**Case Number: 2205459/2012**

**Reserved Judgment**

# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | **and** | **Respondent** |
|---|---|---|
| **P** | | **Commissioner of Police of the Metropolis** |

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**SITTING AT: London Central** **ON: 10-13 February 2020**

**BEFORE: Employment Judge A M Snelson** **MEMBERS: Ms G Gillman**
**Ms O Stennett**

On hearing Mr E Kemp, counsel, on behalf of the Claimant and Mr J Crozier, counsel, on behalf of the Respondents, the Tribunal unanimously adjudges that:

(1) The Claimant's complaints of discrimination arising from disability, failure to make reasonable adjustments and disability-related harassment are not well-founded.
(2) Accordingly, the proceedings are dismissed.

## REASONS

### Introduction

1 The Claimant, a British woman of Pakistani descent now 38 years of age, joined the Cambridgeshire Police as a trainee Constable in 2005 and transferred to the Metropolitan Police in 2008. She was confirmed as a Detective Constable in July 2011. Her period of service as a police officer ended with her dismissal on 12 November 2012 on the stated ground of gross misconduct.

2 It is material to record that, in 2002, at the age of 20, the Claimant was taken to Pakistan and compelled to marry a man not known to her and many years her senior. She never accepted the arrangement and, the following year, was able, with the assistance of the British authorities, to leave and return to the UK. On 20

September 2010 following a four-day trial in the High Court, Baron J declared the marriage invalid for want of consent.[1]

3 The failure of the marriage and the High Court action were a source of considerable resentment on the part of members of the Claimant's family over a protracted period. On 10 April 2010 she was attacked in her home by two Asian men and warned to discontinue the litigation. She sustained significant injuries. The culprits were never identified. The Claimant has always believed that her family was behind the attack. Baron J felt unable so to find, but accepted that extreme pressure had been applied to her to withdraw the case.

4 The Claimant was diagnosed with PTSD in September 2010. The Respondent accepts that, from diagnosis until her dismissal from the force, she was disabled by that condition.

5 On 12 September 2011, whilst off duty, the Claimant went in the company of other off-duty police officers to a nightclub, where she misappropriated the property of two other people and was required to leave by members of the nightclub staff.

6 The Claimant was arrested on suspicion of theft on 11 November 2011. Soon afterwards it was decided that no criminal proceedings would be brought. A disciplinary investigation followed, which culminated in her dismissal.

7 By her claim form presented on 3 December 2012, the Claimant, then acting in person, brought complaints of disability discrimination which were not altogether clear.

8 In the response form the Respondent raised a number of challenges to the Claimant's case, including the averment that the Tribunal was without jurisdiction because the disciplinary hearing at which she was dismissed was a judicial proceeding to which an absolute immunity attached.

9 In March 2013 the Claimant's case was helpfully clarified by means of further particulars supplied by solicitors whom she had instructed, which specified claims of discrimination arising from disability, failure to make reasonable adjustments and disability-related harassment.

10 The merits then took a back seat. The extraordinary delay in bringing this dispute to a final hearing is explained by the fact that the jurisdictional issue was litigated through four levels of adjudication, starting with the Employment Tribunal and ending with the Claimant's successful appeal to the Supreme Court.[2]

11 In January 2019, pursuant to a direction of the Tribunal, the Respondent delivered fresh, comprehensive grounds of resistance, which enabled the parties to agree a list of issues. We attach that list as an appendix to these reasons.

---

[1] See *Re P (Forced Marriage)* [2011] 1 FLR 2060. The remedy of a declaration of nullity being unavailable, the Court granted the declaration pursuant to its inherent jurisdiction. The judge found that the Claimant's evidence had been "embellished" but accepted the central assertion that she had not freely consented to be married.

[2] See *P v Commissioner of Police of the Metropolis* [2017] UKSC 65.

12 The case came before us on 10 February this year for final hearing on liability only, with four days allowed. The Claimant was represented by Edward Kemp, counsel, and the Respondent by Jesse Crozier, counsel. We are much indebted to both for their clear, concise and well-judged advocacy.

**The Legal Framework**

*The reach of the 2010 Act*

13 The 2010 Act protects employees and applicants for employment from discrimination based on a number of 'protected characteristics', including disability. By operation of s42, a police officer is treated as 'employed' by his or her chief officer.

14 Discrimination is prohibited in the employment field by s39 which, so far as relevant, states:

> **(2) An employer (A) must not discriminate against an employee of A's (B) –**
>
> **…**
> **(c) by dismissing B;**
> **(d) by subjecting B to any other detriment.**

Parallel protection against harassment is afforded by s40(1)(a).

