EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Tyra Stoodley-Dowty	v	Chief Constable of Surrey Police

Heard at: Reading — **On**: 24, 26, 27, 28 August 2020 and 1 September 2020;
In chambers — **On:** 2 September 2020

Before: Employment Judge Hawksworth
Mrs A E Brown
Ms H Edwards

Appearances
For the Claimant: Mr J Wilkes (solicitor) on 24 August 2020
Mr R Bhatt (counsel) from 26 August 2020
For the Respondent: Mr R Oulton (counsel)

RESERVED JUDGMENT ON LIABILITY

The unanimous judgment of the tribunal is that:

1. The claimant's complaint of failure to make reasonable adjustments in respect of the requirement for the OCGM co-ordinator role to be undertaken at Woking succeeds.

2. The claimant's complaint of discrimination arising from disability in respect of the decision not to award the claimant a full recognition bonus succeeds.

3. The claimant's complaint of unfair dismissal is well-founded and succeeds.

4. The claimant's complaints of direct discrimination, indirect discrimination, harassment and victimisation fail and are dismissed.

5. The parties will be notified of a date for the remedy hearing and case management orders for the remedy hearing will be sent separately.

REASONS

Claim, hearings and evidence

1. The claimant was employed by the respondent from 30 March 2009 until her dismissal on 22 June 2018.

2. In a claim form presented on 2 November 2018 after a period of Acas early conciliation from 23 August 2018 to 7 October 2018, the claimant made complaints of unfair dismissal, failure to make reasonable adjustments, direct discrimination, indirect discrimination, harassment and victimisation. The respondent presented its response on 18 February 2019. The respondent defends the claim.

3. There was a preliminary hearing before Employment Judge Vowles on 15 August 2019 at which the complaints were clarified and case management orders were made for the parties to prepare for the final hearing.

4. The final hearing was listed for seven days. This was reduced to six days because of the availability of the tribunal panel. The hearing took place in person at Reading tribunal.

5. On the first day of the hearing the employment judge told the parties that before being appointed to the role of salaried judge, she was a partner and principal lawyer at Slater and Gordon, which acts for the Police Federation of England and Wales and its members. This case does not involve the Police Federation or anyone known to the employment judge but she wanted to make the parties aware and give them the opportunity to ask any questions or raise any objection. Neither party had any questions or any objection to the employment judge continuing to hear the case. The tribunal did not consider there to be any need for recusal.

6. There was an agreed hearing bundle which had been prepared by the respondent. It had 1280 pages.

7. After preliminary matters had been dealt with, we took the first day of the hearing as a reading day and read the witness statements and the documents set out on a reading list prepared by the claimant and agreed by the respondent.

8. On the second day of the hearing (26 August 2020) a number of case management issues arose:

   8.1 The claimant's representative made an application to amend the claim to include a complaint of discrimination arising from disability in respect of non-payment of part of a recognition bonus. For reasons given at the hearing we allowed this amendment. In short we decided that the amendment was a relabelling of a complaint which was already included in the claim and which did not require significant expansion of the factual or legal issues for the tribunal to determine.

8.2 The claimant sought to rely on a supplemental statement dealing with some additional points. The respondent's representative considered the statement and confirmed on 27 August 2020 that the respondent had no objection to it. We allowed the claimant's supplemental statement by consent.

8.3 Additional pages were added to the bundle by consent at pages 1281 to 1290. These were documents setting out the claimant's comments on the respondent's witness statements. They were acknowledged to be subject to legal professional privilege but (in respect of these documents alone) privilege was waived by the claimant.

8.4 The respondent made an application to rely on additional disclosure relating to an internal job application made by the claimant for a protection officer post. The documents comprised the completed application, the job profile and the line manager's approval form with comments. The claimant objected to the inclusion of the late disclosure. For reasons given at the hearing we decided to allow it. The documents were added to the bundle as pages 303A to 303I.

9. We heard witness evidence from the claimant on 26 August and the morning of 27 August 2020. We heard evidence from the following witnesses for the respondent:

9.1 Louise Sutton, the head of intelligence for Surrey and Sussex Police (27 August 2020).

9.2 Clare Fullick, the head of intelligence research and analysis for Surrey Police (27 and 28 August 2020);

9.3 James Norbury, a detective chief inspector with Surrey Police who at the relevant time had responsibility with Ms Fullick for the intelligence team (28 August 2020 and 1 September 2020).

10. All the witnesses had exchanged witness statements and supplemental statements. The respondent only relied on paragraphs 1-12 of Ms Sutton's supplemental statement, the remainder of that statement was not in evidence before us.

11. On 28 August 2020, day 4 of the hearing, the respondent sought to adduce additional disclosure. This had come to light as a result of questions put during cross-examination by the claimant's representative concerning the involvement of the respondent's HR team. The claimant did not object to the late disclosure. The documents were added to the bundle at pages 266A to 266E and pages 93A to 93M.

12. Judgment was reserved.

The Issues

13. The issues for us to decide were clarified at the preliminary hearing on 15 August 2019 in an agreed list of issues. An amended list of issues was provided on the second day of the hearing, this included some narrowing of

the issues and the addition of the complaint of discrimination arising from disability following the claimant's amendment application.

14. In submissions at the end of the hearing, the claimant's counsel withdrew one of the complaints of harassment (the allegation that the claimant had been singled out for mention at the 18 January 2018 presentation).

15. The issues for us to determine are therefore as follows.

Jurisdiction

16. Does the Tribunal have jurisdiction to hear the claimant's discrimination allegations pursuant to section 123 of the Equality Act 2010 ("the EqA")? In particular:

    16.1 Were the allegations presented to the Tribunal within 3 months of the date on which they occurred (as extended by section 140B of the EqA)?

    16.2 In respect of any allegations that were not, do they form part of conduct extending over a period which ended within that time limit, within the meaning of section 123 of the EqA?

    16.3 If not, were they presented within such period as the Tribunal considers just and equitable?

Unfair dismissal

17. Was the claimant dismissed for a potentially fair reason within the meaning of s98(1) Employment Rights Act 1996 namely on the ground of redundancy?

18. If so was the dismissal fair in all the circumstances?

19. There is no issue on:

    19.1 The fact of there being a redundancy situation;

    19.2 Selection.

20. As to consultation, the claimant takes issue with:

    20.1 Delays to the redundancy process by Clare Fullick/the respondent which on the claimant's case deprived her of the opportunity to consider other roles;

    20.2 Failure to properly communicate the issue of reasonable adjustments (if it is found that James Norbury did not expressly withdraw the reasonable adjustment(s)). On the facts of this case if it is found that the respondent failed to offer reasonable adjustments the dismissal would not only be discriminatory but unfair under s98.

21. The claimant also takes issue with the fact that the respondent made no efforts to assist her in exploring alternatives during her notice period and before.

22. If the claimant's dismissal was procedurally unfair is there a chance that the claimant would have been fairly dismissed in any event?

Disability

23. It is common ground that the claimant was a disabled person at the material time within the meaning of s6 and sch 1 of the EqA following her diagnosis of bowel cancer in June 2015.

24. It is not common ground that the claimant is a disabled person within the meaning of the EqA at the material time by reason of an orthopaedic knee injury resulting in osteoarthritis of the knee joint. The respondent does not accept that it knew or reasonably ought to know that the osteoarthritis of the knee joint amounted to a disability within the meaning of s6 EqA.

Direct discrimination

25. Did the respondent subject the claimant to direct discrimination because of her disability, contrary to sections 13 and 39 of the EqA? In particular:

    25.1 Has the claimant discharged her primary burden of demonstrating less favourable treatment because she suffered from bowel cancer and/or a knee injury as opposed to no, or some other disability in respect of:

        25.1.1 Dismissing the claimant.

26. If so has the respondent shown that the conduct complained of was in no sense whatsoever related to the claimant's disability?

Indirect discrimination

27. Did the respondent apply the following relevant PCP to persons with whom the claimant did not share her protected characteristic of disability?:

    27.1 Requiring the OCGM role to be undertaken at Woking.

28. If so, did or would the PCP put persons with whom the claimant shares the protected characteristic at a particular disadvantage?

29. If so, did it or would it put the claimant at that disadvantage'?

30. If so, can the respondent show it was a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments

31. Did the respondent apply the PCP listed above.

32. If so did the PCP put the claimant at a particular disadvantage in relation to a relevant matter in comparison to persons who are not disabled?

