



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4102920/2019

Held at Edinburgh on 20, 21, 27 and 28 November 2019

**Employment Judge: W A Meiklejohn
Tribunal Members: Mr S Gray
Mr T Lithgow**

Mr Simon White

**Claimant
Represented by Mr D Jaap,
Solicitor**

Chief Constable, Police Service of Scotland

**Respondent
Represented by Dr A
Gibson, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that the respondent did not treat the claimant less favourably because of the protected characteristic of disability and his claim of unlawful discrimination under section 13 of the Equality Act 2010 is dismissed.

REASONS

1. This case came before us for a final hearing on both liability and remedy. Mr Jaap appeared for the claimant and Dr Gibson for the respondent. We set out the issues

below but in summary the claimant was alleging that he had been subjected to unlawful direct discrimination under section 13 of the Equality Act 2010 (“EqA”) because of the protected characteristic of disability.

2. The claimant did not assert that he was disabled. Indeed he was clear in his ET1 claim form that he was not disabled but he alleged that the respondent had perceived that he was disabled and had subjected him to discriminatory treatment because of that perception.

Procedural history

3. There had been two Preliminary Hearings. The first of these took place on 28 June 2019 before Employment Judge Porter. The principal outcome was an Order that the claimant should provide Further and Better Particulars of his claim and the Respondent should, if so advised, respond to these. Thereafter Further and Better Particulars were submitted by the claimant and responded to by the respondent.
4. The second Preliminary Hearing took place on 30 August 2019 before Employment Judge Sutherland. The claimant was ordered to provide additional information about his claim and the respondent was allowed to respond, if so advised. The result was some further amendment of the statement of claim, providing sharper focus on the agreed issues and the events asserted to constitute less favourable treatment.

Alleged less favourable treatment

5. The Note issued after the second Preliminary Hearing set out the four events which the claimant asserted to be less favourable treatment in these terms –
 - (a) On 29 November 2018 the refusal to return the claimant to non-live fire training.
 - (b) On 12 December 2018 the reference to the 2014 absence within the Reinstatement Request.

(c) On 14 January 2019 the second referral to occupational health.

(d) On 21 January 2019 the request that occupational health examine the claimant's medical record and report which refers to depression.

Agreed issues

6. That Note also set out the agreed issues in these terms -

(a) Did the respondent perceive the claimant to have a mental impairment?

(b) Did the respondent perceive that the impairment had a substantial and long term adverse effect on the claimant's ability to carry out normal day to day activities?

(c) Did the respondent treat the claimant less favourably than it treats or would treat others?

(d) Did that treatment occur because of the claimant's perceived disability?

(e) What if any declaration, order for compensation and/or recommendation should be made?

Background chronology

7. In his claim form the claimant provided a chronology of the events relevant to his claim as originally pled. This included events relating to the treatment of the claimant by his former line manager, PI K Warhurst. Not all of these events remained relevant to the claim as finally pled, and in his closing submission Mr Jaap provided a revised "*Background Chronology*". We reproduce this here in abridged form (and amended where we felt appropriate) as it sets the scene for, but does not form part of, our findings in fact –

On or around 21 August 2014 – claimant reported to respondent a diagnosis of moderate clinical depression. Claimant's status as Authorised Firearms Officer ("AFO") was temporarily withdrawn ("TW").

1 February 2015 – formal grievance submitted by claimant as he had not been returned to active duty following TW of his AFO status.

13 May 2015 – Claimant reinstated as AFO.

29 March 2017 – at annual Personnel Development Check claimant is questioned by PI A Findlay regarding his "depression".

27 June 2017 – claimant returned from sickness absence following mountain bike accident involving concussion and bruised ribs. Claimant asked by PI Findlay about his depression in 2014 allegedly following request from HR that PI Findlay should comment on this in claimant's annual Authorised Firearms Review.

7 January 2018 – claimant asked PI Findlay to remove reference to "*depression*" from Scope record.

23 August 2018 – claimant signed off work by his GP with work related stress, relating to his treatment by PI Warhurst.

24 August 2018 – PI Findlay submitted document seeking claimant's TW from operational firearms duties, including a reference to claimant's absence with depression in 2014.

29 October 2018 – claimant returned to work but remained TW as AFO.

14 November 2018 – claimant assessed fit to return to all duties by Optima Health (respondent's medical advisers) following telephone consultation.