*Discrimination arising from disability*

15 Discrimination arising from disability is covered by the 2010 Act, s15, which, so far as material, provides as follows:

> **(1) A person (A) discriminates against a disabled person (B) if –**
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**

16 In *Pnaiser v NHS England* [2016] IRLR 170 EAT, Simler J (as she then was), sitting in the EAT, summarised the meaning and effect of s15(1)(a) as follows (para 31):

> **In the course of submissions I was referred by counsel to a number of authorities including IPC Media Ltd v Millar [2013] IRLR 707, Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN and Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893, as indicating the proper approach to determining section 15 claims. There was substantial common ground between the parties. From these authorities, the proper approach can be summarised as follows:**
>
> **(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.**
>
> **(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An**

**examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.**

**(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any *prima facie* case of discrimination arises …**

**(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.**

**(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.**

**(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.**

**…**

**(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.**

17 In *City of York Council v Grosset* [2018] IRLR 746 the Court of Appeal approved the analysis of s15(1)(a) in *Pnaiser* (see the judgment of Sales LJ, para 52). The court also stressed that the defence under s15(1)(b) involves an objective analysis (*ibid*, paras 54, 58): a 'range of reasonable responses' approach is inapplicable and the Employment Tribunal must make its own assessment. (That said, the function of the Tribunal is of course to determine whether the Claimant was discriminated against at the time of the act impugned as discriminatory, which means, subject to her succeeding under s15(1)(a), deciding whether *the employer* at the relevant time had a legitimate aim and used proportionate means to achieve it. That must depend on the case actually put before the employer. What *Grosset*

emphasises (para 58 in particular) is that it is for the Tribunal to weigh that case when assessing proportionality, and that it is not obliged to adopt the employer's assessment. What is *not* permitted is an assessment at trial based on a new case which was never put before the employer. So, in *Grosset*, it was open to the Tribunal to find that the employee's expression of remorse had been genuine, despite the fact that the employer had found otherwise. But if it had been established that there was no expression of remorse, sincere or not, before the dismissal, the employee's case on s15(1)(b) could not have been improved at trial by evidence of remorse thereafter. We add this purely to be transparent as to our understanding of the law; we do not suggest that this is an instance in which a claimant's case at trial differs materially from her case at the time of the decision which gave rise to her claim.)

18 In *Aster Communities ltd v Akerman-Livingstone* [2015] AC 1399, a claim for discrimination arising from disability which arose in the housing context, the Supreme Court considered the proper approach to the s15(1)(b) defence. Lady Hale commented (para 28):

> **The concept of proportionality contained in section 15 is undoubtedly derived from European Union law, which is the source of much of our anti-discrimination legislation. Three elements were explained by Mummery LJ in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213, at para 165:**
>
> > **"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"**
>
> **This three-fold formulation was drawn from the Privy Council case of *de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80, which was itself derived from the Canadian case of *R v Oakes* [1986] 1 SCR 103. However, as Lord Reed explained in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, para 68 et seq, this concept of proportionality, which has found its way into both the law of the European Union and the European Convention on Human Rights, has always contained a fourth element. This is the importance, at the end of the exercise, of the overall balance between the ends and the means: there are some situations in which the ends, however meritorious, cannot justify the only means which is capable of achieving them. As the European Court of Justice put it in *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa* (Case C-331/88) [1990] ECR I 4023, "the disadvantages caused must not be disproportionate to the aims pursued"; or as Lord Reed himself put it in *Bank Mellat*, para 74, "In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure".**

*Failure to make reasonable adjustments*

19 The duty to make reasonable adjustments for disabled persons is covered by the 2010 Act, s20, the material parts of which state:

> **(2) The duty comprises the following three requirements.**
>
> **(1) 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.**

Failure to comply with a duty to make reasonable adjustments amounts to unlawful discrimination (s21(2)).

*Harassment*

20 The 2010 Act defines harassment in s26, the material subsections being the following:

> **(1) A person (A) harasses another (B) if –**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of –**
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **…**
>
> **(3) In deciding whether conduct has the effect referred to in sub-section (1)(b), each of the following must be taken into account –**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**

21 The EHRC Code of Practice on Employment (2011) deals with the 'related to' link (in the 2010 Act, s26(1)(a)) at paras 7.9 to 7.11. It states that the words bear a broad meaning and that the conduct under consideration need not be 'because of' the protected characteristic. The guidance in the Code does not have the force of law, but we respectfully agree with it.

22 Despite the ample 'related to' formulation, sensible limits on the scope of the harassment protection are set by the other elements of the statutory definition. Statutory protection from harassment is intended to create an important jurisdiction. Successful claims may result in very large awards and produce serious consequences for wrongdoers. Some complaints will inevitably fall short of the standard required. To quote from the judgment of Elias LJ in *Land Registry v Grant* [2011] ICR 1390 CA (para 47):

> **Furthermore, even if in fact the [conduct] was unwanted, and the Claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment … The Claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the Claimant to a 'humiliating environment' … is a distortion of language which brings discrimination law into disrepute.**

In determining whether actionable harassment has been made out, it may be necessary for the Tribunal to ascertain whether the conduct under challenge was intended to cause offence (*ibid*, para 13). More generally, the context in which the conduct occurred is likely to be crucial (*ibid*, para 43).