33. Did the respondent know, or ought it reasonably to have known, that the Claimant was likely to be placed at that substantial disadvantage by the PCP? If so, did the respondent fail to take reasonable steps to try avoid the substantial disadvantage to which the claimant was subjected as a result of the application of it? The claimant contends that the respondent failed to take the following steps :

    33.1 Facilitating the claimant to apply for the PSD role based at Mount Browne;

    33.2 Permitting or facilitating the claimant to continue to undertake the or an OCGM role from Mount Browne, on a trial and/or permanent basis as proposed in Clare Fullick's updated notes of the 1:1 consultation on 18 May 2018 at pages 274 and 274B;

    33.3 Permitting or facilitating the claimant to undertake another role suitable for her health and her capability at Mount Browne;

    33.4 Assisting the claimant with her relocation to a property nearer to the Woking place of work where the respondent wished to move the claimant;

    33.5 Creating a role for the claimant that would accommodate her health needs by being based at Mount Browne.

<u>Harassment</u>

34. Did the respondent engage in unwanted conduct which had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? The claimant relies upon the following alleged conduct:

    34.1 The claimant's notice period was reduced to two weeks during which time the Respondent made no or no proper effort to assist the claimant with exploring or identifying ways of how the claimant might remain in employment; and/or

    34.2 Failing to deal with the claimant's legitimate concerns and dismissing the same in a high-handed manner when responding to the letter of claim and the further enquiry as to when a considered response might be provided.

35. If so was such conduct related to the claimant's disability?

<u>Victimisation</u>

36. Did the claimant undertake a protected act by:

36.1 making a statement to Ms Fullick that was, or was similar to, a complaint that, Ms Fullick attempting to shoe-horn the claimant into a role, was improper under the EqA 2010; and/or

36.2 causing her solicitor to write a letter to the respondent in the terms referred to at paragraph 33 of her grounds of complaint.

37. Was the claimant subjected to a detriment because she had undertaken one of the above alleged protected act(s) by being subjected to any of the following detriments:

37.1 On or around 23 May 2018 Ms Fullick telling the claimant that it would be the claimant's responsibility to 'convince' SCCP that it was not suitable alternative employment so as to get her redundancy money;

37.2 Dismissing the claimant; and/or

37.3 Refusing to engage with the claimant (through her solicitors) and dealing with her raised concerns in a high handed and dismissive manner?

<u>Discrimination arising from disability</u>

38. The respondent has conceded that it was aware of the claimant's disability, namely her bowel cancer.

39. Did the respondent in so knowing, treat the claimant a result of something arising in consequence of her disabilities'?

40. Did the following arise in consequence of the claimant's disabilities:

40.1 The claimant's inability to undertake the OCGM role at Woking.

41. The unfavourable treatment relied on by the claimant is the respondent's decision not to award the full £500 until the work the claimant was undertaking in her seconded role as OCGM Coordinator was completed (as stated at paragraph 18 of Ms Sutton's first witness statement.

Findings of fact

42. We make the following findings of fact based on the evidence we heard and read.

<u>Background and the claimant's health</u>

43. The respondent is the chief officer of the police force for Surrey. The claimant began working for the respondent as an employee on 30 March 2009.

44. On 11 June 2015 the claimant was diagnosed with bowel cancer. She had chemotherapy and radiotherapy treatment. She returned to work on 4 January 2016 to a new role, Intelligence Support Officer, based at Mount Browne, Surrey Police Headquarters.

45. The claimant had to have further treatment for cancer, including surgery. This took place on 15 March 2016 and resulted in the claimant having a permanent stoma and colostomy bag. She returned to work 8 August 2016.

46. The claimant takes daily measures to ensure that the impact of her surgery on her day to day life is reduced as far as possible. While working for the respondent, she got up at 05:00 in order to fit in her daily routine and be ready to leave home at 07:00. She drove to Mount Browne, parked and was at her desk by 07:20. On arriving home from work, she regularly had to sleep for an hour or so.

<u>Secondment to the OCGM role</u>

47. On 10 August 2016 expressions of interest were invited in a new role called OCGM Co-ordinator. The claimant was asked by a number of managers whether she intended to apply. She spoke to James Norbury, a detective chief inspector who at that time had responsibility for the intelligence team with Clare Fullick, the claimant's manager. The claimant asked Mr Norbury whether he knew why she was being asked to apply for the new role. Mr Norbury told the claimant, strictly off the record, that the claimant's role of Intelligence Support Officer was going to be made redundant in 2018, in a planned restructure which was called the Specialist Crime Capabilities Programme (SCCP).

48. The claimant asked to meet with Louise Sutton, the head of intelligence, for an informal conversation about the OCGM role. Their meeting took place on 25 August 2016. The claimant told Ms Sutton that she suspected that her Intelligence Support Officer role was going to be made redundant during the SCCP process and that the OCGM role would be relocating to Woking. Ms Sutton did not comment on the proposals for the claimant's role or the relocation of the OCGM role, but said that if the claimant applied for the OCGM role, she could do so as a secondment.

49. On 30 August 2017 the claimant submitted an expression of interest for the OCGM Co-ordinator role. She was the only applicant. There was no formal selection process. The claimant was told by Ms Sutton on 14 September that she would be seconded to the OCGM role from 1 October 2017 to 31 March 2018.

50. On 20 September 2017 the head of the Specialist Crime Command, which includes intelligence, sent an email to all staff within the command advising them of the proposed SCCP change programme.

51. On 1 October 2017 the claimant started the OCGM role on secondment. She was still based at Mount Browne, although during the secondment, she covered both Surrey and Sussex. The intention was that the Surrey role would become permanent and that another 'matched' role would be created for Sussex.

The SCCP change programme

52. On 31 January 2018 the first formal group consultation meeting of the SCCP change programme took place. Under the new model which was presented, the intelligence structure would become a Force Intelligence Bureau and would be relocated to Woking Police Station. This was described as a 'location requirement change' (page 1107). The claimant's role of Intelligence Support Officer would be redundant from 25 June 2018, but a permanent role of OCGM co-ordinator was suggested as a suitable alternative.

53. The timeframe set out in the first group consultation meeting said that the 45 day consultation period would run from 31 January 2018 to 16 March 2018. The second group consultation meeting would take place on 27 February 2018. The time frame indicated that formal one-to-one meetings between staff and supervisors to discuss individual circumstances would take place from 27 February 2018 to 16 March 2018 (page 1131).

54. On 26 February 2018 the claimant saw an internal advertisement for the job of office manager with the respondent's Professional Standards Department (PSD) based at Mount Browne. It was advertised as a 12-month secondment, so it would have ended in about March 2019 unless extended. The claimant made enquiries about the role, and also emailed her manager Ms Fullick about it. Ms Fullick replied in an email on 27 February 2018 (page 187), saying

    "You are well within your rights to apply for it, the only issue would be …that your substantive post doesn't exist in the new model and therefore you wouldn't have a substantive post to come back to once the secondment in PSD was over with."

55. The claimant decided not to apply for the PSD secondment.

56. In an email discussion about the PSD role, the claimant mentioned the relocation of the OCGM role to Woking and said she 'would never choose to work in Woking'. She told us she did not like Woking as a town. We find that it is unlikely that she would have wanted to move to Woking.

57. The second group consultation meeting on 27 February 2018 had to be cancelled because of snow. The slides which would have been presented were sent to staff and staff were advised to speak to their line managers if they had any questions.

The first individual consultation meeting – 19 March 2018

58. On 19 March 2018 the claimant had her first formal one-to-one meeting with Ms Fullick, her line manager. At the meeting Ms Fullick proposed that the OCGM role the claimant was currently performing on secondment would, once it was made permanent, be a suitable alternative role for the claimant. Ms Fullick was to be the line manager for the permanent OCGM role as

well. She confirmed that the new role would be based at Woking within the new Force Intelligence Bureau (page 210).

59. The claimant agreed that the OCGM role itself was suitable, but she raised concerns about the impact on her health and well-being of the role being in Woking. She explained that because of her long-term health condition, she needs quick access to her vehicle, and to be able to get home as quickly as possible. She felt the extra journey time to Woking would be unreasonable, and did not agree that the journey from her home to Woking would only be 30 minutes as suggested by the respondent (using the AA route planner). The claimant felt that because of traffic, the journey would often be more like 45-60 minutes. We accept that the journey was likely to be affected by traffic and that it was likely that it would sometimes be longer than 30 minutes.

