 195**
- **Bahl v Law Society 2004 IRLR 799**
- **Madarassy v Nomura International Plc 2017 IRLR 246**
- **Chief Constable of Kent Constabulary v Bowler UKEAT/0214/16/RN**
- **Fraser v The University of Leicester UKEAT/0155/13/DM**
- **Hewage v Grampian Health Board 2012 IRLR 870**
- **Amnesty International v Ahmed 2009 ICR 450**
- **Nagarajan v London Regional Transport 1999 IRLR 572**
- **Chief Constable of West Yorkshire v Khan 2001 ICR 1065**
- **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 UKHL 11**
- **R (on the application of E) v The Governing Body of JFS and the Admissions Appeal Panel of JFS 2010 IRLR 136**
- **Lewisham London Borough Council v Malcolm 2008 3WLR 194**
- **Geller v Yeshurun Hebrew Congregation 2016 ICR 1028**
- **St Helens Metropolitan Borough Council v Derbyshire 2007 IRLR 540**
- **Richmond Pharmacology v Dhaliwal 2009 ICR 724**
- **Harringay LBC v O'Brien UKEAT/004 2016/LA**
- **Grant v HM Land Registry 2011 EWCA 769**

- **Heafield v Times Newspaper Ltd UKEAT PA/1305/12/BA**
- **Pnaiser v NHS England 2016 IRLR 170**
- **Basildon Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305**
- **Williams v Trustees of Swansea University Pension and Assurance Scheme 2018 UKSC 65**
- **Secretary of State for Work and Pensions v Alam 2010 ICR 665**
- **Environment Agency v Rowan 2008 IRLR 20**
- **Newham Sixth Form College v Saunders 2014 EWCA Civ 734**
- **Spence v In Type Libra Ltd UKEAT/0617/06/JOJ**
- **British Gas v McCaull 2001 IRLR 60**
- **Tarbuck v Sainsbury's Supermarkets Ltd 2006 IRLR 664**
- **Latiff v Project Management Institute 2007 IRLR 579**
- **HM Prison Service v Johnson 2007 IRLR 951**
- **Lincolnshire Police v Weaver UKEAT/0622/07**

Codes

9. The Tribunal has considered and applied the EHRC Code of Practice on employment 2011 in particular paragraph 17.4 and also paragraph 6.28 of the Statutory Code of Practice Employment. The Tribunal considered Section 123 of the Equality Act regarding time limits with regard to complaint C especially section 123 (3) namely conduct extending over a period.

10. The Tribunal heard evidence on oath or affirmation from Ms J Joynes, Ms L Dolling, DS Fletcher, DS Probert, DCC Stratford, DS Bean and DI Wood.

11. The Tribunal considered all the documents which were placed before us but we make the point that if our attention was not drawn to a particular document then we have not considered it. We have considered all the written and oral evidence of the witnesses and we have considered the oral and written submissions and additional written submissions from the claimant. We would like to record our thanks to both Counsel for the very professional way in which they have both conducted this case, very much upholding the high standards of the Bar.

12. The claimant joined the respondent service under a contract and this commenced on 6th December 1998 and the service came to and end on 12th December 2018. In particular, as part of the service, there were a number of governing policies in particular the disability policy to be found at page 413,

the attendance policy between pages 281 and especially 285, and Home Office guidance which is to be found starting at page 358. There was quite a helpful flowchart under the disability policy which is to be found at page 425.

13. The claimant worked in an office based role at the Force Intelligence Bureau (FIB) and from 2014 onwards undertook automatic number plate recognition (ANPR) duties. There are nine allegations/complaints. A limitation point is taken by the respondent regarding complaint C. The Tribunal are satisfied that there was a linkage, as argued by the claimant, between the 21st February 2018 onwards to 14 March 2018 onwards to 16 April 2018 and onward to the 18th July 2018. We found Mr Stephenson's submissions on that point particularly helpful. There was, we find, conduct extending over a period therefore complaint C is not out of time and the Tribunal has jurisdiction to deal with it. Even if we were wrong, given all the other allegations, the Tribunal would have extended the time for filing under the just and equitable principle. The respondent has not been prejudiced in defending the claim and indeed has called a number of witnesses dealing with it.

The Witnesses, general comments about some of the witnesses

14. The claimant gave her evidence in a compellingly straightforward manner. Although occasionally becoming upset she impressed the panel as an entirely honest witness. It is important to note that her work appraisals had consistently been extremely good and the respondent's witnesses were largely very praiseworthy of her work ability. However, the evidence of the respondent, on two issues, left an unpleasant and unpalatable taste in the mouth when the claimant's integrity was clearly called into question. For example about the use of her laptop, and the evidence of D S Bean that he wondered if *"Dena had far more control over her anxiety than she was claiming"* paragraph 17 of his statement.

15. Louise Dolling. Louise Dolling did not impress the panel as a witness. For an experienced HR person it is astonishing that minutes were not kept of very important meetings and she seemed to be rather blasé about such failure. She also seems to have not fully briefed DCC Stratford when he considered the medical retirement. For example, he was unaware that the claimant had been offered a permanent role in the IIT with the adjusted duties she had requested in her AWR.

16. DI Wood. He was described by DS Bean as verbose, both verbally and in writing. Certainly his replies were extremely long, often being prefaced with the words that he wanted to give *"context"*. Some of his evidence was rather confusing and unsatisfactory. For example, whilst speaking highly of the claimant he seemed to have an almost indecent rush to reprimand the claimant at page 598 for her written response to DS Fletcher without giving her the opportunity to explain, when she was well enough, as to the reasons why she had written in the way that she did. Another example was how he expressed his concerns about the proposed pattern not providing sufficient work life balance, needing more time away from work and then suggested that she could work weekend cover in FIB (pages 543 – 544).