23 To similar effect, Underhill LJ in *Pemberton v Inwood* [2018] IRLR 542 CA, said this (para 89):

> **I have no difficulty understanding how profoundly upsetting Canon Pemberton must find the Church of England's official stance on same-sex marriage and its impact on him. But it does not follow that it was reasonable for him to regard his dignity as violated, or an "intimidating, hostile, degrading, humiliating or offensive" environment as having been created for him, by the Church applying its own sincerely-held beliefs in his case, in a way expressly permitted by Schedule 9 of the Act. If you belong to an institution with known, and lawful, rules, it implies no violation of dignity, and is not cause for reasonable offence, that those rules should be applied to you, however wrong you may believe them to be. Not all opposition of interests is hostile or offensive.[5] It would be different if the Bishop had acted in some way which impacted on Canon Pemberton's dignity, or created an adverse environment for him, beyond what was involved in communicating his decisions; but that was found by the ET not to be the case.**

*The police disciplinary legislation*

24 The regime governing police misconduct in operation at the time with which this case is concerned was contained in several pieces of legislation, including the Police (Conduct) Regulations 2008 ('the 2008 Regulations'). These, by reg 3, defined misconduct as breach of the Standards of Professional Behaviour ('the Standards') and gross misconduct as a breach of the Standards sufficiently serious to justify dismissal. On a finding of misconduct, a range of penalties was prescribed, but dismissal was available only where the officer was already subject to a final written warning. In the case of gross misconduct, the disciplinary panel was presented with an unrestricted choice up to and including dismissal without notice.

25 The Standards, scheduled to the 2008 Regulations, included one entitled "Discreditable Conduct", which reads:

> **Police officers behave in a manner which does not discredit the police service or undermine public confidence in it, whether on or off duty.**

26 In *R (on the application of the Chief Constable of Dorset v Police Appeals Tribunal and Salter* [2011] EWHC 3366 (Admin), Burnett J (as he then was) remarked:

> **22. Having regard to the reasoning which informs the approach to sanction in the context of the legal profession, in my judgment, the correct approach to the question of sanction on a finding of serious impropriety by a police officer in the course of his duty is reflected in the principles articulated in *Bolton* and *Salsbury.* The reasons which underpin the strict approach applied to solicitors and barristers apply with equal force to police officers. …**
>
> **…**
>
> **24. It follows that when considering questions of sanction, the Panel, the Chief Constable on review and the Tribunal should have regard to the following factors:**

**i) The imposition of sanctions following a finding of misconduct by a police officer may have three elements:**

**a) There may be a punitive element designed to punish the police officer concerned and to deter others, particularly if he has not been prosecuted and convicted. But the imposition of sanctions is not primarily punitive, and may not be punitive at all.**

**b) The sanctions imposed may be designed to ensure that the police officer does not have the opportunity to repeat his misconduct.**

**c) However, the most important purpose of these sanctions, particularly in cases involving dishonesty or impropriety in connection with an investigation, is to maintain public confidence in the police service and to maintain its collective reputation.**

**ii) One consequence of the fact that sanctions imposed in the disciplinary process are not primarily punitive is that personal mitigation is likely to have a limited impact on the outcome.**

## Oral Evidence and Documents

27 We heard oral evidence from the Claimant and her supporting witness, Mr Stephen Spitieri and, on behalf of the Respondent, Ms Attifa Pirmohamed, Mr Julian Bennett, Ms Aneeta Prem, Ms Sadya Hayat and Ms Jacqueline Anderson. All bar the Claimant and Ms Prem were serving police officers.

28 Besides the testimony of witnesses we read the documents to which we were referred in the two-volume bundle.

29 We also had the benefit of loose documents handed up during the hearing: a chronology and the excellent written closing submissions on both sides.

## The Facts

30 The evidence was extensive and wide-ranging. We have had regard to all of it. Nonetheless, it is not our function to recite an exhaustive history or to resolve every evidential conflict. The facts which it is necessary to record, either agreed or proved on a balance of probabilities, we find as follows.

31 It is not in dispute that the Claimant enjoyed a successful police career. She was highly regarded by her peers and by her superiors. She passed Part 1 of the Sergeant's exams in April 2011.

32 The Claimant gave unchallenged evidence that she worked extremely long hours during the week of the London riots (week commencing 8 August 2011) and three days of the following week. After that, she had five days' leave, during which she went with colleagues to a music festival. She then worked a six-day week followed by a rest day, a five-day week followed by two consecutive rest days and a six-day week followed by a rest day, which was 12 September.

33 On 12 September the Claimant was taking medication for her PTSD. She had been advised to avoid alcohol. Further findings are made below concerning the medical evidence before the disciplinary panel.

34 Little of what happened on the night of 12 September 2011 was in dispute before us. Having had the day off, the Claimant met colleagues at a bar. A substantial amount of alcohol was consumed. Three members of the party, the Claimant, one female colleague and one male colleague, then decided to go to a nightclub. They arrived shortly before midnight. One or two further rounds of drinks were purchased but it is not clear whether the Claimant drank any more.