60. Ms Fullick agreed to refer the claimant to the respondent's Occupational Health department for consideration of whether reasonable adjustments were required for her for the OCGM role. She told the claimant that the move to Woking would not be happening until September 2018 due to building works. The claimant said that she was concerned irrespective of the timescale as she could not commit to a move because of her disability.

61. After the meeting Ms Fullick followed up on a number of points raised by the claimant. The claimant's secondment to the OCGM role was extended from 31 March 2018 to 25 June 2018 to align with the date on which her substantive role as Intelligence Support Officer was to become redundant (page 222).

62. A detailed record of the meeting was made on the SCC Intelligence Review individual consultation meeting record (pages 209 to 213).

63. The individual consultation meeting record form included details of the respondent's redeployment process. Under the redeployment process the claimant was responsible for checking regularly for suitable roles. Staff with redeployment status who applied for roles were prioritised above other applicants (this applied provided that there was a skills match of at least 50%).

<u>Recognition bonus</u>

64. After the meeting Ms Fullick contacted Ms Sutton on 21 March 2018 to ask if she could pay the claimant a bonus in recognition of the fact that the role the claimant was performing on secondment was covering two forces, Surrey and Sussex, and it had been recognised that one role per force would be required for the permanent roles (page 205).

65. Ms Sutton replied to suggest that the claimant should be paid a bonus of £500 to recognise the work she had done and would do to take things forward for both forces during her secondment, including buddying the person in the Sussex role once they were recruited (page 206).

Occupational health report

66. Ms Fullick referred the claimant to the respondent's occupational health service on 1 April 2018. She was unable to action the referral any earlier because she did not have the required system login. The claimant's occupational health appointment took place on 26 April 2018. There was no earlier in-person appointment available.

67. The occupational health referral form which was completed by Ms Fullick said that the reason for the referral was:

> *"Currently department is going through a change programme in which the role [the claimant] is being offered as a suitable alternative is relocating to Woking Police Station."*

68. Ms Fullick recorded that the claimant was able to manage 'extremely well at the moment at Mount Browne because she has both parking and a relatively short journey to home.'

69. An occupational health report dated 26 April 2018 was sent to Ms Fullick on 1 May 2018 (page 241). The report summarised the claimant's medical position as follows:

> *"Tyra reports being in remission from cancer. Extensive treatments including surgery, chemo and radiotherapy have left Tyra with residual effects and symptoms which challenge her on a daily basis but which she manages to the best of her ability. Tyra has also had knee reconstructive surgery in the past."*

70. The report records that the claimant's medical conditions and treatment have resulted in impairments which cause fatigue, sleep disruption, and problems with sitting for too long, travelling for too long and walking too far. Sitting for too long aggravates abdominal discomfort, and sitting too long, particularly in a car, causes soreness of the skin, acid reflux, nausea and sometimes vomiting. Travelling for too long causes stress. The claimant's condition can be unpredictable and she may need to manage treatment and change clothing.

71. The report said (under the heading 'Equality Act') that the claimant's cancer is automatically classified as a disability from the date of diagnosis, and provided the following advice:

> *"Based on my assessment today Tyra is fit for her substantive role but I would recommend some supportive measures are taken into consideration….*
>
> *I ask you to consider following adjustments which would assist Tyra in avoiding exacerbating or triggering the impairments listed above. I have advised Tyra that you will have to consider what is reasonable for your department to support.*

- *Parking on site will help to reduce anxiety about walking to and from the car where there may be a need to go home urgently and avoids discomfort which can develop from walking too far.*
- *Work from home part of the day, driving from home to Woking and back when peak traffic time has settled.*
- *Working from home or [Mount] Browne and using video link/similar to keep in touch with wider team*
- *Staying at [Mount] Browne.*
- *Trialling any or all of the options to determine any detrimental impact upon the activities or performance of the team."*

The second individual consultation meeting - 18 May 2018

72. On 16 May 2018 the SCCP sent an email update regarding the move to Woking Police Station. It said that the programme was on track for a number of teams including the Force Intelligence Bureau to move to Woking on Monday 25 June 2018 'with the possibility that some teams will move before then'. This was some two to three months earlier than Ms Fullick and the claimant were expecting.

73. On 18 May 2018 the claimant had her second individual consultation meeting with Ms Fullick. They discussed the occupational health report and the adjustments which had been recommended.

74. Ms Fullick said that the first three of the bullet pointed recommendations could be accommodated in the OCGM role. The claimant would be given parking, would be able to travel later in the day, and would be able to work from home or work at another Surrey Police location. Ms Fullick understood the fourth recommendation (staying at Mount Browne) to mean adjusting the substantive base for the OCGM role to be Mount Browne. She said that this could not be accommodated because 'the base station for the OCGM co-ordinators role is going to be Woking with the [Force Intelligence Bureau] structure and line management'.

75. The claimant said that working from home would not be a viable option for her because she did not have suitable facilities. She wanted to work from Mount Browne as she had been doing. She said that she felt it was Ms Fullick's role to 'shoehorn' her into accepting the OCGM role and relocating to Woking, that she did not feel her disability was being taken seriously and that she felt that the adjustments being offered were not reasonable.

76. After the meeting, Ms Fullick completed the individual consultation meeting record and sent a draft to the claimant. It recorded that the respondent 'can accommodate the first three recommendations'. On the afternoon of 18 May 2018 Ms Fullick sent an email update to the SCCP team including Ms Abberley, the HR representative for the SCCP team, saying that the claimant was 'now considering the role' (page 266C).

77. The claimant asked for some changes to be made to the draft consultation meeting record (page 249 and 250A to 250E). One of the changes the claimant requested was for the document to make clear that she would not

be permitted to work from Mount Browne. This appears to have been a misunderstanding on the claimant's part as Ms Fullick's position was as set out on the first version of the meeting record, namely that the claimant would be permitted to work from other Surrey Police locations, including Mount Browne, on days when she did not have to be at Woking. Ms Fullick corrected this misunderstanding in her email reply to the claimant, to which we return below.

The lead up to the third individual consultation meeting

78. The claimant's third individual consultation meeting was due to take place on 23 May 2018 but Ms Fullick was unexpectedly and unavoidably away from work for a few days and was unable to attend on that date. It initially seemed that the meeting would be rescheduled for a date after Ms Fullick's return to work, but Mr Norbury agreed to step in and hold the third consultation meeting with the claimant on 24 May 2018.

79. Ms Fullick and Mr Norbury spoke on the telephone about a number of matters he was taking over from her, including the meeting with the claimant. Mr Norbury was sent a copy of the claimant's individual consultation meeting record which recorded the meeting on 18 May 2018. He was not sent a copy of the claimant's occupational health report and he did not ask for one. He thought that the summary in Ms Fullick's note of the 18 May 2018 meeting of the adjustments recommended by occupational health was sufficient.

80. On the morning of 23 May 2018 an email was sent to staff in the Force Intelligence Bureau confirming that the 25 June 2018 date for the move to Woking was looking 'more and more likely' (page 268).

81. At 11.42am on the morning of 24 May 2018 Ms Fullick sent an email to the claimant with an updated version of the individual consultation meeting record from 18 May 2018 (page 274). Mr Norbury was copied in. The updated record included some new information on some points which Ms Fullick had followed up at the claimant's request, and it also included some of the changes the claimant had suggested to the draft form.

82. In box 2 of the form, an update had been added. It said:

> *"It is essential that Tyra has regular face to face contact with the FIB team (weekly)…but as mentioned below we can be flexible how many days each week Tyra has to be at Woking and this can be agreed between management and Tyra in advance and based on Tyra's medical situation at that time and operational requirements."*

83. In the box headed 'Explain next steps', Ms Fullick had updated her explanation as to what would happen if the claimant rejected the OCGM post. She had obtained further information about this from Ms Abberley, the SCCP's HR representative. Ms Fullick said the claimant would have to outline her reasons for turning down the role, and the respondent would then consider whether redundancy was an option (pages 274D to 274E).

84. Importantly, in the covering email attaching the updated meeting record, Ms Fullick said:

    "I have also incorporated some of your suggested recommendations, the only one I have not placed on the report was regarding not being able to work at Mount Browne. The reasoning for this is I have never said you couldn't work from Mount Browne only that it couldn't be on a permanent basis because the base station of the OCGM co-ordinator post is Woking but we could be flexible as and when you needed to be there and where you went to when not there ie home or any other of the Surrey Police premises."