29 November 2018 – claimant given work related stress assessment by PI Findlay.

12 December 2018 – PI Findlay submitted AFO reinstatement request in respect of claimant, including reference to claimant’s 2014 absence.

14 January 2019 – PI Hepburn advised claimant of second referral to Optima for face to face consultation.

21 January 2019 – Supt D Pettigrew wrote to Optima asking them to consider contents of “*additional management information*” which included Return of Firearms Authorisation report dated 16 February 2015 relating to claimant.

22 January 2019 – claimant attended Optima face to face assessment and signed as fit for all duties.

25 January 2019 – grievance submitted by PI A Malcolm of Scottish Police Federation (“SPF”) on claimant’s behalf.

29 January 2019 – claimant reinstated as AFO.

Applicable law

8. The key provisions of the Equality Act 2010 (“EqA”) engaged by this case are (a) section 6 as supplemented by Schedule 1, (b) section 13 and (c) section 23. These provide as follows –

6 Disability

(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.

- (2) A reference to a disabled person is a reference to a person who has a disability.
- (3) In relation to the protected characteristic of disability –
- (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
 - (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
- (4) This Act....applies in relation to a person who has had a disability as it applies in relation to a person who has the disability....
- (5)
- (6) Schedule 1 (disability: supplementary provision) has effect.

Schedule 1 Disability: Supplementary Provision

....2 Long-term effects

- (1) The effect of an impairment is long-term if –
- (a) it has lasted for at least 12 months,
 - (b) it is likely to last for at least 12 months, or
 - (c) it is likely to last for the rest of the life of the person affected.
- (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur....

13 Direct discrimination

(1) 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....

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.

(2) The circumstances relating to a case include a person's abilities if –

(a) On a comparison for the purposes of section 13, the protected characteristic is disability....

9. We also refer to the case of **The Chief Constable of Norfolk v Coffey [2019] EWCA Civ 1061** where the Court of Appeal upheld a decision of the Employment Appeal Tribunal which in turn had upheld the decision of an Employment Tribunal that Ms Coffey had been discriminated against because of a perceived disability. This case confirmed two important points which are relevant to our determination of the present case –

- An act will be caught by section 13(1) EqA where A acts because he or she thinks that B has a particular protected characteristic even if B in fact does not – “perception discrimination”.
- The putative discriminator must believe that all the elements in the statutory definition of disability are present – although it is not necessary that he or she should attach the label “disability” to them.

Evidence

10. For the claimant we heard evidence from –

- the claimant himself
- Mr A Malcolm, a Police Inspector employed by the respondent and seconded to the SPF, and chair of the SPF East area committee
- Mr I Reid, a Specialised Firearms Officer employed by the respondent

11. For the respondent we heard evidence from –

- Mr A Findlay, a Police Inspector employed by the respondent in Policing and Operations, East Scotland
- Ms P Hepburn, a Police Inspector employed by the respondent as a Firearms Authorisation Review officer (formerly referred to as an HR Inspector)

12. We describe the witnesses as “*employed*” by the respondent having regard to section 42(1) EqA which provides, for the purposes of the relevant Part of the Act, that “*holding the office of constable is to be treated as employment*” (by the chief officer or the responsible authority as the case may be).

13. We had a joint bundle of documents extending to 257 pages to which we refer by page number.

14. It is not the function of the Employment Tribunal to record every piece of evidence presented to it and we have not attempted to do so. We have focussed on those parts of the evidence which we regarded as most pertinent to the issues we had to decide.

Findings in fact

15. The claimant holds the office of police constable with the Police Service of Scotland. He works under the direction and control of the Chief Constable who is

appointed under and in terms of section 7 of the Police and Fire Reform (Scotland) Act 2012 (the respondent).

