EMPLOYMENT TRIBUNALS

Claimant: Mr Ross Keenan

Respondent: The Chief Constable of Cumbria Constabulary

Heard at: Carlisle Magistrates Court **On:** 20-24 January 2020 Deliberation 7 February 2020

Before: Employment Judge Hoey
Ms Bowman
Mr Carter

REPRESENTATION:

Claimant: Mr Walker (solicitor)
Respondent: Mr Arnold (counsel)

JUDGMENT

1. The claimant's claims under section 15 of the Equality Act 2010 are dismissed following the claimant's withdrawal of said claims.

2. The claimant's claims under section 20 of the Equality Act 2010 are not well founded and are dismissed.

REASONS

Introduction

1. This was a claim alleging disability discrimination. A final hearing had been fixed following a Preliminary Hearing that found that the claimant to be a disabled person at the material times. This hearing was fixed to determine liability.

2. The claimant was represented by a solicitor and the respondent by counsel and the hearing began by my emphasising to the parties that overriding objective in the Employment Tribunal and of the need to ensure that cases are dealt with justly and fairly, that the parties are placed on an equal footing and that the issues were dealt with proportionately.

3. As the Hearing progressed the claimant's agent was able to focus the issues in dispute and the claims being advanced. The list of issues also went through a number of iterations during the hearing. At the submissions stage, the claimant's agent confirmed that the claims under section 15 of the Equality Act 2010 were being withdrawn and were to be dismissed. We so order. The parties also produced and revised an agreed chronology which significantly helped the Tribunal.

Issues

4. As the only claim that was proceeding was for failure to make reasonable adjustments under section 20 of the Equality Act 2020, it was agreed that the live issues before the Tribunal were as follows:

   (1) When was the earliest point when the respondent knew or could reasonably have known that the claimant was disabled.

   (2) Was there a provision, criterion or practice as follows:-

   > "an obligation on the claimant to carry out rapid response work and in particular those parts which involved rapid response (such as driving response vehicles while at work or dealing with situations involving confrontation or potential confrontation)".

   (3) Did the provision, criterion or practice put the claimant at a substantial disadvantage compared to those persons who were not disabled.

   (4) Was the respondent aware or could it reasonably have been aware that the claimant was likely to be placed at such a disadvantage.

   (5) What steps could the respondent have taken to remove the disadvantage and was it reasonable to have taken those steps at that time. The claimant argued that there were 5 steps that amounted to reasonable adjustments:

      a. Obtaining an independent medical report

      b. Making permanent changes to the claimant's role

      c. Redeploying the claimant to an alternative role

      d. Dealing with the claimant's grievance appropriately

e. Taking the claimant's disability into account when applying the capability procedure

(6) The respondent initially argued that there may be a limitation point but subsequently accepted that the claims had been lodged in time.

Evidence

5. The Tribunal heard evidence from the claimant and other witnesses from the respondent, namely Mr Milby (Sergeant), Mr O'Conner (Chief Superintendent), Mr Pearman (Chief Inspector) and Miss Rogerson (Head of HR). Each witness had provided a witness statement and was asked appropriate questions in relation to the issues to be determined.

6. The parties had worked together to agree the bundle in this case which ran to 1431 pages. During the course of the hearing a further document was added with the parties' consent.

Facts

7. The Tribunal is able to make the following findings of fact from the evidence that it heard and from the productions to which its attention was directed. The findings of fact are only made in respect of those issues which require to be determined and not all issues raised by the parties, not least given the claims being advanced have changed. The findings of fact are based upon what is more likely than not to be the case. The parties had essentially agreed these findings as a result of the chronology which was prepared which the parties agreed was accurate.

Background

8. The respondent is a local police authority. As a result of austerity the respondent required to maximise its resources and ensure operational demands were being met. On a given day around 20% of available officers are unable to carry out their tasks and the respondent requires to manage the operational deployment of police officers carefully and efficiently. The respondent has fewer deployable officers than it had in the past with fewer resources.

9. The claimant was engaged as a Police Constable with effect from 19 June 2000. As a police officer, the claimant's duties included frontline operational duties. A police officer's role involves stress, whether or not carrying out front line duties.

10. The day to day management of the claimant was dealt with by his Sergeant who in turn was managed by a Chief Inspector who is overseen by the Chief Superintendent.

11. The respondent is a disciplined service and the claimant (and other officers) are required to carry out such duties as required of them, provided they are fit to do so at such times as the respondent requires (which may include during leave periods).

12. The respondent adopts a structured approach to managing staff who have health issues. Rather than focus on whether the individual would fall within the Equality Act, the respondent's focus is on doing what it can to secure the most efficient use of each resource. That results in the respondent seeking medical advice on an ongoing basis to support and seek a return to work on a case by case basis.

13. The respondent has targets to seek to ensure maximum operational deployment but these are challenging targets which are not always met. The respondent's resources were limited and under pressure.

Managing attendance

14. The existence of an officer's disability does not by itself prevent the individual from being a police officer, nor from carrying out response duties. Each case is considered on an individual basis. Thus the respondent currently employs an officer with one eye to carry out police duties. Steps are taken on an individual basis to support each person, with appropriate medical advice taken and adjustments made.

15. The respondent's HR function is managed by a team of HR professionals. This amounts to 3.6 full time equivalent roles. An HR business partner is assigned to each area of the organisation and supports the respondent in terms of people management. Generally, the same HR specialist assisted the respondent in managing the claimant.

16. The claimant was subject to a number of policies and procedures dealing with illness. One such policy was the Attendance Management Policy and Procedure.

17. Sickness absence is monitored at an individual and constabulary wide basis.

18. The respondent has an occupational health unit which liaises with individuals who have health issues. The role of the occupational health unit is to advise on medical issues affecting a police officer's performance, attendance or well-being. The unit carries out medical reviews of officers in line with the policies and of those on recuperative duties.

19. The manager of the unit, Ms Russell, is a qualified occupational health nurse. That unit engages a specialist medical adviser, called the Force's Medical Adviser ("the FMA"), who is contracted via an external agency to provide specialist medical input into absent staff.

20. The FMA is a qualified medical and occupational health doctor with experience of the work required of the respondent's organisation and the requirements in relation to it (which would include eye sight requirements, response duties and the work of a police officer). The FMA is not an employee of the respondent.

21. The FMA has detailed knowledge as to how the respondent operates and what the requirements are of staff, such as those at the claimant's level. The FMA would consider any medical information provided by the claimant (or his GP) but that information would not be given to the respondent (who would take guidance from the FMA). In the event of any dispute, the respondent would prefer the opinion adopted by the FMA, who could seek further medical input if needed.

22. Any medical assessment or review is confidential and management receive a report (provided the individual consents to the release of the report). Any medical information provided by an individual to the force's medical team, whether occupational health or the FMA, are kept confidential and not disclosed unless the individual specifically consents to such a disclosure. Reference may be made to relevant material within the reports that are provided.

23. Formal action with regard to police officer attendance is governed by the Police (Performance) Regulations 2012.

24. There are 3 formal stages to the unsatisfactory performance and attendance procedures. The first and second stages can result in an improvement notice being issued requiring an officer to improve their performance or attendance within a specified period of time. An improvement notice is normally accompanied with an action/recuperative plan to assist the officer in achieving and maintaining the requisite improvement.

25. A final improvement notice can be issued at the second stage which can then lead to a third stage meeting which can result in redeployment, reduction in rank or the extension of a final improvement notice and potentially dismissal.

26. An officer can appeal each stage of the process.

27. The respondent also has a Limited Duties Policy, Procedure and Guidance (see pages 319 to 375). "Limited duties" can mean one of 3 things: recuperative duties, adjusted duties and management restricted duties.