85. The updated meeting record and covering email corrected the misunderstanding between the claimant and Ms Fullick. The documents made clear that although the substantive base of the OCGM role would have to be Woking, the claimant herself would be permitted to work from Mount Browne on days when she did not have to be at Woking for operational reasons (or if her medical situation required it). Ms Fullick's evidence to the tribunal, which we accept, was that she considered that the claimant would have to be at Woking one to two days a week maximum and that she could otherwise work where she liked, including Mount Browne. We accept this evidence as it is consistent with the reference in the updated meeting record that it would be essential for the claimant to have regular 'weekly' face to face contact with the Force Intelligence Bureau. It is also consistent with what happened later with the role: the person who took up the permanent OCGM role attended Woking about two days a week, and worked from different locations on the other days.

86. In summary, the adjustment Ms Fullick proposed was that although substantive base of the OCGM role would have to be Woking, the claimant's physical work location could be flexible. She would only have to attend Woking as and when business needs required, and this was expected to be one day a week, two days maximum. She would be allowed to physically work from another location on other days, the other location could be Mount Browne.

87. The claimant said, and we accept, that her main concern was the physical location which she would be required to attend for work. She was not concerned about the substantive base of the role being Woking. She was delighted with Ms Fullick's proposal, and considered that the suggested adjustments would have been workable. We find that the claimant could have performed the OCGM role with these adjustments.

88. After receiving the email from Ms Fullick, the claimant was going to the meeting with Mr Norbury to accept the OCGM role with the proposed adjustments.

The third individual consultation meeting - 24 May 2018

89. The claimant's third individual consultation meeting with Mr Norbury started at 12.30 on 24 May 2018. This was a little over 45 minutes after Ms Fullick's email of earlier that day which clarified the point about the claimant being able to work from Mount Browne.

90. Prior to the meeting, Mr Norbury had formed the view that the claimant had no intention of taking the OCGM role as alternative employment. His approach to the meeting seems to have been led by this view. We find that this was not a correct understanding of the claimant's position. It was not reflected in the documents, particularly Ms Fullick's email of 18 May 2018 to the SCCP team which made clear that the claimant was considering the role. That email and the updated meeting record from the 18 May meeting had been copied to Mr Norbury (page 266A and 274).

91. At the start of his meeting with the claimant, Mr Norbury held up a hard copy of the notes of the 18 May 2018 meeting, then put this document down to one side, and said to the claimant:

"Let's put this to one side and you tell me what's been going on."

92. Mr Norbury's evidence to us was that he did this because he wanted to hear afresh from the claimant about her circumstances, and to hear her perspective. He went through everything with the claimant from scratch. The discussion did not start from, and was not informed by, the updated 18 May document which was the product of discussions between Ms Fullick and the claimant which had been going on since March 2018, and which included clarification of the important point that the claimant would be permitted to work from Mount Browne when she was not required to be at Woking.

93. The claimant understood Mr Norbury to be saying that Ms Fullick's proposal for her to work weekly at Woking and the rest of the week from Mount Browne was not possible. She thought Ms Fullick's proposal had been 'taken off the table'. Mr Norbury thought that the claimant did not intend to take the OCGM role and what she really wanted was to leave with a redundancy payment. That was in line with the view Mr Norbury had formed before the meeting, which we have found was not an accurate understanding of the claimant's position.

94. Also, as Mr Norbury had not read the claimant's occupational health report, he was not aware of the medical reasons for the adjustments which had been recommended by occupational health and agreed by Ms Fullick. The claimant had to start again from the beginning and explain her medical condition, the effects of the condition and the problems caused by the need to travel to work at Woking.

95. These issues were compounded by the fact that during the discussion there was a lack of clarity about the distinction between the 'substantive base' for the OCGM role (ie where the role itself was recorded as being based, which was to be Woking) and the physical location which the claimant would

actually be required to attend to do her work (on which Ms Fullick had said there was more flexibility).

96. We find that what Mr Norbury told the claimant in the meeting on 24 May 2018 about the requirements of the OCGM role and the adjustments which could be made for her was different to what Ms Fullick had said. In particular, Mr Norbury's view was that the claimant would need to be in Woking for 'the majority of the working week' and he gave detailed operational reasons for this. These reasons were recorded in the individual consultation meeting record which Mr Norbury completed after the meeting. In his evidence to us, Mr Norbury said that by 'the majority of the week', he meant 2.5 days a week, or slightly more than that. This would have meant the claimant travelling to work at Woking three times a week, which is more than the one day a week, two days maximum, which Ms Fullick had envisaged.

97. The claimant said that she could not see any way that a role based at Woking for the majority of the time could be suitable for her with her medical conditions. She did not wish to accept the OCGM role and understood that this put her at risk of redundancy.

98. After the meeting, Mr Norbury completed the individual consultation meeting form. He recorded that the OCGM role was in principle a suitable role for the claimant and that she agreed that it was a role she could do. He explained that 'the issue is the change of location of the role to sit within the [Force Intelligence Bureau] at Woking' (page 95).

99. When setting out the proposed reasonable adjustments (which he referred to as 'offers') in the record of the meeting, Mr Norbury decided that rather than 'cut and paste' the adjustments which occupational health had recommended for the claimant and which Ms Fullick had included in full in the notes of her meeting with the claimant, he would summarise them in his own words. This meant that an opportunity to clarify exactly which of the recommended adjustments could be accommodated was missed, in particular the important issue of whether the claimant would be permitted to work from Mount Browne if not required at Woking (as had been recommended by the occupational health advisor and agreed by Ms Fullick) and if so how often. Mr Norbury summarised the adjustment to working location by saying 'enabling homeworking' and 'working from alternative locations for some of the working week'.

100. The record of the meeting also said:

> *"The recommendations from OH have all been considered and covered in the updated formal individual consultation document dated 18 May, updated 23 May and [the claimant] fully understood them."*

101. The document did not set out each of the adjustments which had been recommended by the respondent's occupational health advisor, or the respondent's position on each of them.

102. The next paragraph went on to explain the business and operational reasons for the OCGM role "to be in Woking". These included:

    - *"to add OCG inputs to the development of intelligence*
    - *to be available for briefings and Meetings, although making use of technology such as Skype has been considered*
    - *to … add value to informal conversations…*
    - *relationship building"*

103. These reasons (the references to being 'available', to 'informal conversations' and 'relationship building') emphasised the need for the person in the OCGM role to be physically present at Woking, and not just for the role to be substantively based there.

104. Mr Norbury sent the individual consultation meeting record in draft to Ms Abberley, the HR lead for the SCCP change programme (page 93B). She replied and added in some comments and notes to Mr Norbury. One of Ms Abberley's comments said, in relation to the adjustments:

    "Does the list above cover everything that was recommended by OH?? We need to make sure all options were discussed and rationale is stated in this document if they are unable to be accommodated."

105. Ms Abberley also suggested that where he mentioned 'working from alternative locations for some of the working week', Mr Norbury should add more detail about how much of the working week would be spent at Woking and how much at alternative locations. She added "(eg 3 days at Mount Browne, 2 days at Woking)".

106. Mr Norbury finalised the individual consultation meeting record in the light of the comments from Ms Abberley. He did not make any amendment in response to her suggestion that all of the adjustments recommended by occupational health adjustments should be covered. This meant that the record did not expressly say whether some or all the adjustments could be accommodated, and if so which. Mr Norbury included the amendment that the claimant could work 3 days at Mount Browne and 2 days at Woking, but in his evidence to us he said that this was incorrect, and that he had left this amendment in the document by mistake. Two days a week at Woking was less than he thought possible for the role.

107. Mr Norbury sent the form to the claimant. He spoke to her and recorded her comments in section 7 of the final version of the form (page 94). The claimant's comments included:

    "Tyra is not making this decision lightly and if the working location could remain at Mount Browne, she would love to continue working for Surrey Police…

    The occupational health report explains why her medical condition makes Woking unsuitable as a working location."

Further consultation meetings

108. Mr Norbury had two further individual consultation meetings with the claimant on 31 May 2018 and 11 June.

109. At the meeting on 31 May 2018 the claimant provided Mr Norbury with a copy of her occupational health report (page 279). Mr Norbury accepted that it would have been better if he had obtained a copy of this from occupational health. The following day the claimant formally emailed the SCCP team to decline the OCGM role (page 286). She said the reasons she was unable to accept the role were supported by the occupational health report.

Notice of dismissal

110. We find that the decision to dismiss the claimant was taken by Mr Norbury. He met the claimant on 11 June 2018 and gave her a letter with notice of dismissal for redundancy (page 105). The claimant's last day of employment was to be 22 June 2018. The Force Intelligence Bureau's move to Woking was going ahead on 25 June 2018, so the claimant's 9 week notice period was reduced to 2 weeks. She was paid in lieu of notice for the remaining 7 weeks.