A brief history of the claimant's employment

16. The claimant entered the Police Service on 20 March 1995 as a police constable. He was subsequently promoted to the rank of sergeant and continues to hold that rank. He became an AFO in 2004. During the period of time which is relevant for the purpose of the issues we require to decide in this case, the claimant worked in Armed Policing within Operational Support Division. Armed Policing provides a spontaneous firearms response, mainly through the deployment of Armed Response Vehicles (ARVs).
17. From 2009 the claimant was employed as an ARV officer. He was a team sergeant and Operational Firearms Commander ("OFC") tasked with management and leadership of a team of AFOs. As such he was in charge of armed officers on the ground and reported to Tactical Command in the control room.
18. During the Commonwealth Games in 2014 the claimant required to work long shifts and this impacted adversely on his health. After the Games he self-referred to the Rivers Centre in Edinburgh, which he described as a specialist clinic for firearms officers, in July 2014 and was diagnosed with moderate depression. He was then certified by his GP as unfit for work between 23 August and 4 September 2014. He was prescribed citalopram and undertook cognitive behavioural therapy. It was later confirmed that the claimant's depression had been due to an imbalance in his serotonin levels which is a physical ailment.
19. The claimant advised his line manager, at that time PI A Wallwork, of his diagnosis and his AFO status was temporarily withdrawn on or around 24 August 2014. When the claimant returned to work on or around 4 September 2014 he resumed management of his team on a day-to-day basis but his TW status meant that his access to the Armoury was removed.
20. On 16 February 2015 PI Wallwork submitted a Return of Firearms Authorisation report (57-60) with a view to having the claimant's TW status reversed. This report

contained a detailed account of the claimant's diagnosis, treatment and recovery. It referred to an occupational health report dated 30 October 2014 which confirmed that the claimant was fit to undertake all aspects of his role including firearms duties. PI Wallwork supported the claimant's return to operational duties.

21. PI Wallwork's recommendation was supported by Chief Inspector C Armstrong and by Superintendent K Kinnell. After review by Superintendent R Newbigging in People and Development (the respondent's HR department) the claimant's TW status was reversed on 13 May 2015. We return to the process for reversal of TW status below.
22. Following the restoration of his AFO status the claimant resumed his OFC role. He had a period of absence from work in 2015 for an appendectomy and a further period of absence in 2017 when he suffered concussion and suspected fractured ribs in a mountain bike accident. He also had absences relating to minor ailments and his overall level of absence was such that his attendance record was being monitored at the time of the events described below.
23. Between 2015 and 2018 the relationship between the claimant and PI Warhurst became strained. The claimant submitted a complaint about PI Warhurst's behaviour towards him which led to a disciplinary investigation of PI Warhurst.
24. On or around 23 August 2018 the claimant commenced a period of medically certified absence from work. The reason for absence was work related stress. His AFO status was TW in the same way as it had been in 2014. This was documented in a report by PI Findlay dated 24 August 2018 (101-102) in which he made reference to the claimant's absence in 2014. PI Findlay's decision to TW the claimant was supported by CI L Russell and Supt S Irvine. The report then went to Supt I Gardner in People and Development who stated in a memo dated 28 August 2018 –

“Having considered all of the circumstances surrounding Sergeant White's firearms authorisation, I agree that he should remain temporarily withdrawn from firearms duties and also all firearms training until a further assessment can be conducted....”

25. PI Warhurst was moved to other duties in October 2018 and the claimant returned to work on 29 October 2018. At this point his AFO status remained TW.

AFO status

26. Every police officer who becomes an AFO does so voluntarily, and may withdraw from that status at any time. Every AFO must go through an annual review process. Following the reversal of the claimant's TW status on 13 May 2015 his AFO status was renewed in 2015 (69-73), in 2016 (74-78), in 2017 (83-84) and in 2018 (95-98).

27. The annual review process involved a number of stages –

- (i) The first stage was submission by the AFO of a Firearms Training Application – Renewal form. Pages 70 and 75 were copies of the forms completed by the claimant in 2016 and 2017 respectively.
- (ii) The second stage was an assessment by the AFO's line manager against a list of competencies - pages 71 and 76 disclosed the assessments of the claimant in 2016 by PI Hall and in 2017 by PI Findlay respectively.
- (iii) The third stage involved input from the AFO's next line manager – pages 71 and 76 disclosed the input from CI Armstrong in 2016 and 2017 respectively.
- (iv) The fourth stage involved input from occupational health – pages 72 and 77 disclosed the Occupational Health Unit comments about the claimant in 2016 and 2017 respectively.
- (v) The fifth stage involved input from the Chief Firearms Instructor, stating whether or not the application was supported – pages 72 and 77 disclosed that input in respect of the claimant in 2016 and 2017 respectively.