28. Recuperative duties mean duties falling short of full deployment usually following injury illness or medical incident during which the officer adapts to and prepares for a return to full duties and hours. Recuperative duties are intended to be structured, time limited supportive and rehabilitative. They normally last for 6 months but can be further extended. It is possible to consider adjusted duties for an officer in question.

29. Adjusted duties means duties falling short of full deployment and are available for those who attend work on a regular basis and work the hours for which they are paid. Adjusted duties are intended to be for a longer duration than

recuperative duties and are designed to provide an officer with restricted capabilities an established policing role within their capabilities.

30. The final category is management restricted duties where there are concerns as to the individual's suitability to continue in their role.

31. The underlying aim of these policies is to promote the effective management of officers to ensure those individuals are deployed to the fullest extent of their capabilities. The nature of the respondent's operation is also taken into account in that the respondent requires to produce a 24 hour a day, 7 day a week all year round effective policing service to the public and to deal with local and national issues. The operational requirements of the organisation is important.

Disability - background

32. The claimant had central serous retinopathy – "CSR". This affects both his eyes but his right eye is worse.

33. CSR causes blistering in the form of stretch marks on the retinas. These stretch marks cause disturbances to the claimant's vision. The condition affects the claimant in 2 ways. Firstly, he can have an attack of CSR which arises when vessels in the retina burst. Fluid leaks from the vessels between the layers of his eye and the discharge of fluid causes blistering. Secondly, the effect can continue after the attack since stretch marks can result once the fluid has drained away. It is possible for the condition to correct itself over 3 to 6 months which could result in a resolution for the individual concerned. That is the norm.

34. From the claimant's perspective it was not clear whether or not the condition would correct itself and there was uncertainty.

35. The condition is exacerbated by stress.

36. The claimant had 6 attacks of CSR within a 4 year period.

37. The CSR affected the claimant's ability to carry out a number of day to day activities. This includes reading which the claimant can only do slowly and with difficulty. He requires to have breaks.

38. The claimant also has problems driving as his reaction time is affected. The claimant's vision is better in good lighting. Sudden changes in intensity can cause the clamant additional problems.

39. The DVLA are aware of the claimant's condition. The claimant is fit to drive provided he only drives in suitable lighting conditions.

40. The claimant struggles with flashing lights, fast movement and bright colours which make it hard for the claimant to focus.

41. The claimant is unable to carry out close or detailed work as he has poor depth perception.

42. He is unable to move quickly due to his difficulty in focussing which leads to dizziness and nausea if the claimant moves quickly. The claimant had failed to complete the necessary fitness tests for a return to duty. One of the reasons for his failure was due to his being dizzy when running which stemmed from his eye condition.

43. The above effects manifested themselves from August 2017 onwards (when the claimant's condition became chronic) and impacted upon the claimant's ability to carry out the relevant activities from that date.

44. The claimant also suffers from severe anxiety which has led to him seeking counselling and being prescribed medication.

45. The disability relied upon by the claimant for these proceedings is his CSR only.

Absence

46. From 6 July 2015 to 21 October 2018 the claimant had 473 days' absence.

47. During his absences he was entitled to full pay and half pay at relevant points which was applied to him. When the claimant was on adjusted duties or reduced hours he received full pay.

48. On 6 July 2015 the claimant commenced an absence of 303 days as a result of his eye condition.

49. Absences in 2002 and 2006 related to work related injuries and another (unrelated) health issue.

Doing response duties

50. Part of the role of a police officer is to carry out "rapid response" work. This includes driving, arrest and detention.

51. The claimant accepted that at no stage between May 2016 and September 2018 did the respondent require the claimant to do rapid response work since the claimant did not consider himself fit to carry out such work but the respondent's aim was to the claimant's return to full response duties. They continued to aim for such a return up to March 2019.

Managing the claimant - 2015

52. On 7 July 2015 the claimant sent the respondent a letter from his GP confirming his unfitness to work

53. Mr Morgan, Consultant Ophthalmologist on 21 August 2015 wrote that the claimant had symptoms from CSR in his right eye and while there were no signs of improvement and there is an uncertain prognosis the condition could spontaneously resolve.

54. On 15 September 2015 Mr Ahmed, Associate Specialist in Ophthalmology advised that the claimant had CSR. He stated that he was "noticing improvement" in the claimant's vision. Mr Ahmed stated that as his condition was spontaneously improving no specific treatment was needed.

55. On 2 September 2015 there was an internal review meeting within the respondent (involving the claimant and his line manager) which discussed the claimant's absence as a result of his condition. The claimant described he had a blister on the optic nerve of his right eye and was awaiting further tests. It was agreed that his health would be monitored and adjustments would be entered where possible.

56. On 22 September 2015 a further internal review meeting took place and an action plan was agreed with a return to work scheduled within three months.

57. On 13 October 2015 Ms Russell, the respondent's Occupational Health Specialist, provided a report which noted that the claimant had been diagnosed with CSR which is a build-up of fluid behind the retina leading to distorted vision. To avoid long term or permanent damage the eye needs to be "rested" which means avoiding screen time and driving long distances or at night. The evidence indicated that 80-90% of people recover within 6 months and if vision does not recover laser surgery was an option. The report noted that the claimant was currently unfit for work until he had been reassessed in November.

58. On 28 October 2015 Miss Jha, Associate Specialist in Ophthalmology stated that the claimant's CSR had "completely resolved" in his right eye but that the condition had developed in his left eye. The report stated that the claimant was "reassured that this is a self-limiting condition".

59. On 12 November 2015, Dr Gounder, Speciality Doctor in Ophthalmology, noted that the condition was "self-resolving". The claimant required to keep his stress levels under control.

60. On 17 November 2015 Ms Russell provided another occupational health report which stated that the condition in the claimant's right eye had resolved as the blister had dried up, albeit he was left with some residual pigmentation which may or may not improve. He was unfit for work but was engaging with medical advice to facilitate a return to work.

61. On 23 November 2015 the claimant provided a letter from his GP signing him off work to allow healing and avoidance of stress.

Managing the claimant - 2016

62. On 20 January 2016 the claimant was invited to a first stage meeting no grounds of performance. This was called because on 22 September 2015 at an initial review meting a return to work target of 3 months had been agreed. That period expired on 22 December. As the clamant had not returned to work by this stage the matter had been escalated.

63. After the meeting an improvement notice was issued for a period of 12 months to seek to secure the claimant's return to work. It was agreed that a referral to occupational health was necessary to allow the respondent to seek to identify ways to adjust the claimant's hours and duties to facilitate a return to work.

64. The claimant appealed against that notice which was rejected by letter dated 18 March 2016.

65. On 9 February 2016 Dr McGuinness, one of the respondent's FMAs, provided an occupational health report noting the claimant had CSR and that the condition was expected to "eventually settle down". The report suggests recovery was possible albeit the claimant was struggling with certain activities, such as turning quickly. The report noted that the claimant had started to drive his own car again. His anxiety had increased and he was receiving counselling. The report stated that the claimant's underlying condition was improving.

66. On 23 February 2016 Dr McGuinness replied to Superintendent O'Connor who had expressed concerns as to the claimant's visual problems. Dr McGuinness stated that he was "not especially concerned" as the matter should "improve as his vision improves".

67. On 11 March 2016 Mr Hassan, Consultant Ophthalmologist wrote to Dr McGuinness and noted that the claimant's condition is "self-limiting within 3 to 6 months" and in the claimant's case his condition did appear to have resolved without any treatment. He was satisfied from the evidence in his possession that there was no appreciable impact upon the claimant and he expected a "complete resolution" unless there was a recurrence.

68. On 26 March 2018 the claimant was invited to another first stage meeting under the Police (Performance) Regulations 2012. This was held because the claimant's absence had been regarded as unsatisfactory; he had been absent since 6 January 2018 and at an informal review meeting a return date had been fixed for 24 March 2018 which did not happen.

69. At the meeting a return date was set for 11 April 2018 (on CIT duties). The aim was to assist the claimant in his return to front line response duties.