17. DCC Stratford. He was a good witness but appeared to feel that he had to tow the party line because, when told in cross examination that the claimant had been afforded a permanent role in IIT, he said, possibly not surprisingly, that he still would have granted the IHR. He clearly had not previously known of this IIT offer.

Knowledge of the claimant's anxiety

18. It is surprising to the panel that the respondent appeared to be arguing that it was unaware of the anxiety issues when there are examples, too numerous to mention in the evidence, which clearly demonstrate that anxiety was manifesting itself. For example at page 191 paragraph 11. Other examples are the report of Dr Jayawickrama at page 816 – 817 where he says as follows:

> *"What is important to highlight is that she has experienced symptoms of anxiety including worry, apprehension, being on the edge, inability to cope, restless, difficulty in concentrating, worrying about her work, palpitation, sweating and panic attacks leading to inability to control herself".*

19. He goes on, referring in the penultimate paragraph on page 816, to the diagnosis of anxiety disorder by the Occupational Health department in 2006 and in the final paragraph over the page 2817 he further refers to the symptoms of anxiety.

20. The email from DS Probert dated 24 August 2017 informed DS Faraday that the claimant could not conduct the presentation due to her *"ongoing anxiety issues"*. Further in cross examination PS Probert confirmed that there were various factors which triggered the claimant's anxiety namely public speaking, overload of work, exhaustion, dealing with unfamiliar events and the lack of support from the line manager. Paragraph 8 of DS Fletcher's statement is telling because she records:

> *"I first became aware Dena suffered anxiety in a handover meeting with DS Probert and Dena's Human Resources Consultant Louise Dolling on 14th February 2018".*

21. It is important to note on page 476 there is an entry dated 11th May 2017 that the claimant was now deemed to be a restricted officer which has been referred to as 3P.

22. On page 508 the claimant is recorded as saying:

> *"I suffer anxiety which I struggle with when physically and emotionally low which can have a huge impact on my ability to have a balanced view whilst at work".*

23. At page 530 in section 5 which is the moderated duties arrangement management report there is clear reference to anxiety triggered by a number of things. It is very clear to the Tribunal the respondent was well aware of the claimant's mental impairment to anxiety and it went to undermine the overall

credibility of the respondent's witnesses that this was still being advanced at the hearing as an issue to be resolved.

Change of approach towards the claimant and areas of concern concerning the respondent's evidence

24. The claimant impressed the Tribunal as an intelligent, well organised, hardworking, but somewhat vulnerable woman. Vulnerable because of the multiple medical issues with which she has to cope on a daily basis. If there was one sentence which is the backdrop for this case, it is to be found in paragraph 22 of Mr Stephenson's closing submissions. That states as follows:

> *"PS Probert and other departments viewed her as a valued member of staff which begs the question what changed? How is it that the claimant can go from being highly valued by numerous departments as at 6th December 2017 to being fast tracked for medical retirement by 12 December 2018?"*

25. It is not unrelated that in November 2017 DS Fletcher was posted to the FIB and moved to the development and analysis team there on 13th February 2018 and also became the claimant's joint Line Manager on a Monday – Wednesday basis because DS Fletcher worked those three days. The remaining period would be covered by DS Probert who had been her Line Manager.

26. It may well be correct that the respondent viewed the claimant as *"high maintenance"*. We must stress that that is not our finding, and neither is it our expression, but it was an expression used by the claimant's own Counsel Mr Stephenson.

27. From the evidence there definitely appears to have been a change of attitude towards the claimant from having been supportive, to trying to squeeze her out of the organisation. Ms Dolling gave evidence that the claimant would often come to visit her and was sometimes emotional. The inference was that Ms Dolling found that was intrusive and difficult to handle. In cross examination Ms Dolling said that she did not have any discussions with the claimant about the disability passport. The responsibility, according to the respondent's evidence, appears to be upon the claimant to produce such a passport. That ignores the fact that the claimant was a sensitive soul with mental impairment issues and she should have been directed more positively towards the preparation of a disability passport.

28. The Tribunal found the document at page 671 to be particularly telling. It is an email from John Wood dated 17th July and it states as follows:

> *"My view is that is that the benefits would not outweigh the costs. DS Fletcher and I spent an excessive amount of time robustly managing PC Joynes and I believe that due to current staffing levels in the DNA office it would be unfair to the remaining staff to have PC Joynes back in the department".*

29. This is clearly indicative of the fact that he was finding the claimant very trying to handle and is also indicative of the change of attitude that existed.

30. There were various other matters that the Tribunal felt very uncomfortable with as far as the respondent was concerned. We find that it was very poor that an Occupational Health referral was made on 4th December 2017 but not actioned until 16th January 2018. Even allowing for the Christmas and New Year break there is no good excuse for the delay.

31. A request to work three hours Friday and three hours Sunday was made by the claimant but she was made to wait a very long time before the outcome of that was relayed to her. Again, the Tribunal are critical about the delay in this case.