- (vi) The sixth stage involved input from People and Development, again stating whether or not the application was supported – pages 73 and 78 disclosed that input in respect of the claimant in 2016 and 207 respectively.
- (vii) The final stage was approval of the renewal application by either an Assistant Chief Constable or a Chief Superintendent – pages 73 and 78 disclosed that approval in respect of the claimant by Chief Superintendent N Telfer in 2016 and by Superintendent Kinnell in 2017 respectively. [On the face of it, sign off by Supt Kinnell rather than a higher ranking officer seemed inconsistent but we did not regard this as material to the issues we had to decide].

28. Prior to the events with which we are principally concerned, the claimant went through his 2018 renewal (95-98). We noted the comments made by those who dealt with the various stages –

- (a) Line manager (PI Findlay) – *“I have observed Sgt White at training as well as operationally, he has the necessary skills to perform the role. His absence record and current Bradford score has been examined and there are no concerns at this time with regards his health or personal life. I therefore support his application to continue in the role.”*
- (b) Next line manager (CI Russell) – *“I have noted the comments made by Sgt White’s immediate line manager. However worthy of note – During the past few months Sgt White has featured in an AP enquiry carried out by me and although there is nothing at this time to preclude this application being progressed should any additional negative information regarding Sgt White’s judgment come to light a further subject report will be submitted.”*
- (c) Occupational Health Unit – no comments.
- (d) Chief Firearms Instructor (signed by PI Hepburn) – *“No issues from a CFI perspective.”*

(e) People and Development (PI Hepburn) – *“Comments from CI Russell noted. PSD/ACU confirm no issues from their perspective at this time. Absence history noted and being closely monitored by FLM PI Findlay. ASIs confirm no pattern and no additional support required. Nil else of note. Recommend approval with continued monitoring.”*

The claimant's renewal application was then authorised by Chief Superintendent M Richards. We understood the acronyms to mean – AP = Armed Policing, PSD = Professional Standards Department, ACU = Anti Corruption Unit, FLM = First Line Manager and ASI = Absence Support Interview.

Claimant's flexible working application

29. On 29 October 2017 the claimant submitted a flexible working application (85-91). His reasons were expressed in these terms –

“I have served within Armed Policing as a shift Sergeant since 2010 and have always worked the standard full rotating shift pattern of the unit during that time without complaint.

In 2016 the current variable shift pattern was introduced and I personally find it punishing in the extreme, requiring extended duty hours, less rest days and more forced overtime than any other pattern before it. On top of this I am now required to travel 145 miles regularly each month to attend multiple days training as the venue has been centralised. This results in both personal fatigue and a financial burden for Police Scotland in an average of 3.5 hours of overtime per day.

I have noticed a severe deterioration in my physical health, fitness, immune response and the quantity/quality of time with my young family under this current shift system and for those reasons I would like to apply for compressed hours under the Flexible Working SOP.”

30. The claimant's application was supported by his line manager, PI Findlay, and by Resource Deployment (TPS D Muir) and was approved by CI Armstrong on 23 November 2017, initially on a trial period basis. We noted that no reference was made to the claimant's flexible working application at the time of his 2018 AFO renewal. In particular, we noted PI Hepburn's comment "*Nil else of note*".

Daily declaration of fitness/training

31. At the start of every shift the Tactical Firearms Commander reads out a set paragraph to which each AFO is required to respond declaring that he/she is fit for duty. The claimant would do this in respect of his own ARV team. Only after this declaration would AFOs be permitted access to the Armoury to draw weapons and ammunition.

32. There were training guidelines for AFOs laid down by the Police College which had to be met. This involved around 20 training days each year. The training was arranged in modules and included shooting accuracy and tactical drills.

33. There was what the claimant described as a "*general culture*" in Armed Policing that officers would keep fit. They had to undergo an annual fitness assessment. Officers would maintain a fitness regime in their own time which, according to the claimant, resulted in a "*fairly high absence rate*" due to physical injuries.

Claimant returns to work

34. We have referred above to the claimant's employment history up to the point at which he returned to work on 29 October 2018, having been absent since 23 August 2018 by reason of work related stress. We now turn to the events leading up to and following the claimant's return to work.

35. On 22 October 2018 PI Findlay met with the claimant at his home and conducted an ASI. This was recorded by PI Findlay in the claimant's ASI history (105), including the following paragraphs –

“Met with PS White at his home address and discussed his current absence, the fact that Optima hasn’t been involved in his current absence has not meant he has not received adequate support from his GP. PS White pointed out that previous absences or their reasons had no bearing on his current absence and this absence should be taken on its own merits.