111. The claimant was given a right of appeal against dismissal. She did not appeal. She felt that all possible avenues with the OCGM role had been explored and the solution that had been found had been taken away. She felt under a lot of stress and was exhausted.

112. The claimant was told again in her dismissal letter about the redeployment process and the fact that she would have priority consideration for available posts. She was told to review internal jobs on a regular basis.

Supervisor's interview and dismissal

113. On 21 June 2018 Mr Norbury conducted an interview with the claimant about her leaving (page 1196A). Mr Norbury's meeting notes (headed 'Tyra – Exit') record the claimant saying,

> *"I do not understand why I cannot work at HQ [Mount Browne]. I have done it successfully so far."*

114. The claimant's employment with the respondent ended on 22 June 2018.

115. On 26 October 2018, after her dismissal, the claimant was paid the recognition bonus which had been agreed by Ms Sutton and Ms Fullick in March 2018. However, as she left before buddying the person in the new Sussex OCGM role, a reduced bonus of £100 was paid, rather than the £500 payment which had initially been approved.

Letter of claim

116. On 11 July 2018 the claimant's solicitors, Setfords, sent a letter of claim to the respondent about the termination of the claimant's employment. It was a detailed 8 page letter setting out the background and the claimant's claims (page 292). The letter alleged on page 6 that the respondent had contravened sections 15 and 19 of the Equality Act 2010.

117. On 16 July 2018 the respondent's People Services Consultant, Ms Bennett, emailed the claimant's solicitor (page 300-301). Her two-line response acknowledged receipt of the letter of claim and said, 'We do not propose to settle this claim'. The claimant's solicitor asked Ms Bennett to confirm whether her email was to be treated as a formal response, or if a considered response was to follow. Ms Bennett emailed to say that it was a formal response. No further response was sent to the letter of claim.

Agile working

118. Other members of the intelligence team had issues about moving to Woking because of parking and travel. The respondent agreed that intelligence processing assistants (IPAs) could have a substantive base at Woking and an agile working arrangement under which they worked mainly from home, attending Woking once a week.

119. From November 2018 (after the claimant's employment had terminated) the OCGM co-ordinator role was filled by an individual who had an agile working pattern. The role remained substantively based at Woking, but the individual's physical location varied. The basic pattern was two days in Woking, one day in another police location and two days from home. This pattern was flexible depending on workload.

The Law

Disability

120. Disability is a protected characteristic under sections 4 and 6 of the Equality Act 2010. Cancer is a disability pursuant to paragraph 6 of schedule 1 of the Equality Act.

Direct disability discrimination

121. Section 13 of the Equality Act provides:

> *"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

122. Section 23(1) provides that:

> *"On a comparison of cases for the purposes of section 13 [direct discrimination] ... there must be no material difference between the circumstances relating to each case."*

Discrimination arising from disability

123. Section 15(1) of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if:

> *"A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *A cannot show that the treatment is a proportionate means of achieving a legitimate aim."*

124. There are four elements to section 15(1), as explained by the EAT in Secretary of State for Justice and anor v Dunn EAT 0234/16:

    124.1 there must be unfavourable treatment;

    124.2 there must be something that arises in consequence of the claimant's disability;

    124.3 the unfavourable treatment must be because of the something that arises in consequence of the disability; and

    124.4 the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

125. In relation to the third element, the causal link between the 'something arising' and the unfavourable treatment, the EAT in Secretary of State for Justice and anor v Dunn held that motive is irrelevant and, in Pnaiser v NHS England and anor 2016 IRLR 170, EAT, that:

> *'there may be more than one reason or cause for impugned treatment….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.'*

Indirect discrimination

126. Section 19 of the Equality Act provides:

> *"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

Failure to make reasonable adjustments

127. The Equality Act also imposes on employers a duty to make reasonable adjustments. The duty comprises three requirements, in this case, the first requirement is relevant. This is set out in sub-section 20(3). In relation to an employer, A:

> *"(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."*

128. Paragraph 20(1)(b) of Schedule 8 of the Equality Act provides that an employer is not subject to a duty to make reasonable adjustments if they do not know, and could not reasonably be expected to know, that the relevant employee has a disability and is likely to be placed at the identified disadvantage.

129. In Sheikholeslami v The University of Edinburgh [2018] IRLR 1090 EAT, Mrs Justice Simler (then president of the EAT) explained the comparison exercise required in a reasonable adjustments complaint, referring to the EHRC Code and the judgment of Elias LJ in Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216, CA. She said:

> *"48. It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question… For this reason also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances.*
>
> *49. The Equality Act 2010 provides that a substantial disadvantage is one which is more than minor or trivial: see s. 212(1). The EHRC Code of Practice states that the requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people: see paragraph 8 of Appendix 1. The fact that both groups are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether*

there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."

Harassment

130. Under section 26 of the Equality Act, a person (A) harasses another (B) if

"a) A engages in unwanted conducted 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."

131. In deciding whether conduct has the relevant effect, the tribunal must take 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."

Victimisation

132. Victimisation is prohibited by section 27 of the Equality Act:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because

(a) B does a protected act…"

133. A protected act is defined in section 27(2) and includes:

"(d) making an allegation (whether or not express) that A or another person has contravened this Act."

Burden of proof in complaints under the Equality Act 2010

134. Sections 136(2) and (3) provide for a shifting burden of proof:

"(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) This does not apply if A shows that A did not contravene the provision."

135. This means that if there are facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected

characteristic, the burden of proof shifts to the respondent. The respondent must then prove that the treatment was in no sense whatsoever on the grounds of disability. If there is a prima facie case and the explanation for that treatment is unsatisfactory or inadequate, then it is mandatory for the tribunal to make a finding of discrimination.

136. In Igen v Wong [2005] ICR 931 the court set out 'revised Barton guidance' on the shifting burden of proof. We bear in mind that the court's guidance is not a substitute for the statutory language and that the statute must be the starting point.

137. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent has committed an unlawful act of discrimination. "Something more" is needed, although this need not be a great deal: "In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred..." (Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279.)

138. If the burden shifts to the respondent, the respondent must then provide an "adequate" explanation, which proves on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of disability. The respondent would normally be expected to produce "cogent evidence" to discharge the burden of proof.

Unfair dismissal

139. Section 98 of the Employment Rights Act sets out the tests for determining whether a dismissal is fair or unfair. Subsection 1 provides:

> *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."*

140. Redundancy is a reason falling within subsection (2).

141. If the reason for dismissal is a potentially fair reason within sub-sections (1) and (2), then the tribunal must go on to consider whether the dismissal is fair in all the circumstances of the case, and, under sub-section (4):

> *"the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer*

acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case."

Conclusions

142. We have applied the legal principles to our findings of fact to reach our conclusions in respect of the issues we had to decide. We have approached the issues in a different order, starting by considering the issue of disability and the complaints of failure to make reasonable adjustments, discrimination arising from disability and unfair dismissal. We have gone on to consider the other complaints of disability discrimination and finally the question of jurisdiction.

Disability

143. Both parties agree that the claimant was a disabled person at the material time within the meaning of section 6 and schedule 1 of the Equality Act following her diagnosis of bowel cancer in June 2015.

144. The respondent did not accept that the claimant was a disabled person within the meaning of the Equality Act at the material time by reason of an orthopaedic knee injury resulting in osteoarthritis of the knee joint.

145. We heard very little evidence about the claimant's knee condition and about the effect of that condition on her day to day activities. In submissions, it was accepted on behalf of the claimant that her knee condition did not take the case any further, as the adjustments would have been required even if the claimant had no knee condition. We agree with that submission, and have concluded that, when determining whether the claimant's complaints succeed, it is not necessary for us to make a determination as to whether the claimant's knee condition is a disability.

Failure to make reasonable adjustments

146. The claimant relied on one provision, criterion or practice (PCP): 'requiring the OCGM role to be undertaken at Woking'.

147. The OCGM role was a new role which was to be based with the new Force Intelligence Bureau in Woking. The slides presented at the group consultation meeting referred to there being a 'location requirement change'. The occupational health referral which was prepared by Ms Fullick said the role 'is relocating to Woking'. The note of the individual consultation meeting with Ms Fullick on 18 May 2018 records that, 'the base station for the OCGM co-ordinator's role is going to be Woking'. The note of the meeting with Mr Norbury on 24 May 2018 states, 'The issue is the change of location of the role to sit within the [Force Intelligence Bureau] at Woking'.