32. The next area of concern was the fast tracking of the claimant to SMP without any discussions with her. She may have been, and indeed was, one of a cadre of thirty-seven officers who were classified as being disabled and who had not been seen by the SMP. However, it is surprising that the claimant, given her difficulties, was suddenly fast tracked after the change of direction and change of line management for example see pages 554, 567 and 587. Not only was the fast tracking reference surprising in the documentation in the bundle but no minutes were kept of that meeting. That was an extremely important meeting relating to the future of this long serving, highly regarded, officer. Not keeping the minutes was clearly in breach of ECHR guidance which results in the inference that this was at least one starting point of the respondent's attempt to squeeze her out. She had been graded 3P since 2016 with no previous need to fast track her. 3P is defined as *"fit for non confrontational role – likely to require indefinitely"* page 538.

33. Another area of concern was the fact that initially the respondent gave the claimant only three days to comment on the proposed IHR. There was no good excuse for that. It was subsequently extended but that was the initial approach.

34. Another area of concern which has already been touched on in these reasons is that the claimant risked losing her twenty year service medal because the original proposal was to ill health retire her on 2nd November 2018 so she would not have achieved her twenty years service which would have occurred on the 8th December 2018. For a dedicated, well respected officer this was a very poor way to treat her. The reason for the treatment was stated by DI Wood as not to be a good use of public money but that comment did not sit very happily with the fact that three officers DS Fletcher, DI Wood and DS Probott spent many days sitting at the back of the Tribunal waiting for their evidence to come up. This was the case even though their evidence had been timetabled and some of them stayed on afterwards which is hardly a very good use of resources. The sole respondent is the Chief Constable. Those witnesses were called to support him; they were not individual respondents. In fact the ill health retirement occurred on 12th of December 2018 and the claimant achieved her twenty years service.

35. Another area of concern was the treatment of emails which she had sent to DS Fletcher whilst she was off sick and whilst she was suffering with lupus anxiety. She sent an email dated 27th March and this was viewed as low key

misconduct. Within hours of that email being received there was a meeting between DI Wood and DS Fletcher and Pauline Davey *"to discuss the most appropriate course of action"* page 596. On any view a colossal overreaction. This was particularly so as the respondent's witnesses could find nothing offensive in the email and in cross examination admitted that what they were concerned about was the tone of the email.

36. DI Wood stated that the matter may be escalated under the unsatisfactory performance procedure (UPP). Another colossal overreaction. The recommendation that it be recorded on her PDR was also a particularly unpleasant step for the respondent to take and understandably caused the claimant worry.

37. Another area of concern about the respondent's evidence is that the evidence was very clear that for some part of her working career she had worked at home perfectly satisfactorily, generating good quality work and achieving very good appraisals. Then all of a sudden, the attitude seemed to be taken that police officers could not possibly, under any circumstances, work from home. The change of approach was not logically or clearly explained.

38. Another area of concern is that the claimant's integrity was doubted on a number of occasions by the respondent. The Tribunal have already indicated that we found the claimant to be a completely honest and open witness. Examples of her integrity being doubted included a wish to interrogate her laptop by DI Wood paragraph 10. As Mr Stephenson said in his closing submissions *"why not just ask her"*? DS Probert, for example, said in cross examination that during the fourteen months or so he had worked closely with the claimant he had no reason to doubt her honesty and integrity. Her integrity was challenged by DS Fletcher at the meeting on 16th April 2018 when the claimant was asked if she was recording the meeting. DS Fletcher said in her cross examination that she would have had no problem about it being recorded, but it was a curious and somewhat offensive question to ask. At page 653 DS Bean stated, *"unless of course she hasn't been entirely honest in the self disclosure of her symptoms".* Again, a very unfortunate approach. It was unfortunate for DS Fletcher to say to the claimant,which we find was said, *"if other people aren't well enough to come in they would phone in sick and in the interest of fairness why should it be different for you?"* This was made worse by the unhelpful comment by DI Wood in his email dated in February 2018 that a *"standardised approach"* could be adopted on occasions when she was unable to attend the workplace.

39. Another unsatisfactory area of evidence, as far as the respondent is concerned, is that the claimant's AWR was refused by DI Woods on 15th March 2018. When it was referred to DS Bean on the same day, he did not adopt the conclusion of DI Wood because he added an additional reason, namely health and safety grounds. This can really only be viewed as "beefing up", unjustifiably, the original refusal.

40. Another curious aspect of the respondent's evidence is that there had been no previous concerns about the supervision of the claimant or the lack of it until 2018 when it became allegedly a major cause of concern. Yet the quality of her work had been excellent and she was a hard and conscientious worker. Why suddenly were these concerns expressed?

41. The next area of concern is the mixing up, quite deliberately,of the performance and attendance policies with the return to work plan with the non too oblique reference to the possibility of a referral under UPP (page 622). This is in complete contrast to the requirement on page 363 paragraph 2.11:

> *"The misconduct procedure should not be used as a means of dealing with unsatisfactory performance. The unsatisfactory performance procedures exist to deal with issues of individual unsatisfactory performance and attendance".*

42. The last area of concern has already been touched on which is Ms Dolling's failure properly to tell DCC Stratford all the relevant information. Given the general approach by the respondent to the claimant, it is hard to see that that is simply an oversight. The DCC was being led in the direction, as desired, by HR to approve the IHR.