PS White has an ongoing aggravated left shoulder which he is getting treatment for, this would not prevent him returning to operational duties however.

PS White was informed that Optima would now be contacted to engage with him to establish his fitness for returning to operational firearms duties in consultation with HR. This may require information from his GP. PS White intimated that he would only consent to information pertaining to his current absence being shared.”

36. Optima Health (“Optima”) were the respondent’s medical advisers. They provided occupational health input when an AFO was seeking to have his TW status reversed. The claimant was duly referred to Optima and they conducted a thirty minute telephone consultation with the claimant on 14 November 2018. The outcome of this was included in PI Findlay’s reinstatement request (at page 114) in these terms –

“....OH Advisor....concluded that it was unlikely that the subject officer’s stress levels would escalate on his return to operational duties and was of the opinion that his physiological state was normal, his thoughts were fluent and coherent and demonstrated good insight into his presentation. She also confirmed that he did not require a further input from his GP....”

37. PI Findlay submitted a Reinstatement Request in respect of the claimant on 12 December 2018 (113-115). As well as the Optima referral, this covered the claimant’s period of absence and the background to it, the contact between PI Findlay and the claimant during his absence and the completion by PI Findlay and the claimant of an Individual Stress Risk Assessment Questionnaire on 29 November 2018.

38. The claimant's evidence was that he had requested at his meeting with PI Findlay on 29 November 2018 that he should be allowed to catch up on the training he had missed while TW and that this request was refused. PI Findlay's evidence was that he had no recollection of any such request. Given the claimant's desire to get back to AFO duties and the need for him to catch up on training before he could do so, we considered that on the balance of probability the subject of training was discussed but (a) this was not recorded as a formal request, (b) if PI Findlay did respond negatively, it was not indicative of any unwillingness on his part to see the claimant regain his AFO status (given the terms of his Reinstatement Request less than two weeks later).

39. The claimant regarded himself as disadvantaged by being unable to start to catch up on training and by the delay in progressing the reversal of his TW status. He was not permitted to access the Armoury and so could not supervise his team while they were drawing weapons and ammunition. He had to wait outside the Armoury to brief his team. He described this as "*demeaning*". He asserted that he should have been allowed to return to AFO status when declared fit by Optima on 14 November 2018.

40. PI Findlay's Reinstatement Request referred to the claimant's absence record –

"As detailed in the subject officer's original withdrawal report it is of note that he has a fairly substantial absence record, these are by far and large for injuries and minor ailments. He has a recorded mental health absence in 2015, however this was only for a period of a fortnight and in the submitting officer's opinion adds no real value in deciding whether the officer is fit enough to return to operational firearms duties."

41. PI Findlay' requested that the claimant "*be considered for reinstatement to full operational firearms duties*". This request was supported by CI Russell and Supt Irvine (115-116). The report was then sent to Supt D Pettigrew in People and Development. It reached PI Hepburn's desk on 7 January 2019.

Second referral to Optima

42. PI Hepburn told us that her role as an HR Inspector (a title which was changed to Firearms Authorisation Review Inspector in or around April 2019) was to take a “*holistic approach*”. Notably PI Findlay used the same words. She said that she would “*take all the information*” which included asking PSD to check, looking at the vulnerable persons database and checking the officer’s HR file as well as his local firearms file. She described this as looking at the reinstatement request “*as an outsider looking in*”. If something happened and there was a Fatal Accident Enquiry or a Police Independent Review Commission investigation, the Chief Constable would have to be able to justify the decision to restore the claimant to AFO status.

43. PI Hepburn said that it was her job to “*ensure that everything was considered*”. She had PI Findlay’s reinstatement request with the input from CI Russell and Supt Irvine, the claimant’s Armed Policing file, his general HR file, input from PSD and ACU and details of the claimant’s attendance record on Scope, a digital personnel record system. Three other matters had a bearing on the final decision to seek a second report from Optima –

- PI Hepburn had a conversation with Dr Glen of Optima who she described as the respondent’s “*lead medical adviser*” when, according to PI Hepburn, he expressed the opinion that a phonecall was “*never suitable*” for the return to work of a firearms officer.
- PI Hepburn was concerned about some of the language the claimant had used in his flexible working application - she highlighted the phrases “*punishing in the extreme*” and “*severe deterioration in my physical health*”.
- The case was discussed by PI Hepburn with Supt Gardner (and possibly Supt Pettigrew who succeeded to his role) and Mr P Blair, Head of Strategic Workforce Planning, where the outcome was agreement that PI Hepburn should draft a memo to be sent by Supt Pettigrew to Optima.