70. The claimant was suffering stress, particularly about a return to response duties

71. On 12 April 2016 Dr McGuinness, the FMA, provided another report noting an improvement in the condition. The claimant felt he had recovered sufficiently to allow a return to work. He had already met his Chief Inspector and agreed a return to work upon expiry of his medical certificate on 3 May 2016. He would

start on day shift only, working after rush hour. He was unfit for the more physically demanding aspects of police work. He would begin working 4 hours, 4 days a week and increasing gradually. It was anticipated that the claimant would resume full hours within 8 weeks.

72. On 4 May 2016 the claimant returned to work on a phased basis following the FMA's recommendations. He was posted on a temporary basis into an office based role working 4 hours a day as he could not work full time hours.

73. On 17 May 2016 at page 1313 Dr Nightingale, another FMA, provided an occupational health report. In her professional opinion the claimant was medically fit to work full time hours. In her view the claimant required to reduce his eye strain. Ideally she believed he should not work in an office. She stated that the claimant could return a response role which would have more distance vision than close work. She advised against working in dark environments or night shifts. The claimant's confidence was an issue and "double crewing" the claimant would help. In answer to a question as to whether there was an underlying medical condition that was likely to become progressive or chronic, she stated "recovery anticipated". In her view the claimant was fit to return to full hours, response duties if possible (avoiding office work and eye strain) with adjustments, such as double crewing.

74. On 7 June 2016 the claimant emailed Superintendent O'Conner to express concern about the suggestion he return to response duties. Superintendent O'Conner responded noting that both of the force's medical advisors had supported the claimant's return to work from a medical position.

75. On 23 June 2016 FMA Dr Nightingale wrote to Superintendent O'Conner observed that the claimant is "scared" and "anxious" as he feared blindness. At that time the claimant's visual acuity was "very good". She noted that the role of the GP and FMA are different since the FMA can recommend alternative roles and adjustments and she took the full facts into account whereas the GP fulfils a more limited role.

76. On 7 July 2016 a case conference was held which involved the claimant and his line manager. As a result of this conference, the claimant was placed in CIT, the Custody investigation Team, initially for 8 weeks on recuperative duties.

77. The claimant commenced work in CIT in July 2016. While he would nominally remain in his substantive role he would carry out an office based role which involved interviewing detainees in custody pending his return to fitness. This was not an established or substantive role at this time.

78. On 7 December 2016 Ms Patil, ophthalmologist stated that "both eyes CSR resolved" but with some atrophic changes. She stated that the changes were more subjective than objective and she discharged him from the clinic.

Managing the claimant - 2017

79. On 23 March 2017 Mr Limitsios, Consultant Ophthalmologist, noted that there was fluid in the right eye which affected the claimant's ability to focus in the dark and when using a computer for many hours but he expected a "complete resolution within the next three months or so".

80. On 6 April 2017 Dr Nightingale provides an occupational health report noting that there was a further blister on the claimant's left eye a few weeks ago. She stated that the claimant enjoys his work in CIT where he worked six hours per shift. She recommended that reduced hours advised by his GP are "very short term" and suggested a further three weeks thereafter returning to full time.

81. On 18 June 2017 the respondent identified a number of concerns in connection with the claimant's performance at work. These were unrelated to the claimant's illness. A development plan had been issued to assist the claimant improve and no further action was taken in this regard. Instead of progressing the claimant through the formal process, he was placed on a development plan until October 2017 and matters were not then taken further.

82. On 1 August 2017 the claimant's GP received a letter from Miss Butcher, an Associate Specialist in Ophthalmology. She stated that the claimant "is describing a number of chronic symptoms now". This refers to gaps in the claimant's vision. The report noted that the claimant was "comfortable and managing" in the non-front line role.

83. On 25 August 2017 Dr Ahmad, FMA, provided another report, noting that the claimant had brought a letter from his specialist (Miss Butcher's letter of 1 August 2018) which referred to a change in diagnosis and that the claimant was unfit for full response duties. Dr Ahmad noted that the claimant's acuity and field of vision was within acceptable range per DVLA guidance for driving, albeit the claimant had difficulty driving in the evenings but could still drive if his eyes were not too sore. The claimant was fit to continue with his CIT role during day shift with a 3 month review suggested. The FMA stated that the claimant was presently unfit for response duties but this should be reviewed in 3 month's time. The report stated that it was too early to determine whether or not the claimant's condition was permanent. The expectations were of a full recovery but that could not be guaranteed. It was an ongoing process.

84. On 23 September 2017 Sergeant Milby, the claimant's line manager, received Dr Ahmad's report. The respondent sought clarification as to whether the claimant was able to return to full shifts. The FMA advised that the 8 hour shift should continue. His hours were adjusted accordingly. The claimant was to remain on eight-hour shifts until the blister had healed.

85. In the course of December 2017 the respondent was concerned as to the claimant's performance but chose not to implement formal procedures and instead provided the claimant with support.

Managing the claimant - 2018

86. On 3 January 2018 Dr Nightingale provided another report. She stated that the claimant was "in a state of limbo at the present time, both medically and operationally". In her professional medical opinion based on the Consultant's report the claimant is fit for full operational duties between blister attacks. She recommended that the claimant seek more information from his consultant as Dr Nightingale believed that the consultant may be "slightly biased" with regard to a return to work. She stated that a specialist report in mid February would likely confirm "either way" whether the claimant was fit for front line duties. She also opined that there was no medical reason why the claimant could not work a full shift pattern if he was working in a room with lighting.

87. On 25 January 2018 the claimant expressed an interest in joining CID but this was not taken forward. The respondent believed that the claimant had decided against this move following discussions on 28 June 2018.

88. The claimant was absent from 1 February 2018 by reason of anxiety for seventy calendar days finishing on 11 April 2018.

89. On 6 February 2018 Ms Butcher, Associate Specialist, sent a letter to the claimant's Consultant Ophthalmologist indicating that the claimant continues to have "significant visual symptoms" which the claimant considered sufficiently acute to that he was not presently fit for front line policing duties. Ms Butcher was unable to provide any objective evidence to support the claimant's position albeit stress would be a factor.

90. On 20 February 2018 Dr Nightingale provided an occupational health report stating that in her view there was no medical reason why the claimant could not continue to work in CIT.

91. The claimant had submitted another fit note at the start of March 2018 stating that he was unfit for work. As he had been absent for more than 28 days, a formal initial review meeting was held on 17 March 2018. A return to work date of 24 March 2018 was fixed comprising 6 hour shifts.

92. On 19 March 2018 Dr Nightingale provided another occupational health report stating that the claimant was unhappy about being contacted by management who wanted him to return to work. He was not in a good place emotionally and he wanted to be left alone. The position was to be reviewed once a specialist report had been obtained.

93. On 23 March 2018 the claimant's line manager received a copy of the 19 March 2018 report which was sent to the Chief Inspector. He noted that the claimant had not performed his core roles since June 2015 and that the claimant was on reduced hours for most of 2017. He stated that the 19 March 2018 report comments contrasted with previous comments about the claimant being able to perform his duties. Views were sought as to managing the claimant's position. The Superintendent also commented that he was frustrated as to how matters had progressed.

94. On 26 March 2018 Dr Nightingale replied to the comments stating that there was no medical reason why the claimant could not return to front line duties but the difficulty was that the claimant did not want to return given emotional issues arising. In her medical opinion the claimant's "eyes are not currently having any impact upon his health status whatsoever".

95. As a result of the claimant's continued absence a first stage meeting under the Police (Performance) Regulations 2012 was convened on 4 April 2018.This resulted in a written improvement notice being issued requiring a return to work by the claimant by 11 April 2018. An action plan was to be set to assist the return to front line duties. The formal process was being initiated because of the claimant's anxiety and not because of his disability.