148. We conclude that the respondent applied a PCP of requiring the OCGM role to be undertaken at Woking.

149. (The respondent considered in discussions with the claimant whether she would actually be required to attend Woking if she accepted the OCGM role and if so how often. Those discussions were to see if the disadvantage to the claimant of the requirement that the OCGM role be undertaken at Woking could be alleviated. That feature should be excluded from the definition of the PCP itself. As explained by HHJ Richardson in General Dynamics Information Technology Ltd v Carranza [2015] IRLR 43, EAT, paragraph 40:

 "The PCP should identify the feature which actually causes the disadvantage, and exclude that which is aimed at alleviating the disadvantage.")

150. We next consider whether the PCP put the Claimant at a particular disadvantage in comparison to people who are not disabled. We conclude that the Claimant was put at a disadvantage by the respondent requiring the OCGM role to be undertaken at Woking, for the following reasons.

151. The claimant's role of intelligence support officer and her OCGM role on secondment were both substantively based at Mount Browne, and Mount Browne was the location which the claimant attended for work for both of these roles. Mount Browne was a short 20 minute journey from home to desk for the claimant. For her to travel to Woking would mean an increase in the journey to at least 30 minutes and sometimes longer than that. For the claimant as a person with a disability, specifically as someone who had had surgery for bowel cancer, this was likely to cause two main problems. First, longer car journeys were more difficult for the claimant as they caused her to experience adverse symptoms including aggravated abdominal discomfort, soreness of the skin, acid reflux and the risk of nausea/vomiting. Secondly, relocating to Woking would mean that it would take the claimant longer to get home if she needed to return home unexpectedly to manage her condition. Without adjustments to the role which would permit the claimant to be physically located nearer to home for at least some of the week, the claimant would be unable to accept the substantively Woking-based OCGM role and this would put her at the disadvantage of being at risk of redundancy.

152. People who are not disabled (including, hypothetically, the claimant if she had not had this disability) may still have been disadvantaged by the relocation of the role from Mount Browne to Woking. The claimant would still have had a longer journey to and from work. However, in addition to the fact of the longer journey itself, the claimant as a disabled person would have had the additional symptoms caused by sitting in the car for longer, and the additional difficulties arising from working further from home if she needed to go home urgently. Those difficulties would have prevented the claimant as a disabled person from being able to take the role which had been identified as a suitable alternative, increasing her risk of redundancy. The PCP had a greater disadvantage for the claimant as a disabled person than for an employee who was not disabled: it 'bit harder' on her. These additional factors were more than minor or trivial and put the claimant at a substantial disadvantage compared to people without her disability.

153. We conclude that there was a substantial disadvantage to the claimant as a result of the requirement that the OCGM role be undertaken at Woking.

154. We also conclude that the respondent knew that the claimant was likely to be placed at that substantial disadvantage by the PCP. The occupational health report clearly set out the claimant's impairments resulting from her treatment for bowel cancer, and made suggestions for adjustments which would avoid exacerbation or triggering of the impairments and which would reduce issues arising from the claimant's need for a shorter journey and to go home urgently if required.

155. Our conclusions mean that the respondent was under a duty to take reasonable steps to avoid the substantial disadvantage to the claimant which arose from the PCP. The final limb of the complaint of failure to make reasonable adjustments is whether the respondent failed to do so.

156. The claimant says that the respondent failed to take the following steps :

  156.1 facilitating the claimant to apply for the PSD role based at Mount Browne;

  156.2 permitting or facilitating the claimant to continue to undertake the or an OCGM role from Mount Browne, on a trial and/or permanent basis as proposed in Clare Fullick's updated notes of the 1:1 consultation on 18 May 2018 at pages 274 and 274B;

  156.3 permitting or facilitating the claimant to undertake another role suitable for her health and her capability at Mount Browne;

  156.4 assisting the claimant with her relocation to a property nearer to the Woking place of work where the respondent wished to move the claimant;

  156.5 creating a role for the claimant that would accommodate her health needs by being based at Mount Browne.

157. As to the possible adjustment of facilitating the claimant to apply for the PSD role, the claimant made the decision not to apply for the role. There was nothing to suggest that the respondent would not have facilitated her application if she had chosen to apply.

158. In any event, this step would only have temporarily avoided the disadvantage to the claimant. The role was based at Mount Browne, and so if the claimant had applied successfully for it, the disadvantage caused by travel and location issues would have been removed. However, the role was a 12 month secondment. By the end of the secondment (likely to have been in March 2019) the claimant's Intelligence Support Officer role would have no longer existed, and so she would have had no substantive (and permanent) role to return to, either at Mount Browne or Woking. She would have been at further risk of redundancy at that point. This issue was explained by Ms Fullick when the claimant sought her advice. We have

concluded that facilitating the claimant to apply for the PSD role was not a step which would have avoided the disadvantage to the claimant. There was not a failure to make adjustments in this respect.

159. The second proposed adjustment was permitting or facilitating the Claimant to continue to undertake the (or an) OCGM role from Mount Browne, on a trial and/or permanent basis. This was the central part of the claimant's claim.

160. This adjustment was one of those suggested in the occupational health report: 'working from home or [Mount] Browne and using video link/similar to keep in touch with wider team.' We have found that Ms Fullick agreed that this adjustment could be accommodated for the claimant. Her agreement was set out in the updated version of the note of the individual consultation meeting on 18 May 2018, and clarified in the covering email sent to the claimant on 24 May 2018. Ms Fullick (who was to be the line manager for the new OCGM role) was content for the claimant's physical location to be flexible, for her to attend Woking once or twice a week and otherwise work from another location which could be Mount Browne. The person who took on the OCGM role after the claimant left adopted a similar working pattern to this, being physically located at Woking twice a week, with flexibility depending on workload.

161. This adjustment would have removed the disadvantage to the claimant of the role being required to be undertaken at Woking. The claimant considered that travelling to Woking once or twice a week would be manageable. She was delighted with the adjustments proposed by Ms Fullick, and was going to accept the OCGM role.

162. Unfortunately, the adjustments which were put to the claimant by Mr Norbury at the third consultation meeting were not the same as those proposed by Ms Fullick. The difference was a significant one for the claimant. It was Mr Norbury's view (as reflected in the business and operational reasons part of the consultation meeting note) that the person doing the OCGM role had to be physically located at Woking for the majority of the week (as well as the role's substantive base being there). Mr Norbury told the claimant that she would have to be physically located at Woking for the majority of the week. This would require her to travel to Woking on three days each week. This was not manageable for the claimant. Mr Norbury recorded on the consultation form the claimant's comment that if the 'working location' could have remained Mount Browne, she could have continued working for the respondent. A similar comment was made in the supervisor's interview which Mr Norbury had with the claimant on 21 June 2018.

163. The occupational health advisor's recommended adjustment was for the claimant to work from Mount Browne, not to do so for part of the week only. We accept that attending Woking one to two days a week would have been manageable for the claimant, but attending the majority of the week would not. The adjustment proposed by Ms Fullick would have removed the substantial disadvantage of the PCP for the claimant but the adjustment

proposed by Mr Norbury would not have done. It would have required too much travel. It did not go far enough to remove the disadvantage.

164. For these reasons we conclude that the respondent failed to make the adjustment of permitting or facilitating the Claimant to continue to undertake the OCGM role from Mount Browne. This was an adjustment which would have removed the disadvantage to the claimant, and we conclude that it would have been reasonable to make this adjustment (in the terms proposed by Ms Fullick) because it had been recommended by the respondent's occupational health advisor, Ms Fullick (who would be the line manager for the person doing the role) was willing to accommodate it, and the SCCP change team's HR representative had not raised any issue with it.

165. We have next considered whether it would have been a reasonable adjustment for the respondent to have permitted or facilitated the claimant to undertake another role suitable for her health and her capability at Mount Browne.

166. Giving the claimant another role at Mount Browne would have removed the disadvantage to the claimant. The respondent considered other roles for the claimant within intelligence, where she worked. None were suitable for her, and as the whole of the Force Intelligence Bureau was relocating to Woking, the same location issues would have arisen with any other intelligence role. The respondent did not, as part of the consultation, take steps to investigate the possibility of the claimant being given a role in a different department at Mount Browne. It did, however, direct the claimant to the policy which applied to her by virtue of her being at risk of redundancy. The redeployment process was explained on all of the individual consultation meeting records. Under the redeployment process the claimant was responsible for checking regularly for suitable roles. Staff with redeployment status were prioritised above other applicants if they applied for roles with a skills match of at least 50%. The claimant did not apply for any other roles. If she had done, her application would have been prioritised because of the redeployment process. We conclude that the steps the respondent took in this regard were reasonable.