44. As at 8 January 2019 PI Hepburn had formed the view that a second assessment by Optima was required. She stated this in an email to CI Russell on that date (122). PI Hepburn was aware that there were data protection issues around disclosure of the claimant’s personal data to Optima and, having sought advice on

this, she approached the claimant for his consent on 14 January 2019 (125). She referred to *“additional management information”...which may merit further consideration by a Force Medical Advisor*. She told the claimant that this consisted of -

- *“Your “Sickness Absence History Report” as detailed on Scope,*
- *the report dated 16 February 2015 from Armed Policing Operations entitled “Return of Firearms Authorisation – Sergeant Simon White” and*
- *the most recent reinstatement request dated 12 December 2018 and received at P&D on 7 January 2019.”*

45. The claimant, with a degree of reluctance, gave his consent on 18 January 2019 (130). There was then a further exchange of emails between PI Hepburn and the claimant on 18 January 2019 (129-130) in which PI Hepburn sought and obtained the claimant’s consent to add the Flexible Working Application to the documents to be shared with Optima. We did not consider that it was necessary to record in more detail the content of these email exchanges.

46. The request to Optima to carry out a *“further review assessment”* was made by way of a Memorandum from Supt Pettigrew (although drafted by PI Hepburn) to Optima dated 21 January 2019 (132). This was accompanied by the additional management information detailed above, including the claimant’s Flexible Working Application. Optima were asked to *“consider the contents of these reports and, following a full medical assessment, thereafter provide guidance as to Sergeant White’s suitability, taking cognisance of both his physical and mental health, to perform the duties of an ARV officer”*.

47. The claimant attended a face to face consultation with Optima in Edinburgh on 22 January 2019. The subsequent Optima report (151-153), after narrating the background, stated as follows –

“PS White was well presented and cooperated fully with normal behaviour and full eye contact.

During the consultation I also administered standardised questionnaires which help to identify the presence of any significant psychological symptoms. The responses provided by PS White indicated no anxiety or depressive symptoms at present.

In my opinion, PS White is fit to return to his full role as Armed Response Vehicle Officer.”

SPF become involved

48. On 25 January 2019 Mr Malcolm in his capacity as the claimant's SPF representative wrote to Ms M McLean, a Business Partner within People and Development, complaining about the claimant's treatment by the respondent. In his letter Mr Malcolm made a number of points –

- In line with College of Policing guidance, the claimant had already been referred to occupational health and had been assessed as fit to return to duties on 14 November 2018.
- The claimant did not meet the definition of disability in the EqA but *“the provisions in relation to direct discrimination also extend to perception where someone is treated less favourably because a person or organisation believes the person has a disability when they don't”*.
- The claimant's absences in 2014 and 2018 while relating to mental health were *“unconnected”* but the claimant had been sent back to Optima *“to seek clarity on absences in 2014 and 2018 as both are connected to mental health”*.
- *“As a consequence, it could be suggested that Sergeant White is being discriminated by perception in relation to disability as he has been subjected to different treatment, i.e. further referrals and examinations which would not have occurred in relation to an officer with similar absences for non-mental health conditions.”*

We have quoted the last sentence verbatim because it neatly captures what this case was about.

49. Mr Malcolm accepted under cross-examination that it was highly unlikely that the claimant would have had his AFO authorisation renewed four times if he was perceived as suffering from depression.

Reinstatement of claimant's AFO authorisation

50. On 29 January 2019 Chief Supt Richards reinstated the claimant's AFO authorisation (155).

51. The claimant was not able to resume his normal ARV duties because of the need to catch up on training. He thereafter took the decision to withdraw his voluntary status as an AFO on 14 March 2019 (162) and had moved to an alternative role outwith Armed Policing.

Claimant's comparator

52. This was Mr Reid. He had worked for 13 years as an AFO and was currently a Specialist Firearms Officer. He has a form of arthritis affecting his knees. When this flares up he is unable to bear his weight and struggles to stand or walk. He suffered such an episode in December 2018. He was signed off work and was classed as TW. Mr Reid's previous similar episode had been some seven years earlier.

