Case Number: 3334564/2018 (V)

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Lyons	**v**	The Chief Constable of Thames Valley Police

Heard at: Bury St Edmunds (by CVP)

On: 4, 5, 6, 9, 10 & 11 November 2020
12 & 13 November 2020 (Discussion days – no parties in attendance)

Before: Employment Judge Laidler

Members: Mr A Hayes and Mrs CA Smith

Appearances
For the Claimant: Ms L Mankau, Counsel.
For the Respondent: Ms R Tuck, Counsel.

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. **The Claimant's ankle injury amounted to a disability within the meaning of section 6 of the Equality Act 2010 and the Respondent had knowledge that he was likely to be placed at a disadvantage within the meaning of section 20 and Schedule 8 Part 3 (20) Equality Act 2010 from 18 June 2018**.

2. **The duty to make reasonable adjustments applied from that date.**

3. **The Respondent has complied with its duty to make reasonable adjustments**

4. The claims that the Claimant was treated unfavourably because of something arising in consequence of his disability contrary to section 15 Equality Act 2010 are dismissed save for the stage 1 written improvement notice under the UPAP which the Respondent has established was justified.

5. It follows that all claims are dismissed.

REASONS

1. The ET1 in this matter was received on 2 November 2018 in which the Claimant brought complaints of disability discrimination. The claims are defended by the Respondent.

The issues

2. There was a preliminary hearing before Employment Judge Lang on 3 October 2019 and the following is the List of Issues which appeared at Appendix A of the summary sent out after that hearing. This was discussed at the outset of this hearing with Counsel and certain matters that were agreed have been noted as set out below:

Disability

The Respondent agrees that the Claimant was disabled by reason of a long-term chronic pain condition and plantar fasciitis at the material time, and that the Respondent had knowledge of these conditions.

1. Was the Claimant disabled at the relevant time by virtue of having an ankle avulsion fracture, either as a stand-alone disability or in combination with the disabilities conceded above?

2. At the material time, did the Respondent have actual or imputed knowledge that the Claimant was disabled by reason of an ankle avulsion fracture? If so, from what point was the Respondent aware, or should he have been aware, that the Claimant was disabled by virtue of having an ankle avulsion fracture?

Failure to make reasonable adjustments – s21(1) Equality Act 2010

Issue 1 – UPAP (Unsatisfactory Performance and Attendance Policy)

3. The Claimant claims the Respondent applied the following PCPs to him:
   a. the UPAP;
   b. the Respondent's Attendance Management Policy.
   The respondent accepts these were applied to the claimant.

4. The Claimant claims this placed him at a substantial disadvantage in that

a. as a result of his disability, the Claimant was/is more likely to have sickness absence, to reach UPAP triggers and be subject to the UPAP and to exhaust his sick pay entitlement.

The respondent accepts the claimant was placed at this substantial disadvantage.

5. The Claimant claims it would have been a reasonable adjustment to have

a. postponed the UPAP until the Claimant's disability-related health issues improved;

b. disregarded the Claimant's disability-related absence;

c. exercised discretion under the UPAP in the Claimant's favour;

d. recorded the Claimant's absences as disability leave rather than sick leave.

Issue 2: Sick Pay

6. The Claimant claims the Respondent applied the following PCPs to him:

a. the Respondent's sick pay policy.

The respondent accepts it applied this to the claimant.

7. The Claimant claims this placed him at a substantial disadvantage in that

a. as a result of the delays/failure to provide remote duties or suitable recuperative duties the Claimant had to remain on sick leave (part of which was on reduced or nil pay), use his annual leave or other accrued leave and move to an area in which he had no experience or skills;

The respondent does not accept the substantial disadvantage alleged as above.

and/or

b. as a result of his disability, the Claimant was/is more likely to have sickness absence, to reach UPAP triggers and be subject to the UPAP and to exhaust his sick pay entitlement.

The respondent accepts the claimant was placed at this substantial disadvantage.

8. The Claimant claims it would have been a reasonable adjustment to have

a. exercised discretion under the extension to sick pay policy in the Claimant's favour in December 2017.

Issue 3: Remote working

9. The Claimant claims the Respondent applied the following PCPs to him:

a. requiring the Claimant to work in a location away from his home;

The respondent accepts it applied this PCP.

10. The Claimant claims this placed him at a substantial disadvantage in that

a. the Claimant was unable, because of his disability(ies), related symptoms and restrictions, to perform his full substantive role, being limited in the duties which he is able to perform and the location from which he can perform them; and/or

The respondent accepts that substantial disadvantage.

b. as a result of the delays/failure to provide remote duties or suitable recuperative duties the Claimant had to remain on sick leave (part of which was on reduced or nil pay), use his annual leave or other accrued leave and move to an area in which he had no experience or skills;

This is disputed by the respondent.

11. The Claimant claims it would have been a reasonable adjustment to have

a. provided the Claimant with a secure laptop and duties which he could perform from home.

Issue 4: Role at work

12. Did the Respondent apply any or all of the following PCP(s):

a. requiring the Claimant to be fully operational to work in his role in the Protection Group; and/or

b. requiring the Claimant to work in his full substantive role on the Protection Group.

The respondent accepts it applied these PCPs.