96. The respondent sought an up to date medical view from the FMA and Dr Nightingale responded stating that there was no reason why the claimant could not return to front line duties.

97. On 18 April 2018 Dr Nightingale provided another occupational health report. She noted that the claimant was able to concentrate for over an hour. There were issues arising in terms of the claimant's mental health and in her view the biggest issue was the claimant's frustration. She recommended the claimant return to work at 50% hours if operationally feasible, thereafter 80% hours pending a review in four weeks' time. She noted that the claimant's eyesight meets the standard required for front line duties.

98. Arrangements were put in place to allow the claimant a return to work (in the CIT role) at 50% until 2 May 2018 increasing thereafter.

99. On 25 April 2018 the claimant experienced a flare up of in his left eye and he was unable to attend work.

100. The claimant was advised on 2 May 2018 that he would remain on 50% hours pending further medical advice. The claimant was unable to work from 3 May 2018 by reason of anxiety which absence continued until 31 July 2018.

101. The respondent considered whether to progress the formal policy in respect of the claimant's absence but decided not to progress to stage 2 and instead support the claimant by continuing to manage his absence and attendance informally.

102. The claimant lodged a grievance on 1 June 2018 believing that his position has not been taken into account as a disabled person and that reasonable adjustments should be made.

103. On 8 June 2018 at page 1381 Dr Nightingale provided her professional medical opinion and answered questions asked by the claimant's Chief Inspector. The questions were asked as there was a concern that the claimant had been carrying out building works despite alleging serious health concerns that prevented him from attending work. Dr Nightingale's view was that manual work could be detrimental to the claimant's health. She also opined that for a condition to be a disability it must be substantial, long term and impact on daily

living activities. In her professional medical opinion she believed the claimant's eye condition would not fall within the definition since were no substantial adverse effects upon his ability to carry out normal day to day activities.

104. On 28 June 2018 a stage one grievance meeting took place with the outcome being that the claimant was to continue with restricted duties. A Welfare Officer would assist the claimant too. In terms of the grievance procedure a hearing should take place within 10 or 14 days.

105. On 29 June 2018 Mr Aslam, Consultant Ophthalmologist, wrote to the claimant's GP who opined that there is "a significant body of evidence all pointing to the existence of persistent visual loss". He noted that there is a risk of further recurrences and if left unchecked there is a risk of further permanent damage. Mr Aslam suggested that reasonable adjustments be made to the claimant's work environment to reduce the risk of further damage, potentially by looking at office work.

106. On 4 July 2018 Dr Nightingale provided another occupational health report. The claimant had indicated that there was further evidence which might suggest things have changed but from the information available there was no change. The FMA had not seen the report provided by Mr Aslam.

107. On 13 July 2018 the claimant was given notification of the respondent progressing to the second stage of the formal process. On 20 July 2018 a stage two meeting took place, at a which a final written improvement notice is issued with the claimant to return to work on 1 August 2018.

108. The claimant was invited to a second stage meeting under the Police (Performance) Regulations 2012 which took place on 20 July 2018. This was convened because the claimant had been absent in excess of 200 hours during the relevant period. It was agreed that the claimant would return to work on 1 August 2018 and adjusted duties would be agreed. A final written improvement notice was issued given the absence.

109. The claimant did not appeal against that notice.

110. The respondent chose to progress to stage 2 whilst the grievance was ongoing as the aim was to procure the claimant's return to full duties. The intention was to facilitate a return to work. The aim was to manage the claimant's attendance in a structured fashion by seeking appropriate adjustments.

111. A recuperative plan was issued, noting reasonable adjustments of continuing to work in CIT, reducing the claimant's hours with gradual increases. The claimant was to return to response duties once he had completed his work related tests and then he would be placed with an experienced officer.

112. On 1 August 2018 the claimant returned to work on recuperative duties working 4 hours a day. A recuperative duties plan was created which set out the shifts the claimant work and adjustments to be made. The aim was to secure the claimant's return to response duties. This report stated that the claimant had 4 periods of sickness in 2018 and was presently on a final improvement notice

valid for 12 months from 1 August 2018. The report noted that the claimant had anxiety and an eye condition. The report notes that the FMA had stated that the claimant was fit for response duties, but that the claimant disputed this. He was placed on recuperative duties within CIT.

113. The recuperative duties plan was a further attempt to secure the claimant's return to work and contained adjustments, including working with an experienced officer, reduced hours and working from the station (to avoid confrontation),

114. On 3 August 2018 the claimant left his desk because he required to take a break from looking at a computer screen.

115. On 10 August 2018 the outcome of the grievance was issued to the claimant. This stated that whether or not the claimant was a disabled person under the Equality Act was a matter for a court to determine. With regard to alternative roles it was agreed to continue to review the position taking account of the claimant's medical position and steps would be taken to protect the claimant's health.

116. The claimant was due to work 6 hours each day with effect from 13 August 2018 but as his GP recommended remaining on 4 hours per day that was agreed and he remained on a 4 hour shift.

117. On 15 August 2018 Dr Nightingale issued an occupational health report following a request she consider the fit note that had been submitted by the claimant. Dr Nightingale stated:

"The claimant has a recognised ophthalmic condition that is medically well documented. That said, the ophthalmological condition is such that an individual with it would still meet the medical standards for recruitment for full unrestricted front line duties. Therefore despite the condition hypothetically the individual would be considered fit for front line duties."

118. She noted that the claimant "declares significant eye strain and tiredness". She stated that she had suggested to the claimant that there were lines of enquiry and medical evidence that he may wish to source to establish whether specific tasks/postings should be avoided and that the claimant knew medical evidence needs to be sourced and forward urgently. She ended by stating that given he has an eye condition there are clinical reasons why 4 hours per shift would be beneficial to him and that she could not put an end date on such a request and she would consider any new medical evidence that was provided.

119. As a result of the FMA's report, the claimant's recuperative duties plan was amended to allow him to continue to work 4 hours per day.

120. On 17 August 2018 Mrs Patel advises the claimant's GP that the claimant's vision was disturbing him and that he was "possibly less confident in doing his work at the workplace at the moment". He was advised to take a rest and a further review would take place in 4 weeks.

121. The response to the grievance was issued on 20 August 2018. It was agreed that a welfare officer would be put in place to maintain contact during sickness and that HR would review all potentially suitable roles across the force taking account of FMA advice).

122. The delay in issuing the outcome letter was due to the grievance officer seeking information from HR and others. The respondent apologised for the delay.

123. On 24 August 2018 Mr Aslam, the claimant's Consultant Ophthalmologist, asks Dr Nightingale what further vision testing or objective testing she needs to consider assessment for her purposes She replies on 3 October 2018 enclosing the eyesight standards for operational policing and gives her medical view that the claimant satisfies them all. She states that the claimant has been accommodated for prolonged periods on reduced hours and that in her view frontline working would reduce his discomfort given he is presently engaged in office work which she understood created strain for his eyes.

124. Mr Aslam replied on 17 October 2018 confirming that the claimant "does seem to satisfy those eye sight standards". In his view he thinks the claimant was "suffering from visual disturbances which are too subtle or complex to be picked up by the regulations".

125. On 30 August 2018 the claimant's line manager emails the claimant regarding a requirement to work to shift, noting four hours per shift with the claimant's return to work test booked for 8 September.

126. On 4 September 2018 the claimant appealed against the outcome of his grievance. The meeting was delayed due to the requirement to source a senior officer to hear the matter.

127. On 6 September 2018 Dr Nightingale emails the Occupational Health Manager Ms Russell stating that she can medically support the claimant remaining on 4 hour shifts until the end of September and increasing to 6 hours in October increasing 2 weeks later.

128. The claim form is lodged on 21 September 2018.

129. In October 2018 the respondent took the decision not to progress to stage 3 of the Unsatisfactory Performance Procedure despite the claimant's absence having hit the relevant triggers. The decision was taken to continue to support the claimant informally.