35 The Claimant visited the toilets at the nightclub three times. The first occasion was almost immediately after arriving. After about 40 minutes, she paid her second visit. This time she entered carrying a bag which she later admitted to be the property of another visitor to the club, whom she did not know. It seems that she also had a jacket or jumper belonging to that person, either contained in the bag or separately. A female member of the nightclub staff was suspicious and entered the toilets. She heard sounds consistent with a sanitary bin in one of the cubicles being opened and saw some items strewn across the toilet floor. She confronted the Claimant and what she described as a "weird" conversation followed. At one point the Claimant hugged her. Soon afterwards the Claimant left the toilet, without the third party's bag or jacket/jumper. Ten minutes after the end of the second visit, the Claimant went to the toilet for a third time, now carrying a bag belonging to her and another bag belonging to her female colleague. By this time the female colleague had become aware that her purse was missing. She went to the toilet and spoke with the Claimant. The female member of staff arrived a little later and confronted the Claimant. She searched the cubicles and found the missing bag and jacket/jumper in one sanitary bin and the missing purse, together with most of its emptied-out contents, in another.

36 In conversation with the female member of staff and, subsequently, a male member of staff, the Claimant gave no coherent explanation of her conduct and was rude, unco-operative and sarcastic.

37 In the exchanges with the nightclub staff the Claimant and her colleagues identified themselves as police officers. The staff members asked them (or at least the Claimant) to leave. All three did so.

38 Before us it was not in question that the Claimant alone was responsible for the unauthorised removal of items owned by her colleague and the third party and the apparent attempt to dispose of them in the sanitary bins.

39 Most of the property taken was recovered. It seems that the Claimant's colleague lost a retail account card, a bank card, some loose change and two stones, which were of purely sentimental value.

40 In interviews on 11 November 2011 (following her arrest) and 17 January 2012, the Claimant stated that she had no recollection of taking the third party's bag. When shown the CCTV footage, she said that she must have picked up the bag by mistake, owing to her drunken state, and, for the same reason, dumped it in

the bin when she realized that it was not hers. But she did claim to have a clear recollection of the third visit and her reason for taking her colleague's bag with her (to make sure that it did not get stolen). And she explicitly denied taking her colleague's purse. She also claimed that she had had her own phone and various items stolen, but specifically denied that the property included her warrant card, stating that she did not take her warrant card out with her in the evening.

41 The female staff member's evidence when interviewed by the police was consistent with the narrative already given above. The Claimant's claim that she had had property stolen at the nightclub did not fit with the female staff member's account, which was that the Claimant made that claim at the time of the confrontation following the third visit, but then produced her phone and said that she had found her warrant card.

42 The Claimant's claim to have lost her phone at the nightclub was also contradicted by evidence of her partner (also a police officer), who told the police inquiry that she had phoned him (on her mobile) from the nightclub and told him that she had lost her purse and/or some cards. (His evidence was consistent with her having lost her phone, or having thought that she had done so, on the way home from the nightclub, but if that happened it is consistent with the female staff member's account and not the Claimant's. There was no suggestion that she had more than one phone.)

43 The female staff member's account was corroborated by the Claimant's female colleague on certain important points – most notably that the missing property was recovered from sanitary bins in the toilet.[3]

44 On 17 November 2011 the male nightclub staff member described the Claimant's demeanour when he spoke to her following the third toilet visit. He is noted as saying:

> **She was slightly intoxicated but she appeared to be purposefully deflecting any questions I was asking.**

45 A Detective Inspector at the station where the Claimant was based gave evidence to the police investigation that, on 14 November 2011, the Claimant had told him that she had got so drunk on 12 September that she had lost her warrant card, that she "now" realized that she had picked up the third party's bag to look for her warrant card and that she could not believe how stupid she had been to discard the bag in the sanitary bin on becoming aware that it was not hers.

46 A Police Constable who had been a friend and housemate of the Claimant's volunteered evidence to the police investigation to the effect that the Claimant had often related stories of property going missing on nights out which she had attended. She also alleged that the Claimant would habitually accept drinks but not consume them and pretend to be more drunk than she was.

[3] There was a small discrepancy in that the staff member said that some items were in one bin and some in another, whereas the Claimant's colleague thought that all were found in one bin.

47 As we have mentioned, a decision was taken at an early stage not to bring criminal charges against the Claimant. But on 15 December 2011 a police misconduct investigation was commenced.

48 On 20 March 2012 the investigating officer produced a report summarising the evidence gathered. He pointed to the many inconsistencies in the Claimant's account and argued that her claimed inability to recall taking the third party's bag was convenient but implausible. His recommendation was for disciplinary action alleging dishonesty, contrary to the Honesty and Integrity Standard of Professional Behaviour.