53. Mr Reid was off work for around six weeks. When he returned he had a telephone consultation with Optima and was permitted to undertake the training required to catch up. His TW status was then revoked. PI Hepburn's evidence was that the revoking of Mr Reid's TW status had coincided with his annual AFO renewal.

Comments on evidence

54. All of the witnesses gave their evidence without hesitation and all were credible. Where their accounts of events differed it was - appropriately in a case involving alleged discrimination by perception – a matter of perception.

Submissions

55. We heard oral submissions from Mr Jaap and Dr Gibson. Both also provided a written submission. We record their respective arguments briefly.

56. Mr Jaap submitted that the respondent had perceived the claimant to have a mental impairment. Both PI Findlay and PI Hepburn accepted that they had referred to the claimant's depressive illness in 2014, but not his physical injuries, when considering his fitness to return to AFO status in 2018/19. The delay in having his TW status revoked had caused the claimant to fall further behind with training.

57. Mr Jaap argued that the respondent's witnesses had perceived the claimant's mental impairment to have a substantial and long term adverse effect on his ability to carry out normal day to day activities. They had refused to allow him to return to training in November 2018 because of that perception.

58. Mr Jaap asked us to find that the claimant had been treated less favourably than Mr Reid. Mr Reid had been TW with a physical impairment and had been allowed to return to training immediately after his telephone consultation with Optima. There had been no second referral. In contrast, the claimant had had not been allowed to return to training until after his second Optima referral.

59. Mr Jaap submitted that but for the claimant's perceived disability - which related to his depression in 2014 – he would not have been referred to Optima a second time. There was a material difference between how the respondent dealt with physical injuries and mental impairment.

60. Mr Jaap argued that the claimant's promotion and therefore career prospects had been damaged as a result of his treatment by the respondent. He had been forced to leave Armed Policing in March 2019. Mr Jaap urged us to make a declaration

that the respondent could not and should not treat those with mental health issues differently from those with physical injuries.

61. Dr Gibson advanced three arguments. The first was that the respondent had not perceived the claimant to have a mental impairment which met the statutory definition in section 6 EqA. The claimant's episode of depression had occurred in 2014. His TW status had been withdrawn on 13 May 2015. Thereafter his AFO authorisation had been renewed four times and had been reinstated on 29 January 2019. He had been perceived to be a person capable of carrying out extraordinarily stressful day to day activities, never mind normal day to day activities.

62. Dr Gibson's second argument was that the respondent had not treated the claimant less favourably than a hypothetical comparator. This was predicated on the argument that Mr Reid was not an appropriate comparator because there was a material difference between his circumstances and those of the claimant. With reference to the allegations of less favourable treatment, Dr Gibson submitted –

- The respondent had not refused a request from the claimant to return to non-live fire training on 29 November 2018.
- PI Findlay's reference to the claimant's earlier episode of depression in his reinstatement request of 12 December 2018 was not less favourable treatment. PI Findlay had stated that this added "*no real value*".
- The decision to refer the claimant to Optima on 14 January 2019 had been taken because the claimant had been off for two months with work related stress.
- Similarly, the claimant had been referred to Optima on 21 January 2019 for a face to face consultation because he had been off for two months with work related stress and not because anyone perceived him to be disabled.

63. Dr Gibson's third argument was that Mr Reid was not a valid comparator. His circumstances were materially different to the claimant. There was no evidence that the respondent perceived him to be disabled.

Discussion and disposal

64. We approached matters on the basis of the agreed issues, save that we addressed the first two issues together –

- Did the respondent perceive the claimant to have a mental impairment?
- Did the respondent perceive that the impairment had a substantial and adverse long term effect on the claimant's ability to carry out normal day to day activities?

65. We considered whether the respondent had perceived the claimant to have a mental impairment from the time of his absence with moderate depression in 2014. We found that the respondent had not done so. The process for annual renewal of AFO authorisation was robust and it was in our view inconceivable that the claimant would have been assessed as suitable for AFO status if he had been perceived as disabled by reason of a mental impairment.

66. We recognised that there was an inconsistency in the respondent's approach to the claimant's flexible working application. At the time of the determination of the claimant's AFO renewal application in June 2018 this was information available to PI Hepburn and yet she had commented "*Nil else of note*". Following the claimant's absence due to work related stress in August/October 2018 she had taken this into account and had specifically included it in the material sent to Optima in January 2019.