130. Dr Ezan's, FMA, produced a report on 22 October 2018. Having reviewed the background he states that:

   "In most people CSR gets better on its own and does not cause long term changes to vision. In some people it may reoccur. The more times someone has CSR the higher the chance of having some permanent changes in vision".

131. He noted that there are reports from 6 different eye surgeons but the claimant has good visual acuity with some anatomical changes. He was also diagnosed

with anxiety and depression. The latest fit note recommended avoiding stress, working 4 hours per day and avoiding night work. The FMA noted that it was not possible to avoid stress in any role given the nature of police work (whether or not off the front line). He recommended 3 months at 4 hour shifts during day light. The claimant's mental health prevented him from carrying out the job related fitness test. His eye condition ought not to impact his ability to do the test. From the medical evidence now available the FMA recommended the claimant be excluded from response duties pending further medical opinion.

Relevant issues arising in 2019

132. Dr Ezan received a report from Ms Raynor, Consultant Ophthalmologist, on 14 January 2019 which stated that the prognosis was uncertain and that stress should be minimised. She recommended that if he is employed in day light hours only in a non stressful position he should be able to continue to work as a police officer.

133. On 23 January 2019 Dr Ezan, FMA, provided a report repeating the medical advice obtained from Ms Raynor. Dr Ezan had discussed the position with the claimant including how to reduce stress. It was noted that at the moment the claimant would struggle with front line duties which in turn causes him stress. With adjustments to reduce stress, it is likely that long term stability of his condition would ensue and the claimant may be possible to return to full time work. As a result he recommended a graduated increase in hours to full time as an adjusted duties officer. Certain other adjustments were recommended. He recommended a further review in 12 months.

134. On 18 February 2019 Dr Ezan wrote to the claimant's Chief Inspector noting that the claimant's ophthalmologist was unable to give a long-term view regarding prognosis but that provided his clinical situation improves in the long term there would be no reason why the current restrictions could not be lifted. The timescale could not be determined at this stage and he recommended 12 month adjusted duties.

135. The claimant had his stage three grievance meeting on 12 March 2019 (following a stage 2 meeting on 16 November 2018). The outcome of this meeting was that the medical advice had changed and that the claimant has been posted into the CIT role which had become a substantive role. The respondent explained that they sought to follow the advice of the FMA at each stage of the process.

Adjustments

136. The respondent sought to accommodate the claimant by following the guidance issued by the FMA. This involved the respondent adjusting the claimant's duties and roles on an ongoing basis following the FMA recommendations.

137. From July 2016 the claimant was posted in the Custody Investigation Team on recuperative duties in line with FMA advice. The claimant was retained in the CIT role and continued to work reduced hours.

138. The shift pattern required of the claimant varied depending upon the FMA advice. If there was a conflict between what the claimant's GP believed and the FMA the respondent would seek the view of the FMA with queries being raised as needed.

139. The CIT role which the claimant had been carrying out was a temporary role.. In March 2019 the respondent made a decision to create a substantive post. The claimant was advised that he would be posted into this role with effect from 1 April 2019. That was the first time the CIT role had become funded and permanent.

140. Following the claimant's permanent posting to the CIT role, there had been no material absences.

141. The respondent had also taken the following steps in relation to the claimant:

    a. The respondent sought to manage the claimant's absence informally without progressing matters formally and immediately via their formal processes (rather than dismissing)

    b. The claimant was subject to action plans and development plans to seek to procure a return to work

    c. The claimant's hours were reduced

    d. The claimant was allowed to work less days in a week than his normal shift would ordinarily require

    e. The risk of confrontation during his work was reduced by deploying the claimant into an office role

    f. The claimant was permitted to take regular breaks to minimise any strain

    g. The claimant's hours were adjusted to allow him to avoid rush hour traffic

    h. The requirement to undergo specific training was disapplied in relation to the claimant

    i. The claimant was placed in an office based role (in CIT) since July 2016

Law

142. The complaints of disability discrimination were brought under the Equality Act 2010. Section 39(5) applies to an employer the duty to make reasonable adjustments which was the key claim in this case.

Burden of proof

143. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

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

144. The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

145. Consequently it is for a claimant to establish facts from which the Tribunal can reasonable conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment

146. In **Hewage v Grampian Health Board [2012] IRLR 870** the Supreme Court approved guidance previously given by the Court of Appeal on how the burden or proof provision should apply. That guidance appears in **Igen Limited v Wong [2005] ICR 931** and was supplemented in **Madarassy v Nomura International PLC [2007] ICR 867**.

147. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Disability

148. Section 6 of the Equality Act 2010 states that:

(i) "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…

(ii) A reference to a disabled person is a reference to a person who has a disability.

(iii) In relation to the protected characteristic of disability –

i. A reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

ii. A reference to persons who share a protected characteristic is a reference to persons who have the same disability

149. Paragraph 12 of Schedule 1 of the Act provides that when determining whether a person is disabled, the Tribunal "must take account of such guidance as it thinks is relevant." The "Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability" (May 2011) (the "Guidance") was issued by the Secretary of State pursuant to section 6(5).

150. In **Goodwin v Patent Office** [1999] ICR 302, Morison J (President), provided some guidance on the proper approach for the Tribunal to adopt when applying the provisions of the (then) Disability Discrimination Act 1995. Morison J held that the following four questions should be answered (which apply as much today for the Equality Act 2010 as it did then), in order:

(i) Did the claimant have a mental or physical impairment? (the 'impairment condition');

(ii) Did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition');

(iii) Was the adverse condition substantial? (the 'substantial condition');

(iv) And was the adverse condition long term? (the 'long-term condition').

151. That case also contains a reminder that a purposive approach should be taken of the legislation in this area and that Tribunals should bear in mind that even although a claimant can carry out a task with difficulty, the relevant effects can still be present. Persons with disabilities often downplay the effects of their impairments. Tribunals should also ensure they do not lose sight of the overall picture in making their assessment.

152. Substantial means more than minor or trivial. This reflects the general understanding that disability is a limitation going beyond the normal differences in ability that might exist among people.

153. Long term also means the impairment has lasted for at least twelve months, is likely to last for at least twelve months, or is likely to last for the rest of the person's life. "Likely" means could well happen.

Reasonable adjustments

154. Section 39(5) of the Equality Act 2010 provides that a duty to make reasonable adjustments applies to an employer. Further provisions about that duty appear in Section 20, Section 21 and Schedule 8.

155. Schedule 8 paragraph 20 of the Equality Act 2010 states that an employer is under no duty to make reasonable adjustments if it could not

know or could not reasonably know both that the claimant was disabled in terms of the definition of section 6 and that the claimant is likely to be placed at the relevant substantial disadvantage that is relied upon.

156. There are therefore two ways in which the respondent can avoid the duty to make adjustments on the ground of lack of knowledge. The first is ignorance of disability. The respondent must show that it neither knew nor could reasonably have been expected to know that the claimant was disabled within the meaning of section 6 (that is, that the person was disabled as defined with each part of the definition being satisfied). The second is ignorance of the substantial disadvantage.

157. That duty appears in Section 20 as having three requirements, and the requirement of relevance in this case is the first requirement in Section 20(3):-

"the first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage".

158. The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the EAT in **Environment Agency v Rowan [2008] ICR 218** and reinforced in **The Royal Bank of Scotland v Ashton [2011] ICR 632.**

159. As to whether a "provision, criterion or practice" ("PCP") can be identified, the Commission Code of practice paragraph 6.10 says the phrase is not defined by the Act but "should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions".

160. There is no legal requirement that the PCP must be applied to the claimant himself as there may be a PCP applying to others which still places the claimant at a substantial disadvantage: **Roberts v North West Ambulance Service** UKEAT/0085/11.