167. We do not consider that assisting the claimant with her relocation to a property nearer to Woking would have been a reasonable adjustment. The respondent was undergoing a substantial costs saving review and providing financial assistance with a house move could have been a significant cost. It was suggested on behalf of the claimant that she could have been provided with non-financial assistance, such as help identifying a property or estate agent. However, the claimant did not like Woking and we have found that it was unlikely that she would have wanted to move there. Offering assistance (financial or otherwise) with a relocation that the claimant did not want would not have removed the substantial disadvantage to her.

168. In relation to the last of the adjustments proposed by the claimant, we do not consider that it would have been a reasonable adjustment for the respondent to create a role for the claimant at Mount Browne. The duty to

make reasonable adjustments does not normally extend to creating a role for a disabled employee. There may be limited circumstances in which it may be reasonable to create an adjusted role, for example where an employer is carrying out a wholesale restructure. We do not consider that it would have been reasonable to do so in this case, because there was already a role which would have been suitable for the claimant with reasonable adjustments, namely the OCGM role. There was no need for the respondent to create another role for her.

169. In summary, we find that from 24 May 2018 onwards the respondent failed to make reasonable adjustments for the claimant in one respect. It failed to allow the claimant to undertake the OCGM role on the basis that her physical location could be flexible, that she would attend Woking once or twice a week and that she could otherwise work from another location which could be Mount Browne. This failure led to the claimant's decision that she would have to reject the OCGM role and leave the respondent on redundancy.

170. The complaint of failure to make reasonable adjustments succeeds in this respect.

Discrimination arising from disability

171. The claimant said that the respondent's decision not to award her the full £500 recognition bonus until the work the claimant was undertaking in her seconded role as OCGM coordinator was completed amounted to less favourable treatment because of something arising in consequence of her disability.

172. The respondent paid the claimant a recognition bonus of £100 in October 2018 rather than the full £500 which had been agreed in March 2018. The reason for the reduction in the payment was that the claimant left the respondent before the work in her seconded role was completed. Specifically, she did not buddy the person in the new Sussex OCGM role. That person had not been appointed at the time the claimant left the respondent's employment.

173. The claimant's inability to undertake the OCGM role at Woking was something arising from her disability. The symptoms and effects of the claimant's disabling condition and the treatment she had had for it meant that it was not possible for her to undertake a role that was located at Woking (without reasonable adjustments being made to the role).

174. As a result of being unable to undertake the OCGM role at Woking, the claimant left the respondent when the role relocated to Woking. That meant that she was unable to buddy the person who would be doing the OCGM role for Sussex, as they had not been appointed at that point.

175. There was therefore a causal influence between the claimant's inability to undertake the OCGM role and carry out the buddying of a new colleague (which arose in consequence of her disability), and the reduction of the

recognition bonus. The inability to undertake the OCGM role and carry out the buddying was the reason for (the effective cause of) the reduction in the recognition bonus payment.

176. We have considered whether the reduction in the claimant's recognition bonus was a proportionate means of achieving a legitimate aim. We conclude that it was not. We have taken into account the relatively small amount of the reduction, and the fact that the claimant had to leave because there was a failure to make reasonable adjustments to enable her to take up the OCGM role.

177. The complaint of discrimination arising from disability succeeds.

Unfair dismissal

178. It was agreed that the reason for the claimant's dismissal was redundancy. This is a potentially fair reason for dismissal.

179. We need to consider whether in the circumstances (including the size and administrative resources of the organisation) the respondent acted reasonably or unreasonably in treating redundancy as a sufficient reason for dismissing the claimant.

180. On the question of delay, the individual consultation process with the claimant took longer than we would have expected. The period between the first individual consultation meeting and the occupational health report being sent to Ms Fullick was 6 weeks. This became particularly problematic when the proposed move to Woking was confirmed as taking place on 25 June 2018 when the anticipated date had been September 2018. However, looking at the reasons for delay at each step in the process, we do not consider that the delay was such that the dismissal fell outside the range of reasonable responses for that reason. We do not consider that the delays deprived the claimant of the opportunity to consider other roles. The claimant was informed at all stages of the possibility of applying for other roles under the redeployment process, and we were not told of any other roles which she could or would have applied for if she had had a longer notice period. In any event, fewer or shorter delays would have led to a shorter consultation period, and that may have meant the claimant having less time overall in which to consider other roles.

181. We have next considered the question of the impact of the failure to make reasonable adjustments on the complaint of unfair dismissal.

182. There was a suitable alternative role in the sense that the role of OCGM co-ordinator had a good skills match with the role of intelligence support officer which was the claimant's role and which was to be redundant. There was a further question as to whether the OCGM co-ordinator role was suitable for the claimant herself, taking into account her personal circumstances and in particular her disability. We have found that the claimant could have performed the OCGM role with reasonable adjustments. The respondent's occupational health department suggested adjustments which could be made, including to the role's location, which would make the role suitable for

the claimant. The line manager of the role agreed that the role could be performed with adjustments including flexibility as to the physical location the claimant would have to attend. The HR representative of the SCCP change team suggested that the claimant could work 3 days a week from Mount Browne. The claimant reasonably rejected the suitable alternative role when she was told by Mr Norbury that she would be required to attend Woking for the majority of the week; with that requirement, it was not a suitable role for her.

183. The failure to make adjustments to a suitable alternative role to make it suitable for the claimant herself took the decision to dismiss outside the range of reasonable responses. Different approaches were taken by Mr Norbury and Ms Fullick as to the adjustments which could be made and ultimately this led to the dismissal of the claimant. A reasonable employer would have taken steps to ensure that there was more clarity on this key issue before deciding to dismiss. In particular, a reasonable employer would have:

    183.1 started from the position on adjustments which had already been reached by Ms Fullick and the claimant, as recorded in the updated record of the 18 May 2018 consultation meeting and email of 24 May 2018;
    183.2 read the occupational health report before forming a view that the claimant was required to attend Woking for the majority of the week;
    183.3 investigated with Ms Fullick, who was to be the line manager for the role, whether she thought it was possible for the claimant to attend Woking for less than the majority of the week (which she did);
    183.4 followed up the question of adjustments as suggested by Ms Abberley, the SCCP's HR representative, when she questioned whether the occupational health advisor's recommendations had been fully addressed, and when she suggested that the number of days per week the claimant was expected to travel to Woking should be expressly set out in the record of the meeting on 24 May 2018 and could be 2 days a week.

184. It was not reasonable not to take these steps, because it meant that the adjustments to the OCGM role which were suggested for the claimant from 24 May 2018 did not go far enough to avoid the disadvantage to her of the OCGM role having to be undertaken from Woking, and she accepted that she would have to leave the respondent's employment. A reasonable employer taking these steps would have been able to clarify that further adjustments to the role were possible, as agreed by Ms Fullick. The role adjusted as proposed by Ms Fullick was felt by the claimant to have been manageable, and she would then have accepted the role and not been dismissed for redundancy.

185. For these reasons, we have concluded that the decision to dismiss the claimant fell outside the range of reasonable responses and was unfair.

186. This is not a case in which the claimant could have been fairly dismissed in any event. The OCGM role was a suitable alternative and would have been

suitable for the claimant with reasonable adjustments. If the respondent had taken further steps to clarify this issue, as a reasonable employer would have done, the claimant would not have been dismissed.

187. The claimant did not appeal the decision to dismiss her. There will be an issue for consideration at the remedy hearing as to whether, if there had been an appeal against dismissal, the question of what adjustments could have been made to the OCGM role for the claimant would have been clarified, and the redundancy dismissal avoided (or the claimant reinstated).

<u>Direct discrimination</u>

188. The claimant said that she was subject to direct discrimination because of her disability in respect of her dismissal. The burden is on the claimant to satisfy us that there are facts from which we could properly and fairly conclude that, in being dismissed, the claimant was less favourably treated than someone who does not have her disability, and that the difference in treatment was because of her disability.

189. We heard no evidence of a real or hypothetical comparator being treated more favourably than the claimant in respect of her dismissal. There was also no evidence before us from which we could properly and fairly conclude that the claimant's dismissal was because of her bowel cancer (or, for completeness, that it was because of her osteoarthritis).