49 In the event, the decision was taken to charge the Claimant with breach of the Discreditable Conduct Standard (see above). The charge was in these terms:

> **On the evening of 12 December 2011, whilst off duty, you consumed a number of alcoholic drinks with friends, which group included two other off-duty police officers. After you became drunk, you decided to attend a nightclub with the two officers. The three of you entered the nightclub together, the two other officers showing identification which showed them to be police officers. Whilst at the nightclub, you picked up somebody else's bag and took it to the ladies' toilet, where you put it into a sanitary being and left it. You later took the bag of one of the officers to the toilet and emptied its contents into another sanitary bin. When the nightclub security staff challenged your suspicious behaviour, you identified yourself as a police officer or implied that you were one and were rude and abusive to them. The staff asked you to leave, after which you continued to be rude and abusive to them. Even though you were off duty, your behaviour was of a manner that would bring discredit on the police service and/or which would undermine public confidence in it.**

50 In accordance with the 2008 Regulations the Claimant delivered a written response to the charge. In the introductory section she admitted behaving as alleged, except for the reference to her being abusive. She accepted that she had acted discreditably and that she had committed misconduct. But she denied gross misconduct and stressed that she had not behaved dishonestly.

51 Most of the response consisted of mitigation. In paras 6-13 the Claimant traced the history of the forced marriage, the High Court proceedings and the alleged 'honour-based' attack of April 2010. She then described (paras 14-17) the effect of the events, most notably the attack, on her mental health, citing a diagnosis of depression in October 2010, prescription of anti-depressant medication and, in January 2011, diagnosis of PTSD. She also referred to increased drinking, to counselling treatment under Dr Pippa Stallworthy, Consultant Clinical Psychologist, which commenced in September 2011 (just before the nightclub episode), and to the stressful effects of that treatment. We will summarise the medical evidence separately. Next (paras 18-22) the Claimant referred to her long working hours in August and early September 2011 and to a blood condition which might have contributed to her "erratic behaviour" on 12 September. As to the events of that night, her response said this:

> **23. [She] does not understand why she behaved in the way she did on the night of 12 September 2011. Indeed, she cannot recall much of what occurred that evening. She accepts that she was drunk and that her behaviour was extremely odd.**

> **24. Her conduct was totally out of character. Her bizarre behaviour must therefore be attributable to a combination of medical and emotional factors which came to a head that night, namely PTSD, depression, anti-depressant medication and excessive alcohol consumption (during that period in general and that night in particular).**
>
> **25. It is for these reasons that she behaved as she did; it is for these reasons that she has such an unclear recollection of the incident.**
>
> **26. She understands that this does not wholly excuse her conduct.**

The Claimant also prayed in aid (paras 27-31) her "exemplary record" as a police officer and her commitment to a number of charitable causes. In her conclusions (paras 32-42), she acknowledged that her behaviour had been "disappointing and irregular" but invited the panel to view it in the context of the great pressure which she had been experiencing at the time and her medical conditions. She drew attention to the positive prognosis provided more recently by Dr Stallworthy. Adding an unreserved apology for the discredit which she had bought on the Metropolitan Police Service, she contended that the harm had been limited (there had, for example been no press coverage or criminal proceedings). In all the circumstances, he submitted that the case called for a compassionate rather than punitive outcome.

52 In her response (paras 43-44) the Claimant also stated that, "given that the factual allegation [was] not disputed and the misconduct [was] admitted" it should not be necessary for the disciplinary panel to hear from witnesses, but submitted that the evidence of her former friend and housemate (see above), who was not present on 12 September 2011, should be disregarded.

53 The medical evidence accompanying the Claimant's response included two reports by Dr Stallworthy, dated 22 May and 16 October 2012. In the second, which reproduced much that was in the first, Dr Stallworthy noted that assessments in the first half of 2011 indicated depressive symptomatology in the severe range. She referred to a variety of 're-experiencing' phenomena (intrusive thoughts, nightmares and flashbacks), 'avoidance and numbing' symptoms and hyperarousal symptoms (including sleep problems, irritability and hypervigilance). Moving on to the counselling treatment, she explained that the first two sessions were held in early September 2011, before the nightclub episode. In the first, she noted the Claimant's account of the long hours worked and her reference to feeling under pressure to work overtime and added:

> **She reported feeling exhausted and that she had begun drinking to try and cope with her symptoms.**

Addressing the impact of the Claimant's symptoms on her behaviour on 12 September 2011, Dr Stallworthy remarked:

> **In my opinion, her behaviour … is best understood as a result of an unfortunate combination of factors, the sleep problems and hyperarousal (inability to relax) which are symptoms of PTSD and the exhaustion subsequent to working long hours over a protracted period. It is common for people with PTSD to increase their alcohol use, in order to relax. Indeed people with PTSD have substance misuse problems at twice the rate of those without PTSD. Using alcohol to manage PTSD symptoms is**

> **particularly common in high-risk occupational groups, such as the emergency services, which tend to have occupational cultures with higher rates of alcohol use.**
>
> **As I understand it, she had gone out socially with colleagues and drunk heavily. When looking for her handbag, she had accidentally picked up another similar bag, and then put it down (in a different place) when she realised it was not hers. No theft was reported and she had notified the station of what had taken place, as the professional code of conduct dictates.**

Dr Stallworthy went on to note that, although the treatment was difficult and demanding, after 31 counselling sessions, the Claimant's depressive symptomatology had reduced, now sitting in the moderate range. She expressed confidence that the chances of a full recovery were high.