161. The question of what will amount to a PCP was considered by the Employment Appeal Tribunal in October 2012 in **Nottingham City Transport Limited v Harvey UKEAT/0032/12** in which the President Mr Justice Langstaff (dealing with a case under the Disability Discrimination Act 1995 and the Disability Rights Commission's Code of Practice from 2004, both now superseded by the provisions summarised above) said of the phrase "provision, criterion or practice" in paragraph 18:

"Although those words are to be construed liberally, bearing in mind that the purpose of the statute is to eliminate discrimination against those who suffer from a disability, absent provision or criterion there still has to be something that can qualify as a practice. "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator,

and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply. These points are to be emphasised by the wording of the 1995 Act itself in its original form, where certain steps had been identified as falling within the scope to make reasonable adjustment, all of which, so far as practice might be concerned, would relate to matters of more general application than simply to the individual person concerned."

162. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the Code provides considerable assistance, not least the passages beginning at paragraph 6.23 onwards. A list of factors which might be taken into account appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards.

163. The purpose of a step is to remove the disadvantage that the PCP placed upon the clamant. There is no separate duty to consult unless there is a specific step that would remove the substantial disadvantage (see **Tarbuck v Sainsburys** [2006] IRLR 664).

164. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) defines substantial as being "more than minor or trivial".

165. The Tribunal must decide whether or not the steps relied upon could avoid the relevant disadvantage and whether it was objectively reasonable for the steps to be taken. The matter is to be considered objectively bearing in mind the aim of such steps is to remove the substantial disadvantage suffered. See Baroness Hale in **Archibald v Fife Council** [2004] IRLR 651 (at paragraph 47), Elias J in **Griffiths v Secretary of State** [2016] IRLR 216 (para 15 and 16) and Cox J in **South Yorkshire Police v Jelic** [2010] IRLR 744 (paragraph 41).

Decision in relation to the issues

166. The Employment Tribunal reached a unanimous decision on each of the issues arising and took full account of the oral and written submissions lodged by both parties to which reference is made below. The Tribunal has taken a considerable amount of time to consider the evidence and issues arising in this case and sets out its unanimous decision in relation to each of the issues below.

Knowledge

167. The first issue to be determined is when the respondent knew or could reasonably have known the claimant was disabled. The respondent requires to

know that the claimant was a disabled person as defined by section 6 of the Equality Act 2010. Knowledge of a medical condition by itself is not enough. The respondent requires to know about the impairment and that it has a long term, substantial and adverse effect upon the claimant's ability to carry out day to day activities (as set out above).

168. The claimant argues that this was known by the respondent on 21 August 2015 given the terms of Mr Morgan, Consultant Ophthalmologist's letter of the same date when he opined that the CSR is "proven" and "shows no signs of improvement" and has an uncertain prognosis and may resolve,

169. The respondent argues that it was not possible to know the claimant was disabled until August 2017. This is because the evidence available was uncertain and did not show that the condition resulted in substantial and adverse effects upon the claimant's ability to carry out day to day activities. The respondent notes that the evidence up to August 2017 was such that the claimant's condition was improving. They note:

    a. The consultant's letter of 21 August 2015 makes no mention of substantial adverse effect and there is no evidence of it lasting 12 months given the consultant suggests it could "spontaneously resolve".

    b. In September 2015 Mr Ahmed suggests the condition is "spontaneously improving"

    c. The condition was described as "self limiting" by Miss Jha in October 2015

    d. By March 2016 Mr Hassan, Consultant Ophthalmologist, stated that the condition and resolved in both eyes and there was no substantial adverse effect.

    e. On 7 December 2016 Ms Patil stated that both eyes were resolved.

    f. Mr Limitsios on 23 March 2017 expected a complete resolution within 3 months;

170. The respondent argues that Ms Butcher's letter of 7 August 2017 changed matters since the diagnosis had described chronic symptoms for the first time. The respondent only became aware of the change on 25 August 2017 when Dr Ahmad, FMA sees the report of Miss Butcher and becomes aware of the substantial effects of the condition.

171. The Tribunal considered the evidence carefully. The issue is when the respondent knew or ought reasonably to have known that the claimant was disabled, namely had a physical impairment which had a long term, substantial and adverse effect upon his ability to carry out day to day activities.

172. The respondent learned of the condition in 2015 but the medical evidence available to them was clear that the condition was self-limiting and likely to

resolve within a short period of time. It cannot be said that in 2015 the respondent knew the effects of the condition were likely to last for 12 months or the rest of the claimant's life.

173. Mr Russell's report in October 2015 reported what she had been told by the claimant and his medical advisers. That noted that 80 – 90% of people recover within 6 months.

174. The medical information available to the respondent was as submitted by the respondent above. They reasonably relied upon that evidence. There was no suggestion that the effects of the condition were substantial or long term as the reports suggested that the condition was improving. It was not unreasonable to rely upon that medical evidence. There was no reason for the respondent to challenge the medical information that was being provided and the fact that a complete recovery had been suggested as likely (and could well happen). There was no suggestion that the impairment or impact was likely to (could well) last for 12 months or had done so.

175. The Tribunal concluded that it was on 25 August 2017 that the respondent knew and could reasonably have known the claimant was disabled, which was when the information obtained by the respondent as to the claimant's condition changed markedly. At that point it was clear that the impairment had changed and the effect upon his ability to carry out day to day activities had become substantial. It was not reasonable for the respondent to have known about the disability before this date in all the circumstances.

176. This means that the obligation to make reasonable adjustments arose on that date (and beyond) which we consider below.

Provision, criteria or practice

177. The PCP relied upon by the claimant in this claim was carefully considered and carefully defined by the claimant. It was:

     "an obligation on the claimant to carry out rapid response work and in particular those parts which involved rapid response (such as driving response vehicles while at work or dealing with situations involving confrontation or potential confrontation".

178. The respondent's position was that this was never applied to the claimant since he accepted that from July 2016 he was never in fact required to carry out rapid response work. The respondent wanted him to do so but in fact he never did such work. At best the respondent had shown a desire or wish for the claimant to undertake this part of his role.

179. The claimant accepted that he did not in fact do the work but that did not stop there being a provision, criteria or practice that the work be done, and the claimant be obliged to do it. The claimant was in a role that required response work to be done. The fact he did not actually do it did not alter that fact. We take into account **Roberts v North West Ambulance Service** UKEAT 0085/11.

180. The claimant argued that there were short term adjustments made but the obligation to do response work remained. The respondent always made it clear that they required the claimant to undertake response duties.

181. There was no doubt that the claimant's role, as a police officer, required him to carry out rapid response work. There was also no doubt that the respondent required this of the claimant in the sense that their position was that the claimant, when fit, resume the duties that he was paid to do. The fact that he did not actually do those duties, because of his fitness and position, did not alter the fact that the respondent did require him to carry out the duties pertaining to the role.

182. We therefore concluded that the PCP had been established in this case.

Substantial Disadvantage

183. The next question is whether the claimant's disability placed him at a substantial disadvantage compared to those who were not disabled.

184. The claimant argues that the PCP put him at a substantial disadvantage in comparison to persons who are not disabled because his disability made it significantly harder than a non-disabled person (being a person who does not have the claimant's eye condition) to do rapid response work, which required good eyesight and the ability to process what happens quickly.

185. "Substantial" in this regard means more than minor or trivial. The disadvantage is comparative in that provided the disadvantage to the claimant is greater than that suffered by someone who does not have the disability in question, the provision has been satisfied.

186. The respondent's principal argument was that the claimant was not substantially disadvantaged since he never carried out any response work during the material period. As we discuss above, we consider that too basic and technical a proposition given the facts. The respondent did require the claimant to do the work (when he was fit to do so). The claimant was unfit/unable to do it. That did not result in the respondent not still requiring him to do response duties.