Attendance and Performance

43. It is clear from pages 437 – 438 that the Bradford Attendance Scores for the three year period averaged 45. The respondent had no issues with her performance until there was the change of line manager as set out earlier in these reasons. Significantly, on pages 444 – 445 DS Casling stated as follows:

> *"It is fair to say that if the FIB was full of officers like Dena my role would be simple! Dena's efficiency and speed at completing tasks often leaves me in awe. I know the processes of the FIB in which she is involved are in safe hands when she is attending to them".*

44. DI McCormack was equally complimentary, and also DS Faraday, who had been her supervisor in November 2017, who stated as follows:

> *"Dena completes this work to a high standard and is very proud of the assistance that she provides to her colleagues".*

45. As recently as May 2017, there is reference as set out in Mr Stephenson's paragraph 15,

> *"For the last three weeks Dena has been working from Bamfurlong two days a week to cut down on traveling and also assist her with her work with Tri Force. Dena is very busy and manages her workload well. This has been another year of consistently good work from Dena against the backdrop of health issues which at times are extremely debilitating".*

46. The claimant states that her health deteriorated because of the removal of the reasonable adjustments.

47. As Mr Stephenson says in his paragraph 16 it is important to note that Ms Dolling accepts that these were reasonable adjustments which had been implemented to accommodate the claimant's disability. Dr Dickson had recommended that these adjustments would assist the claimant at work and

maintaining attendance. Dr Dickson expressed in his Occupational Health reports caution as to the number of hours she should work and advised,

> *"working from home or working from any reasonably accessible police station on days when she is office based including Bamfurlong".* (page 463)

48. The reasonable adjustments that were recommended were formally agreed and implemented. This is to be found at page 469.

49. In a job chat which the claimant had with DS Probert on 11 July 2017, it was stated:

> *"Working closer to home has also helped her personal circumstances as it cuts down considerably on commuting time. The present arrangements appear to work well, we just need to finalise things. Dena is still very happy and enthusiastic in respect of her work. She produced a comprehensive daily briefing package which is used by numerous departments and always has a valued input in the daily management meetings another consistent three months of good work"*.

50. The claimant's health began to deteriorate in approximately October 2017 when her request to work three days on Friday and three hours on Sunday to prepare for the Monday briefings was overlooked. The claimant was good about keeping the respondent appraised of her medical situation.

51. DS Bean seemed to think in his evidence that the claimant worked substantially at home, which was not the case. He seemed to take the view that no police officer could work from home. A rather inflexible attitude given that she had done so previously, successfully.

52. The Tribunal was greatly assisted by the documents submitted by Mr Arnold entitled legal principles. Mr Stephenson said in his closing comments that he did not take any issue with that document. It is an unusual document to produce in such a case but the Tribunal found it helpful and we are grateful to Mr Arnold for doing that. We adopt the summary of legal principles that are set out therein and just go on to highlight one or two additional matters in relation to the various jurisdictional heads of claim with which we are concerned.

53. Turning firstly to reasonable adjustments. On the issue of substantial disadvantage we agree with Mr Stephenson in paragraph 124 of his skeleton argument that it must have been evident to DS Fletcher and DS Probert that requiring the claimant to work from headquarters would put her at a substantial disadvantage compared to her non disabled colleagues. Colleagues could drive to headquarters without difficulty. The respondent removed the adjustments that were in place purportedly to monitor her welfare and provide adequate support but there was little consultation with the claimant and therefore the approach adopted by the respondent was unsatisfactory. When considering reasonable adjustments there has to be consideration of the statutory code of practice employment as set out in Mr

Stephenson's skeleton argument and that requires a consideration of the following:

(a) Whether taking any particular steps would be effective in preventing the substantial disadvantage.

(b) The practicability of the Step.

(c) The financial and other costs of making the adjustment and the extent of any disruption caused.

(d) The extent of the employer's financial other resources.

(e) The availability to the employer of financial other assistance to help make an adjustment such as advice through access to work.

(f) The type and size of the employer.

Discrimination arising from disability

54. Section 15 makes it unlawful for an employer or other person to treat a disabled person unfavourably not because of that person's disability itself but because of something arising from or in consequence of a person's disability and in order to succeed four elements must be met, and the Tribunal has considered each of them.

(a) There must be unfavourable treatment.

(b) There must be something that arises in consequence of the claimant's disability.

(c) The unfavourable treatment must be because of ie caused by the something that arises in consequence of the disability.

(d) The alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

55. We have also considered the case of **Pnaiser v NHS England 2016 IRLR 170** as to the "something arising" point.

Direct Discrimination

56. In addition to Mr Arnold's helpful summary, we also considered paragraphs 100 – 104 of Mr Stephenson's skeleton.

57. As earlier recorded in these reasons it is alleged that the claimant's health began to deteriorate on or around 18 October 2017.

58. On 4th December 2017, the claimant was required to submit an alternative working request (AWR) which was intended to put in place reasonable adjustments. She told the respondent that she suffered with SLE and also hypothyroidism which affected her joints and her ability to sit at a desk all day which also negatively impacted her energy levels.

59. The claimant proposed working between 7.00am – 2.30pm Monday – Thursday and 7.00am – 10.00am on Fridays and three hours work on Sundays. These hours, coupled with her working at Bamfurlong police station, or from home during flare ups, would allow her to perform her role more effectively. This was discussed with DS Probert in a job chat on 6th December 2017 and an extract from page 509 has already been highlighted in these reasons. The claimant took annual leave over the Christmas period returning on or about the 8th January 2018.