54 The supporting material relied upon by the Claimant included a glowing commendation from the Chief Superintendent for the Borough to which she was assigned, and numerous testimonials from professional colleagues and other character witnesses.

55 The misconduct hearing was held on 12 November 2012 before a panel consisting of Mr Bennett and Ms Prem (both witnesses before us) and Mr Stuart Palmer. Mr Bennett holds the rank of Commander and Mr Palmer, Superintendent. Ms Prem was the designated independent member. She is a magistrate and author and a campaigner on behalf of victims of forced marriage, female genital mutilation and 'honour-based' violence.

56 At the hearing the Claimant and the 'appropriate authority' (the Respondent, through the Directorate of Professional Standards ('DPS')) were represented by counsel.[4] As had been agreed, no evidence was given. At an early stage there was a debate about whether or not the statement of the Claimant's former friend and housemate should be excluded. The Claimant's counsel contended that it was irrelevant and prejudicial. Acknowledging that the decision had been taken not to pursue allegations of dishonest conduct, counsel for the 'appropriate authority' was neutral. The panel, through Mr Bennett, ruled that it would not be excluded but promised that it would be treated with caution.

57 Argument was then heard on the question whether the case was properly classified as one of misconduct or gross misconduct. Counsel for the Claimant addressed submissions to the panel which corresponded closely with her response to the notice of charge. He submitted that her behaviour had been "bizarre" and incapable of explanation. Little wonder, he suggested, that, when confronted, she was "incoherent and unable to account for herself". The episode should be seen as "a sort of meltdown" brought about by extreme pressure and her poor mental health. Counsel developed the argument through allusions to the background history and the medical evidence. He stressed that the charge was of discreditable, not dishonest, conduct.

58 Counsel for the DPS was neutral as to how the charge should be classified.

[4] Neither of the advocates before us was involved in the internal proceedings.

59 After an adjournment, the panel, through Mr Bennett, announced its decision, which was that the case fell into the category of gross misconduct. Counsel for the Claimant then deployed all the mitigatory material not yet used in support of the submission that a warning would constitute a fitting penalty. In his submissions he repeated the Claimant's apology got her misconduct and stressed her deep regret for what she had done.

60 After a further adjournment, Mr Bennett announced the panel's conclusion that the mitigation did not outweigh the negative impact and damage to public confidence resulting from the Claimant's conduct and that accordingly she would be dismissed without notice.

61 The Claimant appealed against the finding of gross misconduct and the sanction of dismissal, on the ground that both were unreasonable. According to established case-law, appeals on that ground were to be approached by asking whether the finding or conduct fell within a reasonable range of options. The appeal was summarily dismissed on 9 June 2013 by a designated Chairman as having no real prospect of success and raising no other compelling reason for it to proceed further.

## Secondary Findings and Conclusions

*Discrimination arising from disability*

62 Rightly, Mr Kemp focused his attention principally on the s15 claim. The parties are agreed that the Claimant was subjected to unfavourable treatment (dismissal) and that the dismissal was 'because of' the 'something' alleged to have arisen in consequence of the disability, namely her misconduct on 12 September 2012. The dispute centres on two issues: whether the 'something' did arise in consequence of the disability and, if it did, whether the dismissal was a proportionate means of achieving a legitimate aim.

63 As to the 'something arising' point, we remind ourselves of the applicable law. The link between the disability and the conduct must be causative and material, but the Tribunal is not required to find that the former was the sole, or even principal, cause of the latter. Moreover, there may be several end-to-end links in the chain (although the more intervening sections there are, the harder it becomes to identify a real cause and effect relationship between the first and last). Our function is to weigh the relevant material before us and arrive at a robust, pragmatic assessment.

64 Although we do not think the matter as clear-cut as Mr Kemp submitted we should, we are persuaded that the Claimant is entitled to succeed on the 'something arising' issue. We have two main reasons. First, it seems to us self-evident that her drinking on the night of 12 September 2012 was a material cause of her misconduct. It is plain that, by the time she reached the nightclub, she was in drink to a significant extent. The independent evidence of the two members of the nightclub's staff is testament to that and the security officer's description of the property strewn across the floor of the toilet speaks for itself. We do not think it necessary to address the suggestion that, after being challenged, the Claimant

pretended to be much more drunk than she was. On any view, her judgment and natural inhibitions were substantially impaired when she took property not belonging to her and we find it more likely than not that her inebriated condition was a significant influence upon her behaviour. That said, we are also clear that she was not so drunk that she did not know what she was doing or that the goods which she appropriated were not hers.[5] It would be unhelpful for us to attempt more precise findings than these about how drunk a person was on a September night more than seven years ago.