187. The respondent's secondary position was that there was no evidence showing substantial disadvantage by performing the response role. In any event it was submitted that any disadvantage in performing the response role related to the claimant's anxiety and not his disability. The respondent notes that even in

October 2018 the claimant's Consultant Ophthalmologist, Mr Aslam, accepted the claimant's eye sight appeared to satisfy the official standards.

188. The claimant argues that the evidence clearly shows that there are parts of the rapid response role which the claimant could not carry out due to his eye condition. This included patrol, supervision, public order, arrest and restraint (and dealing with confrontation), incident management, working nights and response driving.

189. Mr Aslam (in October 2018) accepted the claimant's vision appeared to meet the minimum official standards but he suggested the claimant's condition was too complex or subtle to be picked up by the official tests.

190. The claimant's position was that the respondent's witnesses knew that the reason the claimant could not carry out his response duties was principally due to his eye condition. That was what the claimant had said in cross examination.

191. We have considered the parties' submissions carefully together with the evidence we heard.

192. There must be a link between the PCP and the substantial disadvantage since the substantial disadvantage must "arise out" of the PCP.

193. It is not enough therefore for the claimant to have been disadvantaged or even badly treated since the PCP must have caused the substantial disadvantage. The test is not strict, as noted by Simler P (as she then was) in **Sheikholeslami v University of Edinburgh** [2018] IRLR 1090 since the issue is not whether the PCP caused the disadvantage but whether the disadvantage "arises out of" the PCP. It is an objective test. We have taken into account paragraph 6.16 of the Code in this regard, with caution in light of Simler P's judgment.

194. We must also identify the functional effects of the disability and the nature and extent of the disadvantage. Generalised assumptions about the nature of the disadvantage should be avoided and we must correlate any alleged disadvantage with the claimant's particular circumstances.

195. The specific disadvantage relied upon in this case is the inability to carry out the response parts of the claimant's role.

196. We are satisfied from the evidence that substantial disadvantage has been established. The claimant's disability prevented him from carrying out the response part of his role or at least substantial parts of that role. For example, the claimant failed to complete fitness tests necessary to return to duty. One of the reasons for his failure was due to his being dizzy when running which stemmed from his eye condition. That clearly impacted upon his ability to carry out response work. That was substantial.

197. The claimant was unable to drive in evenings. He struggled to read and run. These effects of the claimant's disability limited his ability to do response duties in a way that was not minor or trivial.

198. We have found that the PCP placed the claimant at a substantial disadvantage. This arose from the claimant's disability, his eye condition. That condition resulted in the claimant being unable to fully focus, run and drive at night.

199. The disadvantage was more than minor or trivial. The claimant did find it significantly more difficult to carry out response duties than a person without his disability would.

200. We are satisfied that the requirement to do response duties placed the claimant at a substantial disadvantage compared to those who did not have an eye condition. Those without an eye condition would have been able to carry out response duties.

201. The claimant's other conditions, particularly his anxiety, did also limit his ability to carry out the response duties but that did not alter the fact that his disability did so too.

Was the respondent aware or could it reasonably have been aware that the claimant was likely to be placed at such a disadvantage.

202. There was no doubt that the respondent knew the claimant was placed at a disadvantage given the steps they had taken to seek to procure the claimant's return to work and the reasons the claimant gave for his inability to work as required. The occupational health reports refer to the challenges the claimant encountered in carrying out the response duties, including the challenges driving, focussing and his being dizzy etc. Mr Aslam's report, for example, highlighted the nature of the claimant's condition. The FMA reports also refer on occasion to the claimant being unfit for response duties (which was often due to the disability). The respondent's witnesses knew the challenges the claimant encountered.

203. The respondent was aware of the disadvantage at the time the respondent became aware the claimant was a disabled person as set out above, namely in August 2017. We note for example that Miss Butcher in August 2017 noted that the claimant had to move his head to read and was unfit for response duties. The impact of his condition was clearly known to the respondent from this date.

204. The respondent therefore knew of the substantial disadvantage on 25 August 2017 and did not constructively (or reasonably) know sooner.

Steps to remove the disadvantage

205. Having found that the PCP put the claimant at a substantial disadvantage (arising from his disability) and that the disadvantage was the inability to fully carry out response work at that time, we now turn to the steps the claimant argued it was reasonable for the respondent to take to remove the disadvantage.

206. We must decide whether or not the steps relied upon could avoid the relevant disadvantage and whether it was objectively reasonable for the steps to be taken. We consider the matter objectively bearing in mind the aim of such steps is to remove the substantial disadvantage suffered. We have taken into account the comments of Baroness Hale in **Archibald v Fife Council** [2004] IRLR 651 (at paragraph 47), Elias J in **Griffiths v Secretary of State** [2016] IRLR 216 (para 15 and 16) and Cox J in **South Yorkshire Police v Jelic** [2010] IRLR 744 (paragraph 41).

207. We have taken into account the helpful guidance set out in the Equality and Human Rights Commission Code of Practice (at paragraph 6.23) in determining this issue. We shall look at each step relied upon by the claimant.

Step one – obtain an independent report or advice to address discrepancies in the advice of the FMA and the claimant's external practitioners

208. The claimant argued that the disadvantage he suffered (not being able to do response duties) was perpetuated by not having a resolution of the perceived differences in the medical position. The claimant's solicitor pointed to fact that the FMA and medical specialists all had a different view on the seriousness of the condition. He argued that any independent report would "almost certainly" have the effect of causing a "rethink" with regard to following the FMA advice since an independent report might say the FMA was wrong and the claimant's specialists should be listened to.

209. The respondent's counsel submitted that obtaining a report is a neutral act it is not a step. The claimant presupposes that the report would be beneficial to him but there is no evidence of that. Thus even if the getting of the report was a step, it would only remove the disadvantage if it was favourable to him which was far from certain given the evidence in his case. Conceptually this is not a reasonable adjustment.

210. The purpose of a step is to remove the disadvantage that the PCP placed upon the clamant. There is no separate duty to consult unless there is a specific step that would remove the substantial disadvantage (see **Tarbuck v Sainsburys** [2006] IRLR 664). We accept that there were some differences in approach as between the evidence the claimant and the position adopted by the FMA but that was not unusual since the FMAs each provided their expert medical opinions from all the information available to them, which included not just the claimant's medical reports but the knowledge of the role and alternatives that existed, and knowledge of the wider picture.

211. We are not satisfied that the obtaining of a medical report by itself is a step that could remove the disadvantage the claimant suffered. The respondent followed the advice it had and sought, at each stage, to ensure the steps they had taken were medically supported.

212. Even if the obtaining of a report was a step, we are not satisfied that it would have been a reasonable one in the circumstances, when assessed objectively.

213. One of the considerations within the Code (when assessing reasonableness) is the practicability of the step. We are not satisfied that obtaining a report would be effective in removing the disadvantage. While it would be enough for there to be a prospect that the disadvantage be removed, there is no evidence that an independent report would necessarily disagree with what the FMA said or alter what the respondent did. There was as much chance such a position would confirm the respondent's position.

214. Objectively considered we did not consider this proposed adjustment to have been reasonable in the circumstances.

Steps 2 and 3 – Making a permanent change to the claimant's duties to avoid the requirement that he do rapid response work

215. The issue here was being required to carry out response duties when the claimant considered himself to be unfit to do such work. His position was that requiring him to carry out response duties put him at a disadvantage compared to those who did not have his disability since he was unable to carry out his role. His position was that if the requirement to do response duties was removed, he would be able to carry out the remainder of his duties.

216. We decided that removing the duties permanently would have removed the substantial disadvantage since not requiring the claimant to do the response duties would mean he is not disadvantaged in carrying them out. The question is whether this was objectively reasonable.

217. We have carefully considered this step given the evidence that was presented. We have considered the matter objectively to determine whether the step was reasonable in all the circumstances.

218. By September 2018 (when the claim was lodged) the evidence before the respondent was that there was still a prospect of a recovery. The respondent had taken medical advice from the FMA and sought to introduce adjustments to facilitate the claimant's return to response work. This was an ongoing process.