60. Upon her return she sent an email to DS Taylor stating as follows:

> *"Before I start I would like to take the opportunity to remind you that in early December I was absent from work for two weeks for fatigue something of which I suffer as a result of my health. This in turn if not managed can lead to anxiety and stress. Sadly, I am feeling very unsupported in FIB and feeling slightly overwhelmed in my return to work".*

61. As earlier highlighted in these reasons the referral to OH which had been made had been mentioned was not in fact activated until 16 January 2018. There was no excuse for that delay. At that time the claimant worked 36 hours per week which was made up of four core days Monday – Thursday along with six hours on a Friday. DS Probert completed a moderated duties arrangement management report which has already been highlighted in these reasons. Significantly, DS Probert confirmed that there were no issues concerning the claimant's performance but noticed the deterioration on her Bradford factor score, under section 7 of the document. DS Probert confirmed that the FIB would require intelligence officers to work at least one set of late shifts and one weekend in every ten cycle, despite knowing that the claimant cannot work late shifts due to her conditions. The claimant is also a single parent. Nonetheless the respondent enquired if she would work weekends at the headquarters. Dr Dickson made a series of recommendations at page 536 which have already been referred to in these reasons. He made it abundantly clear that further periods of sickness absence were entirely foreseeable without implementing the recommended adjustments and he suggested a review of the claimant's position in twelve months time. This is a very strong demonstration that the Doctor did not envisage that the claimant would be medically retired in the near future.

62. The claimant sent an email on 7th February 2018 repeating her request to work three hours on Fridays and Sundays which did not meet with approval initially from DS Probert. He told her that a meeting had been arranged to discuss and that *"he hoped to update her soon"* (page 547). As a matter of record, she was not updated "soon."

63. On 14th February 2018, DI Wood Louise Dolling, DCI Webb, DS Probert and DS Fletcher met. The Tribunal has already touched on this meeting because it is the one where no minutes were kept. As set out on pages 543 and 544 there were:

> *"concerns that this current pattern does not provide her with a sufficient work life balance due to the fact she will be working every*

Sunday appreciating that this is only for three hours I feel she needs a more prolonged period of time away from work".

64. So, as earlier stated, DS Probert was expressing his concerns but also suggesting weekend work which seemed to be completely contradictory. The person who was best placed to assess what pattern would allow her greater flexibility was the claimant, yet no one thought to seek her views.

65. As a result of that meeting on 14th February 2018 an action point document was prepared and that is to be found at pages 554 – 555. It is recorded that *"the purpose of this meeting was primarily to discuss the recent Occupational Health referral and the subsequent recommendations by the FMO."* As Mr Stephenson submits in paragraph 33 of his skeleton rather the emphasis was on exploring options outside of the FIB whether that was a transfer to Tri Force or by fast tracking her referral to SMP. It was at this meeting that there was a suggestion that her laptop computer should be interrogated to see how much work she was doing and how much work was being done at home.

66. There was a further discussion on 20 February 2018 and DI Wood confirmed that he and DCI Webb had discussed aligning the claimant to another work stream in the FIB to support the other force operational priorities. He emailed Miss Dolling requesting further guidance on whether this left the organisation vulnerable by effectively going against the FMO's advice. He said, *"I need to try and resolve this FIB structure issues sooner rather than later".* This clearly suggests that there was much more attention being on alignment changes within the department rather than trying to consider the requirements of the claimant. There is no written record of any discussions that may or may not have happened at around that time between DI Wood and HR. The references to fast tracking the claimant to SMP appears in pages 554, 567 and 587.

67. On 21st February 2018 DS Probert and DS Fletcher met with the claimant to discuss the document just referred to. At that meeting the claimant stated that she did not wish to work at the headquarters because of the driving distance causing her fatigue, that she had enough work for her, and indeed that she required an assistant to assist her. She had undertaken cognitive therapy sessions in order to help deal with her stress. She was unable to perform tasks as an IDO because *"her brain did not work like everyone else and when requested to do a task outside of vehicle intelligence this caused her undue anxiety".* The claimant also said that she would not be able to cope with any sudden demands of work and if it came to the point that her role within the D and A office meant that she had to perform other tasks then she would want to leave because of health reasons. She confirmed that the only way of this working for her was to work within set tasks.

68. It was at that meeting that the claimant alleges that DS Fletcher made the comment about other members of staff phoning in sick. Having heard the way in which the claimant gave her evidence, whenever there is an evidential dispute between her and the respondent's witnesses we prefer the claimant's evidence. In cross examination DS Fletcher said that she felt that the claimant was confused about a conversation that they had about annual leave when a comment was made about fairness. We find that there was no such confusion and that it was said as alleged by the claimant.

69. It was also at this time that there was the reference to the proposed standardised approach. As a result of all this DI Wood confirmed by email dated 22nd February that the claimant would remain solely aligned to Vehicle Intelligence for the short term. However, Dr Dickson had recommended that the adjustments required were likely to be permanent. However, DI wood decided that firstly, the claimant could no longer work from Bamfurlong police station and must report to FIB daily. Secondly, greater scrutiny was required regarding homeworking and the only homeworking agreed was in the morning prior to coming into FIB. Thirdly, that HR would fast track her application to the SMP and flagged this as a priority. Again, much reference to fast tracking her application.

70. A long time after the AWR request had been filed by the claimant on 15th March 2018 DI Wood refused it. Reasons for the refusal are set out on page 586. DI Wood was asked in cross examination about what welfare arrangements and support he had in mind for the claimant. He confirmed that he had not identified any because the review of the claimant's role had not been completed. Having refused the AWR, on the same date, the matter was sent to Detective Superintendent Bean who refused it, this time on the grounds of health and safety. The outcome of this was given to the claimant on 16th April. She was criticised in cross examination for not appealing the refusal but the reality is that on 17th April, the claimant submitted a further AWR. Although technically she did not appeal the refusal it could be deemed to be a de facto appeal because she was placing another AWR before the respondent to consider, clearly expressing the fact that she was not happy with the decision that had been taken. As Mr Stephenson suggests in paragraph 44 of his skeleton no concern about the lack of supervision arrangements/monitoring materialised at the time, quite the opposite. As the claimant made clear during her evidence there were nine PCs available on each shift along with two PSs and Inspectors if she needed any assistance. She had also managed her conditions for many years.