67. This difference in approach was attributable to the claimant's period of absence due to work related stress. Did this indicate that the respondent perceived the claimant to have a mental impairment? The claimant's flexible working application had been subjected to greater scrutiny by PI Hepburn in the context of revocation of the claimant's TW status than it had been at the time of AFO renewal. That was, on the balance of probability, because there were no other contra-indicators at the time of AFO status renewal. That greater scrutiny led to PI Hepburn's concern about the language used by the claimant in his flexible working request.

68. Our view of this was that PI Hepburn perceived that there might be a mental impairment issue with the claimant. She was aware of the reasons for the claimant's absences in 2014 and 2018. Both related to the claimant's mental health. The language used by the claimant in his flexible working request gave her cause for concern. The key issue for us was whether that indicated that PI Hepburn had perceived that the claimant (a) did have a mental impairment or (b) might have a mental impairment.

69. We decided that PI Hepburn, and therefore the respondent, had not perceived that the claimant did have a mental impairment within the meaning of section 6 EqA when she formed the view that a second assessment of the claimant by Optima was required. Our view of the evidence was that PI Hepburn had become concerned that there might be a mental health issue by reason of (a) the claimant having had a previous diagnosis of moderate depression, (b) the claimant having recently been diagnosed with work related stress and (c) the language the claimant had used in his flexible working application. In our view, having a concern that there might be a mental health issue and referring the claimant back to occupational health for a second time was not the same as believing that the claimant did have a mental impairment satisfying the statutory definition of disability. This had not been the situation in **Coffey** where the Employment Tribunal had found that there had been a perception of mental impairment.

70. That conclusion was fatal to the claimant's discrimination by perception claim but we went on to consider the other issues.

71. Firstly – did the respondent treat the claimant less favourably than it treats or would treat others? This depended on our view of the claimant's comparator. We did not regard Mr Reid as an appropriate comparator. His arthritis in the knees was a physical impairment. In our view this was a material difference between his case and that of the claimant for the purpose of section 23 EqA.

72. We considered that the appropriate comparator was someone in the same circumstances as the claimant who was not perceived to have a mental impairment. Given our finding that the claimant was not perceived to have a mental impairment,

that was in essence a comparison of the claimant with his hypothetical self in the context of seeking reversal of his TW status. We believed that the language used by the claimant in his flexible working application would have caused PI Hepburn concern irrespective of the claimant's allegedly perceived mental impairment. We found no less favourable treatment.

73. Secondly – did that treatment occur because of the claimant's perceived disability? Our answer to the preceding issue effectively dealt with this issue. If there had not been less favourable treatment then the reason became irrelevant.

74. Thirdly – what if any declaration, order for compensation and/or recommendation should be made? Given our findings above, we did not require to address this.

75. We have focussed on the treatment of the claimant by PI Hepburn and in doing so have addressed allegations (c) and (d) in paragraph 5 above. Turning to allegations (a) and (b) in the same paragraph which refer to the treatment of the claimant by PI Findlay, we came to the following conclusions.

76. Allegation (a) was that PI Findlay had refused to allow the claimant to return to non-live fire training on 29 November 2018. We have dealt with this at paragraph 38 above. Even if we accepted that PI Findlay had done so, this was not because he perceived the claimant to be disabled by reason of a mental impairment. That would have been wholly inconsistent with his having submitted a reinstatement request for the claimant less than two weeks later on 12 December 2018.

77. Allegation (b) was that PI Findlay had referred to the claimant's 2014 absence within the reinstatement request. This was a case of "damned if you do and damned if you don't". The claimant had returned from a period of absence due to work related stress. That was a mental, as opposed to physical, reason for absence. PI Findlay was aware that the claimant had been absent by reason of depression in 2014, again a mental as opposed to physical reason for absence. His reference to the 2014 absence has to be read in the context of his reinstatement request – he said that this "*adds no real value in deciding whether the officer is fit enough to return to operational firearms duties*". That was not in our view

consistent with a perception that the claimant had a mental impairment which met the statutory definition of disability.

78. Accordingly, our decision is that the respondent did not perceive the claimant to be disabled within the meaning of section 6 EqA at the time of the alleged less favourable treatment on 29 November and 12 December 2018 and on 14 and 21 January 2019 and the claimant's claim of unlawful disability discrimination has to fail.

Date of Judgement: 11th December 2019

Employment Judgement: W Meiklejohn

Date Entered in Register: 13th December 2019

And Copied to Parties