219. The respondent had made a number of adjustments with a view to the claimant's return to response duties. The medical information available to the respondent was that the claimant was likely to be able to return to response duties. While the claimant may have disagreed with this, that was the medical position.

220. The steps the respondent had already taken sought to allow the claimant space to return to full duties. This remained the position even although the claimant was unable to do the response duties for the periods in question. The prognosis was that there was likely to be a return to fitness. Indeed the FMA's position was that she considered the claimant on occasion to be fit for response duties even when the claimant himself considered himself to be unfit. There was a concern that the unfitness was not due to the disability but mental issues. The claimant did have other issues which had an impact on his ability to carry out the response duties.

221. From the evidence available, it was reasonable to anticipate such issues could potentially have been resolved such that a return to response duties was entirely possible at this time or within a reasonable time. The recuperative duties plan in August 2018 envisaged such a return which had the backing of the medical experts.

222. The information available to the respondent suggested that the claimant was able to return to work in a response role. They had taken and were taking reasonable steps to secure this. In our view we did not consider it reasonable during the period up to and including the date the claim was lodged to remove the requirement to do response duties permanently.

223. There were other steps that were reasonable to remove the disadvantage, which were the steps the respondent was taking and continued to take, including changing his hours, limiting his shifts, providing support during shifts (by double crewing) and having him work in the CIT role on a temporary basis to allow the claimant time to recuperate and then return to response duties.

224. In September 2018 the FMA's position was that office work could potentially affect the claimant adversely. Permanently removing response duties from the claimant's role (and thereby placing him in an office based role) could potentially adversely affect the claimant (and cause further eye strain).

225. We also note that there was no evidence as to a permanent role into which the claimant sought to be placed. The position in that respect differs from **Jelic v South Yorkshire Police** [2010] IRLR 744 where the claimant in that case sought a job swap with a specific role. There is no obligation to create a role which is not otherwise necessary (or in existence).

226. There was no evidence before the Tribunal of any vacancy as such that the claimant sought to be placed into on a permanent basis. The CIT role was not permanent until April 2019. Prior to that date the role was carried out by different officers, but such officers could be required to carry out response work. The role itself was not a permanent role as such prior to becoming a substantive role in April 2019. The claimant was carrying out that role (albeit on a temporary basis) but that was because the role was temporary.

227. The cost of removing the claimant from front line duties is a relevant factor in considering reasonableness. The respondent was subject to challenging financial constraints and was seeking to deploy officers effectively to meet the targets and ensure the public had an effective police function. Permanently removing the claimant from response work would result in the response duties having to be covered by other officers.

228. It is relevant to note that even in January 2019 the FMA was still not satisfied that the claimant could not return to response duties. More time was needed to assess the outlook and impact of the condition.

229. We took a step back to consider whether objectively removing the requirement to work on response duties up to the date the claim was lodged was reasonable. We considered the practical outcomes and whether the adjustment

was reasonable in all the circumstances. We balanced all the factors. We were not satisfied at the time in question that the permanent removal of response duties was a reasonable step, objectively analysed in all the circumstances at the relevant time.

Step 4 – Dealing with the grievance appropriately, within a time limit and with appropriate risk management to inform decisions

230. The claimant's position in relation to this step was that in short by delaying the grievance, a successful outcome was delayed. The claimant's argument was that so long as the grievance had not been favourably resolved in favour of the claimant, the substantial disadvantage persisted and a reasonable step to remove the disadvantage was the expeditious progress of the grievance. Had the respondent dealt with the grievance quicker the disadvantage would have been removed sooner.

231. The respondent argued that this was misconceived since dealing with the grievance does not necessarily mean that the disadvantage would have been removed.

232. The Tribunal was not satisfied that the respondent unreasonably delayed concluding the grievance. The timescales involved were outwith the respondent's policy but at the same time the respondent was seeking to accommodate the claimant's position by taking into account the medical position. There was no evidence of any malice or intention as to the delay.

233. There is no evidence that dealing with the grievance in a different way, whether more quickly or otherwise, would have removed the disadvantage the claimant suffered. The Tribunal found that the claimant was placed into the CIT role when it became a substantive role. Dealing with the grievance sooner or carrying out any assessments, would not have altered that position. The claimant remained subject to office duties during the material times (and subject to the other adjustments the respondent had made). The respondent had taken such steps as was reasonable to manage the concerns arising and they followed the medical advice they had at their disposal.

234. It is not clear that the steps relied upon in this regard would be effective in removing the substantial disadvantage (being unable to carry out all response duties). The respondent was aware of the claimant's position that the requirement to carry out response duties was, in his view, placing him at a disadvantage, since that was why they had adjusted his role. In our view dealing with the grievance differently and carrying out assessments would not have altered the position in any material respect.

235. We are not satisfied that it was practicable to have dealt with the grievance in a more expeditious fashion in all the circumstances. While that would have been an ideal position, ultimately the respondent relies upon its officers who have operational duties in addition to managing staffing. The respondent was also seeking input from HR and others to conclude the grievance. The respondent provided the claimant with an explanation as to the delay and had involved the claimant in the process. Any other assessments would have taken into account

the evidence that the respondent had which would not have changed the position or removed the disadvantage.

236. In all the circumstances and considering the matter objectively we considered that the step relied upon under this heading was not therefore a reasonable adjustment.

Step 5 – taking account the claimant's disability when assessing what action to take against the claimant pursuant to the capability procedure

237. In this regard the claimant argued that respondent failed properly to take account of the claimant's disability in progressing the claimant via the formal process. By insisting upon the claimant's return to work, via the internal processes, the claimant was "being set up to fail". The claimant's solicitor conceded that some of the process was based upon absence triggers (and not the disability) but ultimately this derived from the claimant's disability which ought to have been taken into account.

238. The claimant's concession is an important (and correct) one. The claimant was on a development plan in June 2017 due to performance issues which had no connection with any disability.

239. The claimant remained on a development plan until October 2017 rather than progressing via the formal process.

240. In December 2017 and despite continuing underperformance the respondent decided not to progress formally and instead provide the claimant with further support. This was a matter conceded by the claimant.

241. The respondent extended its processes in its application with regard to the claimant's attendance.

242. Thus in 2015 and 2016 the claimant was absent for over half the year with the claimant being formally progressed on 2 February 2016 with a written improvement notice being issued. The claimant returned to work on 4 May 2016 and the process lapsed until 2018.

243. The capability process was initiated in 2018 due to anxiety and not his eye condition. Stage 1 commenced on 4 April 2018 with a written improvement notice being issued. This related to the claimant's absence by reason of anxiety, his mental impairment, not the disability.

244. The respondent had already adjusted the triggers within the policy by extending the trigger points. Thus in May 2018 the claimant's absence had reached a stage where stage 2 could have been invoked since the written improvement notice had been breached by further absence but the respondent did not formally progress matters.

245. With regard to the practicability of the adjustment, the Tribunal is not satisfied that this step would have removed the disadvantage being relied upon. Leaving aside the steps the respondent did take, taking into account the claimant's

disability in making decision would not by itself result in any different outcome to the claimant. These steps were about taking formal action to facilitate the claimant’s return to work. That was not unreasonable.

246. Putting the claimant’s case at its highest in this regard would have resulted in the respondent taking no formal action against the claimant as a result of his absence. That would not result in removal of the disadvantage, the application of the requirement to do response duties.

247. In all the circumstances this was not a step which was reasonable to take.

Summary

248. In summary, we have concluded that the steps advanced by the claimant were not reasonable in the circumstances and the claim under section 20 of the Equality Act 2010 is not well founded.

249. The claim is accordingly dismissed.

Employment Judge Hoey

Date: 28 February 2020

JUDGMENT SENT TO THE PARTIES ON
3 March 2020

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.