71. There is no compelling evidence that is placed by the respondent before the Tribunal to explain why the claimant's welfare needs could not be met by her working at home or working remotely on occasions. The Tribunal agree with the assertion set out below from paragraph 46 of Mr Stephenson's skeleton that,

> *"The respondent contends that they accommodated the claimant's disabilities by placing her on moderated duties. Whilst that is true, those moderated duties took her disability into account by allowing her to work two days from Bamfurlong police station rather than attending HQWW every day and provided flexibility to work from home in the mornings and three hours on Sundays. Flexibility to work from home was crucial to the claimant as she could not predict when her symptoms were likely to flare up.*
>
> *Undoubtedly, the flexibility was necessary to accommodate home working when she was too fatigued to commute to HQWW. What happened then was that the respondent removed the adjustments that were in place because they felt they could neither monitor her welfare effectively or provide adequate support when she worked from*

Bamfurlong police station or from home. The claimant was not able to commute the distance to the designated place of work without severely aggravating the effects of her disabilities on her normal day-to-day activities".

72. Accordingly, the Tribunal agree that it was wholly unreasonable to remove the adjustments that were in place especially when they had clearly been working well from the claimant's perspective and as endorsed by DS Probert and valued by numerous departments. Pages 481 – 482.

73. On 13th March, the claimant experienced a flare up of her condition at a meeting at HQWW which caused her legs to swell. The next day the claimant states that DS Fletcher said *"it's crap that you can't do live time work. I've just seen you react dynamically to live intel".* DS Fletcher was clear in denying that she had used the expression *"it's crap"* although the claimant says that the intention behind the comment was supportive.

74. The difficulty for the respondent is that they have to find the claimant as she is. The claimant was at a vulnerable stage of her mental health, and reacted very badly to the expression. Again, having to resolve the evidential dispute between the claimant and DS Fletcher we preferred the version of the claimant and we find that the expression was used. It is not exactly an expression that is unheard of in the workplace and the Tribunal's view of DS Fletcher was that she was a forthright soul and that she did use the expression alleged.

75. On 15th March the claimant sent DS Probert a text saying that she would not be in that day. During the time that the claimant was off her line manager, who was then DS Fletcher, attempted contact with her on several occasions. Although the relevant policy provides for frequent contact, and although there is an obligation on the claimant to maintain frequent contact, what was not appreciated is quite how ill the claimant was and the effect of contact from the respondent and the effect that it had on her. She made it very clear that she did not want to have any further contact because it was aggravating her symptoms. Notwithstanding that, there was further contact or attempted contact by DS Fletcher. As a result of this contact the claimant wrote an email and that was the one that was deemed to be low level misconduct which has already been referred to in these reasons.

76. DI Wood seemed to be more interested in escalating what he saw to be possible low level misconduct, possibly escalating it under the UPP. This was a curious response to a woman who was clearly not well.

77. As a result of all this a return to work plan was envisaged and drawn up and the Tribunal have seen the first draft and the final document and paragraph 1 sets out specific targets:

"Authority, respect and courtesy you are expected to:

Engage effectively with DS Fletcher as your first line manager.

Act with self control in the workplace.

> *Treat your line manager and other colleagues with respect and courtesy.*
>
> *Adhere to the Force Code of Ethics and the FIB core values.*
>
> *Not defer to another supervisor unless DS Fletcher is absent".*

78. There is no other way in interpreting this document as a conflation, and an inappropriate conflation, of the two policy procedures. This was clearly not allowed in relation to the paragraph earlier highlighted in these reasons. It is entirely natural for the claimant to have interpreted that paragraph 1 as being extremely serious for her and it should not have been done. Dr Dickson in his Occupational Health recommendations stated that "she will of course be best suited to continuing with duties she has the most experience and familiarity as previously. She would benefit from a mix of home and office working she remains fit to drive locally." This is quite clear: there is no room for ambiguity or misinterpretation as to the medical recommendations.

79. On 6th April DS Probert met with the claimant and he told her about the return to work plan but did not discuss all the details. Amazingly, there were no minutes of that meeting either. This meeting was of very considerable importance as far as the claimant is concerned. There was a clear breach of the Equality and Human Rights Code of Practice 2011 and adverse inferences are drawn by the Tribunal as a result of that failure.

80. DS Fletcher then told the claimant that she was no longer permitted to work on Sundays from home or from the Bamfurlong police station. At that meeting the claimant attended on 16th April with DS Fletcher it commenced with DS Fletcher asking if the claimant was recording the discussion. The claimant was not recording that discussion.

81. The most important part of that return to work plan is that it stipulated that unless there was substantial improvement the UPP may be instigated. The Tribunal find that the sentence in paragraph 66 of Mr Stephenson's submissions is completely correct namely that *"far from supporting her return to work she believed it effectively constituted disciplinary action"*. DS Fletcher updated DI Wood and sent an email to him stating what was agreed.