65 Second, the medical evidence points to a connection between the Claimant's PTSD and her drinking on the night of 12 September 2012 and around that time. Dr Stallworthy supports the link, pointing out, as a matter of general experience, the relatively high incidence of alcohol abuse among PTSD sufferers and detailing in her contemporary notes the Claimant's admissions of an increase in alcohol consumption and/or the temptation to drink, at around the relevant time. She also draws attention to stress as factor associated with PTSD, refers to particular stressors to which the Claimant was subject, in particular exhaustion (caused by overworking) and the start of treatment for PTSD, and finds that heavy drinking was a "strategy to cope with the stress". We are mindful that Dr Stallworthy's evidence is open to the significant objections that she does not stand as an independent expert and that her assessment relies on the Claimant's untested account, some at least of which seems to have been self-serving and unreliable.[6] Although these points have force, they do not, in our view, undermine the essential evidential connection between the Claimant's PTSD and her drinking on 12 September 2012. In particular, we do not see that Dr Stallworthy's evidence on that link is called into question by the fact that she may not have received from the Claimant a satisfactory explanation for how or why she came to be in possession of items which were not hers.

66 Satisfied that the evidence establishes causal links between the PTSD and the drinking and between the drinking and the misconduct, we have gone on to ask ourselves whether it is reasonable to regard the misconduct as a relevant consequence of the PTSD or, to put it another way, to regard the PTSD as having materially caused or contributed to the misconduct. We answer the question (however formulated) in the affirmative. The chain is short and the links are secure. A finding that causation is made out accords with justice and common sense, having regard to the purpose of the legislation (to provide protection where the effects of a disability lead to unfavourable treatment)[7] and the wide ambit of the statutory language.[8]

67 In all the circumstances, having stepped back and reviewed the matter in the round, we conclude that the Claimant's misconduct was 'something arising in consequence of' her disability.

---

[5] As far as we know, that case has never been advanced. Nor, except (apparently) in one conversation with Dr Stallworthy, has the Claimant ever sought to explain her conduct as a simple accident, in mistaking the stranger's bag for her own (and accident was never put forward as explaining the removal of her colleague's purse).

[6] See, in particular, the passage from Dr Stallworthy's report of 16 October 2012 quoted in our narrative above.

[7] See *eg Pnaiser*, cited above, para 31(d) (Simler P).

[8] See *eg Grosset*, cited above, para 50 (Sales LJ).

68 As to justification, we again start by reminding ourselves of the law. Our role is to decide whether the Respondent infringed the Claimant's legal rights. The question focuses our attention on the decision to dismiss taken on 12 November 2012, but we do not apply a 'range of reasonable responses' test, as would be appropriate in an unfair dismissal claim. Rather, we make our own assessment, applying the statutory language to the material before the disciplinary panel. We are mindful that the Respondent bears the burden of making out the defence under s15(1)(b).

69 As to 'legitimate aim', there is nothing between the parties. The Claimant accepts[9] the Respondent's stated aim, namely "to ensure appropriate discipline within the Metropolitan Police Service and ensure adherence to the Standards of Professional Conduct".[10]

70 Turning to 'proportionate means', we apply the four-stage approach explained in the *Aster* case. First, was the objective sufficiently important to justify limiting a fundamental right? Subject to the proper application of the other elements of the test, the obvious answer is yes. In any civilised society the police are a vital public service and the maintenance of police discipline and observance of high standards of professionalism are indispensable requirements to which, in appropriate circumstances, fundamental individual rights may have to yield.

71 Second, was the measure rationally connected to the objective? Self-evidently, it was. The fact that the disciplinary panel was presented with a range of alternatives to dismissal does not argue to the contrary.

72 Third, was the means no more than was reasonably necessary to accomplish the objective? Mr Kemp understandably stressed the options open to the panel and argued that a sanction short of dismissal, such as a final written warning, would have been adequate to secure the legitimate aim. He relied heavily on the evidence of Dr Stallworthy, not only as mitigation for the Claimant succumbing to the temptation to drink to excess but also in so far as it offered a positive prognosis and suggested that the risk of the misconduct being repeated was low. More generally, he pressed the wider mitigation points, drawing attention to the quality of her service to date (as testified to by her commanding officer), her commitment to her career, her promise for the future, the remorse which she had shown and diverse other matters.

73 Despite the persuasive submissions of Mr Kemp, we are satisfied that the means was reasonably necessary. The critical problem for the Claimant was that her conduct was unexplained. Presenting it as "bizarre" and a "one-off" was no answer to the questions which the disciplinary procedure posed. Rightly, she did not set out to show, in the investigatory stages or at the disciplinary hearing, that she had been so drunk on 12 September 2012 as not to know what she was doing. Absent a defence of (self-induced) automatism, the panel was, understandably, interested in receiving an explanation for what, we think, Mr Crozier was entitled to

[9] See Mr Kemp's submissions, para 29.
[10] Amended Grounds of Resistance, para 22c.

describe as "deeply suspicious" behaviour. But no explanation was forthcoming.[11] In the circumstances, we can well understand why the two panel members called before us gave evidence that they had been (and remained) unable to reach a view as to what the Claimant's mental state had been at the time of the misconduct. This fundamental deficiency in her case was exacerbated by her inconsistent and implausible evidence about what she could and could not remember. The result was that the disciplinary panel was not presented with a credible basis on which to assess the gravity of the misconduct, the risk of recurrence or the weight of the mitigation relied upon. Rather, the core facts given to it were that a police officer of six years' experience had put herself into a vulnerable position by drinking an excessive amount of alcohol on top of incompatible medication, interfered with the property of two individuals, failed to provide any explanation for her action and given some inconsistent and/or implausible answers during the investigation. Despite the fact that there was ample mitigatory material in the background, it seems to us impossible to say that dismissal in such circumstances was more than reasonably necessary to secure the legitimate aim. Indeed, it seems to us difficult, given the aim, to see how the panel could safely have reached any other conclusion.