190. In the circumstances, the burden of proof does not shift to the respondent, and the complaint of direct discrimination fails and is dismissed.

<u>Indirect discrimination</u>

191. The claimant's representative said in submissions that the complaint of indirect discrimination went hand in hand with the reasonable adjustments complaint.

192. It is correct to say that the same PCP was relied on in both complaints; we have found that the respondent applied the PCP of requiring the OCGM role to be undertaken at Woking.

193. However, the test for disadvantage is different in the indirect discrimination complaint. In the reasonable adjustments complaint, the question is whether the claimant herself was put at a substantial disadvantage in comparison to people who are not disabled. We have found that she was, based on the evidence of the claimant herself and the occupational health report.

194. In a complaint of indirect discrimination under section 19, there is a wider issue to consider. We need to determine whether the PCP put or would put people with whom the claimant shares the protected characteristic of disability at a particular disadvantage compared with people who are not disabled. Group disadvantage, which is not part of the reasonable adjustments complaint, needs to be established here.

195. There are a number of reasons why it is difficult for us to assess whether the PCP in the claimant's case puts or would put people with the claimant's disability at a disadvantage. First, the PCP specifically refers to Woking: it was expressed as the requirement that the OCGM role be undertaken at Woking. In the claimant's case it was the location of the role at Woking that caused the disadvantage, because of where Woking is in relation to where she lives. If we consider a group of people with the same disability as the claimant, whether it is a disadvantage to them to have to undertake a role at Woking will depend in part on where they live.

196. We could approach the question by considering only people (or hypothetical people) with the claimant's disability who live in the same place as the claimant, on the basis that we should look at cases with no material difference of circumstances, when making the required comparison. However, we were not given any evidence about the likelihood of other people with bowel cancer having the same treatment and the same symptoms as the claimant and therefore being subject to a particular disadvantage by the PCP. We cannot make an assumption that all those with the claimant's disability would be affected in the same way as the claimant: the symptoms and treatment for bowel cancer may vary from person to person. The only evidence we were given about the symptoms and effects of bowel cancer or the effects of treatment for bowel cancer was in relation to the claimant herself.

197. We have the same problem if we generalise the PCP, and treat it as a requirement to undertake a role which is 30 minutes or more from home (although this is not how the PCP was put by the claimant). We did not have any evidence to support a finding that there would be a particular disadvantage arising from this for people who have had or have been treated for bowel cancer, compared to people who do not have that disability.

198. We conclude that the claimant has not established the element of particular disadvantage required for a complaint of indirect discrimination, and therefore this complaint must fail.

<u>Harassment</u>

199. In her complaint of harassment, the claimant relies upon the following as unwanted conduct:

    199.1 the claimant's notice period was reduced to two weeks during which time the respondent made no or no proper effort to assist the claimant with exploring or identifying ways of how the claimant might remain in employment; and

    199.2 failing to deal with the claimant's legitimate concerns and dismissing the same in a high-handed manner when responding to the letter of claim and the further enquiry as to when a considered response might be provided.

200. We have not found that during the claimant's notice period the respondent made no or no proper effort to assist the claimant with exploring or identifying ways of how the claimant might remain in employment. In the dismissal letter, Mr Norbury explained the respondent's redeployment policy and advised the claimant to review internal jobs on a regular basis.

201. We have found that the claimant's notice period was reduced to two weeks. The reduction of the claimant's notice period to two weeks in itself did not amount to unwanted conduct which had either the purpose or the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

202. We did not find the respondent's reply to the claimant's letter of claim to be high-handed. It was a matter for the respondent whether or not to reply in detail to the letter of claim.

203. We have found that the respondent's reply to the claimant's letter of claim did not respond to the claimant's concerns set out in her letter of claim. This did not amount to unwanted conduct which had either the purpose or the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

204. The complaints of harassment fail.

<u>Victimisation</u>

205. We have found that the following occurred:

    205.1 at the consultation meeting on 18 May 2018 the claimant said to Ms Fullick that whilst she appreciated that it was Ms Fullick's role to 'shoehorn' her into accepting the OCGM role and relocating to Woking, she did not feel her disability was being taken seriously and she felt that the adjustments being offered were not reasonable;
    205.2 the claimant's solicitor wrote to the respondent on 11 July 2018. The letter included allegations that the respondent had contravened sections 15 and 19 of the Equality Act 2010.

206. Both of these were protected acts. The comment made to Ms Fullick was an allegation by the claimant that the respondent was breaching the duty to make reasonable adjustments under section 20 of the Equality Act. The claimant's solicitor's letter made allegations on the claimant's behalf that the respondent had contravened the Equality Act. These were protected acts within section 27(2)(d) of the Equality Act.

207. The burden is on the claimant to establish evidence from which we could conclude that she was subjected to one or more detriment because of making one or both of those protected acts.

208. The claimant said that she was subjected to three detriments.

209. First, the claimant said that on or around 23 May 2018 Ms Fullick told her that it would be the claimant's responsibility to 'convince' the SCCP that the OCGM role was not suitable alternative employment, so as to get her redundancy money.

210. We have found that Ms Fullick liaised with Ms Abberley from HR to establish the procedure which would be required if the claimant decided not to accept the OCGM role. This was done as part of the redundancy consultation process, to provide the claimant with information about possible next steps. It was not a detriment, nor was it done because of the comment the claimant made to Ms Fullick about shoehorning her into a role or breaches of the duty to make reasonable adjustments.

211. The claimant also said that her dismissal was a detriment because of a protected act. The only protected act which the claimant had done by 11 June 2018 when she was dismissed by Mr Norbury was the comment to Ms Fullick. There was no evidence before us from which we could conclude that this comment played any part in the decision to dismiss the claimant.

212. Finally, the claimant said that the respondent's refusal to engage with the claimant (through her solicitors) and dealing with the concerns raised on her behalf in the letter of claim in a high handed and dismissive manner was a detriment because of the protected act(s).

213. We have not found that the respondent's response to the letter of claim was high-handed or dismissive. It was a matter for the respondent whether it chose to reply in detail to the letter of claim or not. There was no evidence from which we could conclude that the respondent's decision not to reply in detail to the concerns raised in the letter was because of the comment the claimant made to Ms Fullick, or because the letter of claim included complaints of breach of the Equality Act. There was no evidence that the respondent would have treated a letter of claim making allegations which were not protected acts any differently.

214. We have therefore concluded that the claimant's complaints of victimisation fail. Although she made two protected acts, we have found that one of her alleged detriments was not a detriment. Further, there was no evidence from which we could conclude that the protected acts played any part in the three acts she complains about. The burden of proof did not shift to the respondent on these complaints.

215. Because of our conclusions on the complaints of victimisation, we do not need to consider the judicial proceedings immunity issue which was raised by the respondent in connection with the allegation about the letter of claim.

Jurisdiction

216. Finally, we have considered whether the claimant's complaints which have succeeded were presented to the tribunal within 3 months of the date on which they occurred or were otherwise in time.

217. The failure to make adjustments to the OCGM role for the claimant took place on 24 May 2018.

218. The claimant notified Acas for early conciliation on 23 August 2018, within three months of 24 May 2018. An early conciliation certificate was issued on 7 October 2018. By section 140B of the Equality Act 2010, the early conciliation period is not counted for the purposes of working out the time limit under section 123 of the Equality Act.

219. The claim form was presented on 2 November 2018. Under section 140B(4) the time limit for presentation of the claim was extended to 7 November 2018 (one month after the early conciliation certificate was issued). The complaint of failure to make reasonable adjustments was therefore presented in time.

220. The decision to reduce the claimant's recognition bonus was based on the fact that the claimant was leaving the respondent's employment before buddying her counter-part in Sussex. This decision must have been taken after the decision was taken to dismiss the claimant. It cannot have been before 24 May 2018. The complaint of discrimination arising from disability was therefore also presented in time.

Summary

221. The claimant's claim succeeds in relation to the failure to make reasonable adjustments in respect of the requirement for the OCGM co-ordinator role to be undertaken at Woking, discrimination arising from disability in respect of the decision not to award the claimant a full recognition bonus and unfair dismissal.

222. The claimant's other complaints fail.

223. Notice of a remedy hearing will be sent to the parties; a case management order for preparations for the remedy hearing has been sent separately.

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Employment Judge Hawksworth
Date: 13 October 2020

Judgment and Reasons sent to the parties on:......4th November 2020.
T Yeo......................................
For the Tribunal Office

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