82. The next day the claimant submitted a fresh AWR and she proposed reducing her contractual hours from 36 – 33 making the point that:

> *"My health conditions are ever changing and I welcome a constant review of the AWR for this reason. Friday is shown to be a long nine hour day. I have not been in a position to work longer hours within the office environment for a period of time due to fatigue and driving in the hours of darkness. I would therefore like to request a reasonable adjustment requesting consideration to work 9.00 – 3.00 within the office environment and completing the final hour three hours from home using the laptop provided in 2015/2016. I would also like to request the option of flexibility of working from home under reasonable adjustments in place previously and suggested following an Occupational Health referral when I am well enough to sit down and*

> *work but not well enough to drive in, sit at a desk all day and drive home".*

83. The claimant proposed working six hours Monday – Friday with the final three hours working from home. The claimant asked to meet with Miss Dolling to express her concerns and there were also discussions between Miss Dolling and DS McKie of Investigations Crim Command. Rather significantly, Miss Dolling confirmed that the claimant was *"intent on being retained as she loves being a police officer but was struggling in FIB".*

84. As a result of the discussions the claimant agreed to a placement in IIT for a period of three months to be reviewed on 23 July 2018 and the agreed hours were:

- week 1, 5 hours per day currently 9:00 – 2.00
- week 2, 6 hours per day 9.00 – 3.00
- week 3, hours to be agreed

85. The claimant then suffered a panic attack and requested to be transferred away from FIB and she was then posted to IIT on a three month temporary posting. The matter was referred to DS Bean at page 653, he stated:

> *"I am therefore concerned that if Dena has requested a temporary move to a completely different role in an unfamiliar department while she is suffering an acute period of anxiety then this actually contradicts the medical recommendations as advised by the Dr Dickson that were dictated in her presence. Based on Dr Dickson's assertions any move would be detrimental to her health unless of course, she hasn't been entirely honest in the self disclosures of her symptoms".*

At paragraph 17 of his statement:

> *"It did not make sense and I wondered if Dena had far more control over her anxiety than she was claiming".*

86. On 30th April, the claimant resubmitted the AWR requesting reasonable adjustments at pages 660 – 665. This was supported by PS Costello-Byrne and also Acting Inspector Paul Crews. It is, as stated in paragraph 78 of Mr Stephenson's skeleton, *"in stark contrast to that of the FIB".* At the same time the claimant met with Miss Dolling to discuss the various options and there was discussion about the 3P IHR process. Miss Dolling told the claimant that any return to the FIB would be qualified with three conditions. Firstly, they would not accommodate her working from home. Secondly, DS Fletcher would continue to supervise her and it was clear that the relationship between the claimant and DS Fletcher was not good and had probably broken down. Thirdly, that the claimant would be required to satisfy the terms of the three month return to work plan.

87. The claimant considered that the FIB management did not want her to return. Indeed, as earlier highlighted that is quite a correct conclusion to reach especially bearing in mind the comments of DI Wood at page 671.

88. The next matter which was very carefully considered because when it was first placed before us, it takes some mental athletics to actually work out what is being stated, is paragraph 82 of Mr Stephenson's skeleton where Dr Vivian stated *"that he anticipated that the claimant had not worked more than 30 hours a week unless able to work from home"*. He went on to say *"that the number of hours she could work would be increased by allowing her to work from home regularly".* Having given it much thought, we think that the statement in the final sentence of paragraph 82 of Mr Stephenson's skeleton is exactly correct namely that, in other words, the claimant could work up to thirty hours per week without home working but more than thirty hours if home working was allowed.

89. Notwithstanding this, the claimant's IHR was initially set for the 2nd November 2018. She was notified of this on 11 October 2018, she quite understandably felt that there was a rushed process because she was being given only three days to reply. This woman had worked for the police for nearly twenty years and was being asked in three days to make a really serious, important, decision in relation to her future within the service. Ultimately, the time for responding was increased from three days to a twenty-eight day period but in fact within that period the claimant indicated that she had decided that she would accept the ill-health retirement. She was also in touch with the Police Federation. In her cross examination by Mr Arnold the claimant stated *"It was almost a relief to remove myself from the environment".* The claimant met with the Chief Constable on 6th November and expressed her concerns but on 15th November, DCC Stratford signed off the report. The Tribunal has already stated our concerns that he was not given the full picture before that report was signed off.

90. We turn now to the specific complaints. These complaints are set out in the agreed list of issues. It was extremely helpful of Counsel and legal representatives on both sides to set out the legal issues in such a clear way we thank them for that.

Complaint A

91. Much of our findings have already been made apparent from what is set out earlier in these reasons, and we do not repeat them individually now going through each complaint but we do make certain additional comments.

92. Complaint A is an allegation of the refusal of working three hours on a Friday and three hours on a Sunday. This is referred to as PCP1. The recommendations are again to be highlighted, without repeating, from Dr Dickson. The evidence strongly supports the conclusion that the respondent applied the requirement to work six hours on Fridays PCP1 to the claimant. It would have been a reasonable step for the respondent to have allowed the claimant to work three hours on a Friday and three hours on a Sunday. We read with approval paragraphs 30 and 31 of the claimant's skeleton.

93. For all the reasons set out earlier in these reasons we find that the complaint A is established and therefore there was a failure to provide reasonable adjustments.

Complaint B

94. This is an allegation of a failure to reduce the claimant's workload from January 2018. The PCP was to undertake a large volume of work. This was against a backdrop that the claimant had repeatedly raised concerns about her ever growing workload and indeed had made reference to having an assistant and duties were added to her workload. It would have been a reasonable step for the respondent to have taken to reduce her workload in accordance with the recommendation of the Force medical officer dated 31st January 2018. For all the reasons earlier set in this judgment it is also a failure to provide reasonable adjustments.