74 Fourth, notwithstanding our views on the first three points, does the overall balance come down against the sanction imposed on the ground that its disadvantages were disproportionate to the aims pursued? We fully accept that the inevitable consequence of dismissal was to cause the Claimant enormous distress. She lost a cherished, well-remunerated career in which she had thrived and shown great promise. Dismissal left her damaged and vulnerable on the labour market. Such an outcome would represent a huge blow for any police officer but we accept that the impact would have been particularly severe for the Claimant as a disabled person with a significant mental health condition. Nonetheless, giving these considerations the full weight which they merit, we are satisfied that proportionality favours the Respondent's case – largely for the reasons given in relation to the third *Aster* point. Quite simply, on the facts of this case, a sanction short of dismissal would not meet the overriding need for an outcome to the disciplinary process which served its central purpose of protecting the reputation of the police and maintaining public confidence in it.

75 Mr Kemp also submitted, in keeping with well-established authority, that the defence under s15(1)(b) should fail for the further reason that the Respondent failed to make reasonable adjustments and, had they been made, the misconduct would not have occurred or, at least, dismissal would have been unnecessary or inappropriate (see the EHRC Employment Code, para 5.21). The first adjustment contended for was to reduce the Claimant's working hours, or excuse her from working excessive hours, at and around the time of the London riots.[12] We have accepted that the recent history of overworking may have contributed (with other factors) to the symptoms of stress which the Claimant was experiencing on and

[11] The Claimant offered none. We cannot treat Dr Stallworthy's remarks about the Claimant picking up a bag in error (report of 16 October 2012) as an explanation: rather, they undermined the Claimant's case by offering an account which did not correspond with her evidence given in the investigation.

[12] This was pursued as an argument in support of the s15 claim only: there was no free-standing reasonable adjustments claim directed to working hours.

around 12 September 2011, but we do not consider it realistic to suppose that, had she worked fewer hours, she would not have misconducted herself on that date as she did. Sensibly, Mr Kemp did not press the point with any real vigour. The second proposed adjustment was to impose a sanction short of dismissal. Here the analysis becomes circular. In any event, as we explain below, we are satisfied that there was no failure to make a reasonable adjustment in the penalty applied.

76 For all of these reasons, we are satisfied that the s15 claim is not well-founded.

*Failure to make reasonable adjustments*

77 The only complaint of failure to make reasonable adjustments pursued as a claim contended that the sanction of dismissal should have been adjusted to a final written warning. For the reasons we give above for upholding the Respondent's defence to the s15 claim, we are satisfied that the adjustment contended for would not have been reasonable. Assuming (which we are far from deciding) that the PCP relied upon (application of the Standards) placed the Claimant at a substantial disadvantage in comparison with officers who did not share her disability, we are clear that imposing a penalty short of dismissal would not have amounted to a step which it would have been reasonable for the disciplinary panel to have to take to avoid the disadvantage.

*Harassment*

78 Understandably, Mr Kemp did not pursue the harassment claim with any evident enthusiasm. This part of the case rests on the contention that the dismissal was *per se* an act of harassment, not because it was effected in a *manner* which amounted to harassment but because of the impact on the Claimant of the experience of being dismissed. The claim fails because we are satisfied that the dismissal, distressing as it was, and related as it may have been (loosely) to the disability, did not have the effect[13] of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. She admitted serious misconduct and received a fitting, and certainly permissible, sanction as a consequence. The fact that the penalty was painful and upsetting does not warrant it being classed as harassment. If she perceived an effect meeting the demanding language of the 2010 Act, s26, her perception was unreasonable. The observations of Underhill LJ in the *Pemberton* case (cited above) are wholly in point.

*Burden of proof*

79 Counsel rightly did not to focus their submissions on the burden of proof provisions (see the 2010 Act, s136), which are directed in the main to cases turning on inferential findings linking the treatment complained of to the relevant protected characteristic. This was not such a case and they did not assist us.

[13] No claim based on 'purpose' was advanced.

## Outcome

80. For the reasons stated, all claims fail on their merits and the entire proceedings must be dismissed.

81. This has been a very sad case. We hope that the result, disappointing as it must be, will at last enable the Claimant to put an unhappy chapter of her life behind her and find fulfilment in a fresh start.

_____

EMPLOYMENT JUDGE Snelson
06/03/2020

**Judgment entered in the Register and copies sent to the parties on 06/03/2020**
**..... for Office of the Tribunals**