Complaint C

95. In relation to complaint C this is in relation to direct harassment and discrimination arising from. It is important to remember that Section 212 of the Equality Act provides that it is not possible from a particular allegation to have a finding of harassment and direct discrimination.

96. On day nine of the case, at the invitation of the panel, Counsel for both sides were invited to make any further submissions in relation to that point. Mr Stephenson had provided some written submissions, Mr Arnold, for entirely understandable reasons, simply relied on his previous submissions on that point in relation to direct.

97. In relation to the direct claim the Tribunal entirely agree with Mr Arnold that there was no evidence led that DS Fletcher would have treated a non disabled officer or a disabled officer with a different disability more favourably in circumstances with no material difference. We find that there is no evidence of less favourable conduct and therefore would not find for the claimant in relation to direct discrimination. However, rather than dismissing it which we do not think is the correct step we go onto find that this amounts to harassment. We make no adjudication upon the direct discrimination claim.

98. Going onto the harassment allegations we find that having regard to the conduct of DS Fletcher on 21st February and 14th March that the found facts created an intimidating, hostile, degrading, humiliating or an offensive environment for the claimant and we agree with paragraphs 36 and 38 of the claimant's skeleton argument in relation to 21st February. We agree with paragraphs 49 – 51 of the claimant's skeleton argument in relation to the 14th March. For all the reasons we find that the harassment succeeds.

99. There is no provision against also finding regarding an "arising from" claim and we would agree in relation to that with paragraphs 133 – 135 of the claimant's skeleton argument. The claims of harassment and arising from succeed in relation to complaint C.

Complaint D

100. In relation to complaint D this is to some extent linked with complaint H and this is the conduct and comments of DS Fletcher on 16th April and issuing the claimant with a return to work plan. Complaint D is a requirement for the

claimant to maintain regular contact with DS Fletcher whilst she was off sick failing which she be issued with a formal plan in the terms set out in the return to work plan of 16th April. This was clearly a PCP requiring the claimant to maintain regular contact because of the claimant's medical condition she was less able to meet the requirements and more likely to be subject to such disciplinary sanction. It would have been a reasonable step for the respondent to have taken not to issue the return to work plan in those terms and not to treat any failure as a conduct issue. We find therefore, for this and for the reasons earlier set out that the reasonable adjustments claim succeeds.

101. In relation to the harassment, we also find that what happened on 16 April for the reasons already set out caused an intimidating, hostile, degrading, humiliating or offensive environment and the claim for harassment also succeeds.

102. In relation to the discrimination arising from which is linked to H we repeat, with approval, paragraphs 136 – 140 of Mr Stephenson's skeleton argument and that claim succeeds.

Complaints E and F

103. In relation to complaints E and F, E is removing the claimant's permission to work from home on 16th April and F is removing the claimant's permission to work in a station close to home on 16th April. This has already been dealt with in some detail above. It would have been a reasonable step for the respondent to have not removed the claimant's permission to work from home and and/or be allowed to work in a station closer to home when both had clearly worked satisfactorily. That is a reasonable adjustment claim and that succeeds.

Complaint G

104. In relation to Complaint G this is a reasonable adjustment claim. PCP 5 was a requirement to undertake full duties of the ITO role from 18th July 2018 but as is clear from page 536 the expectation of Dr Dickson was as follows: "It would also be helpful if the claimant could have defined duties eg continuing exclusively with vehicle intelligence duties as the volume uncertainty and variety of FIB duties considerably adds to her anxiety and that her ability to cope overall." By suggesting a PCP of a generic IDO role that flew in the face of medical recommendation because she would have been expected to do work with which she perhaps had no or little experience. The claimant was therefore substantially disadvantaged because her symptoms meant that she was less able to meet the requirements and was more likely to lose her role as an IDO. For that and all the other reasons set out that complaint succeeds.

Complaint H

105. In relation to complaint H that is a discrimination arising from and the Tribunal repeat what was found in relation to D set out earlier.

Complaint I

106. In relation to complaint I none of these complaints succeed.

107. In relation to the reasonable adjustments claims we find that Mr Arnold is right to assert that the claimant has failed to identify any PCP regarding her ill health retirement that places her at a substantial disadvantage in comparison with non disabled persons. She made no comments on the form, she consented to the ill health retirement having had access to advice from the Federation, and although she drafted a letter of appeal that letter was never sent. Although we are critical about the provision of the three days to comment upon her IHR what is said under complaint A is the medical health retirement. Looking at the claim of "arising from", she has not made out a prima facie that the ill health retirement was in fact against her wishes and in relation to that we would certainly refer to paragraph 182 of the respondent's skeleton argument and agree entirely with it without repeating here. Therefore, the claim of arising from and the claim for reasonable adjustments both fail for the reasons set out above and as briefly summarised here.

108. In relation to the claim of harassment the Tribunal again agree with the submissions made by Mr Arnold in his skeleton argument at page 183 and it is clear that the allegations of harassment are not established. The harassment claim, in relation to complaint I also does not succeed.

109. We wish to highlight that our comments in relation to those specific complaints have to be read in conjunction with our findings throughout the extended reasons.

110. Having announced our decision, it is now appropriate for directions to be made in relation to the remedy hearing. Post script : those were set out on a separate document.

_____
Employment Judge R Harper MBE

Date: 3 January 2020
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