13. The Claimant claims this placed him at a substantial disadvantage in that

a. the Claimant was unable, because of his disability(ies), related symptoms and restrictions, to perform his full substantive role and being limited in the duties which he is able to perform and the location from which he can perform them; and/or

This is accepted by the respondent.

b. as a result of the delays/failure to provide remote duties or suitable recuperative duties the Claimant had to remain on sick leave (part of which was on reduced or nil pay), use his annual leave or other accrued leave and move to an area in which he had no experience or skills.

This is disputed by the respondent.

14. The Claimant claims the following reasonable adjustments should have been made:

a. providing the Claimant with a restricted role on the Joint Operations Unit;

b. providing the Claimant with a suitable restricted role on another team which enabled him to be deployed in a way that is commensurate to his capabilities in line with the Guidance to support changes to the Management of Police Officers on Limited Duties;

c. providing a suitable alternative role for the Claimant elsewhere in the force;

d. allowing the Claimant to work his agreed flexible working pattern on the fixed penalty unit; and/or

e. moving another officer from a role which was suitable for the Claimant, thereby freeing up the role for him.

The respondent does not accept that these were reasonable adjustments.

Issues

15. Did the Respondent apply the PCPs set out above? The Respondent admits it applied the PCPs referred to above under Issues 1-3.

16. If yes, did the above PCPs put the Claimant at a substantial disadvantage compared to non-disabled person?

17. Did the Respondent know both that the Claimant was disabled and that his disability was liable to disadvantage him substantially, or ought the Respondent have known that the Claimant was disabled and that his disability was liable to disadvantage him substantially?

18. If yes, did the Respondent fail in its duty to make reasonable adjustments?

Discrimination arising from a disability – s15(1) Equality Act 2010

19. The "something(s) arising" from the Claimant's disability, which he relies upon are:
    a. his sickness absence
    b. his requirement to have reasonable adjustments
    c. his need to work from home/his mobility issues
    d. his need to work restricted duties.

    The respondent accepts these save for the need to work from home at c above.

20. Did the Respondent treat the Claimant unfavourably because of something arising in consequence of his disability by virtue of the following acts:
    a. giving the Claimant formal notice of the UPAP stage 1;

    The respondent accepts the claimant was given the formal notice.

    b. failure to exercise discretion to extend the Claimant's full sick pay beyond 31 December 2017;

    The respondent accepts only that this is factually correct.

    c. failure to exercise discretion to extend the Claimant's half sick pay beyond 11th June 2018;

    This is also accepted as factually correct.

    d. not permitting the Claimant to work from home
    e. not permitting the Claimant to return to his role in the Protection Group

    The respondent accepts that d and e amounted to unfavourable treatment.

    f. not identifying a suitable alternative role for the Claimant.
    This is not accepted by the respondent and is very much in issue in the case.

21. If yes, was the treatment complained of a proportionate means of achieving the following legitimate aims:
    a. having officers perform their duties;
    b. managing attendance effectively;
    c. protection of the public (by having processes in place to ensure a sufficient number of officers working at appropriate times for the force to operate effectively and efficiently);
    d. effective and efficient use of public funds;
    e. proper consideration of the application of its Attendance Management Policy;
    f. proper consideration of the application of the UPAP;

g. proper and consistent application of the guidance in PNB Circular 05/01; and/or

h. placing officers on recuperative duties to appropriate and safe roles when they are unable to carry out their substantive roles?

The claimant does not dispute that these were legitimate aims, but the issue is one of proportionality.

Jurisdiction

22. Do the matters complained about amount to conduct extending over a period?

23. If not, are any of the matters complained about outside the primary limitation period of 19 June 2019 (three months prior to the date of commencement of the ACAS early conciliation period)?

24. Would it be just and equitable to extend time?

Remedy

25. Should the Tribunal make a declaration?

26. What, if any, award of compensation should be made?

27. Are there any appropriate recommendations?

3. There was discussion about the timetabling, and it was agreed that the tribunal would need more than half a day for its reading. The Claimant called three witnesses in addition to himself and the Respondent eight witnesses. Whilst clearly the tribunal would not have to read the entire bundle of documents which ran to 800 pages it was agreed that the tribunal would read for the first day of this listing and that the hearing would be a hearing on liability only with remedy dealt with on another occasion in the event that the Claimant is successful.

4. As a reasonable adjustment for the Claimant and also to assist all attending this hearing on CVP there were breaks approximately every hour of about 10 minutes save for the lunch adjournment which was usually 1 hour.

Non-legal Member – Mr A Hayes

5. On the morning of the second day of this hearing Mr Hayes advised the parties in the interests of openness and transparency, that from late 2001 until mid-2006 he had been a Chief Superintendent in Norfolk Constabulary and as such had oversight of the royal estate at Sandringham (and consequently of close protection officers performing a role similar to that held by the Claimant). He had no dealings with the Respondent or the Claimant, or any of the witnesses. The representatives were given the opportunity to take instructions on this issue.

Claimant's recusal application

6. On behalf of the Claimant submissions were made that Mr Hayes should recuse himself and another member be found or the case adjourned for a new tribunal to be constituted. Mr Hayes was a high-ranking and career police officer and there was concern of unconscious bias. The claim being against a police force there were real worries on the Claimant's part that Mr Hayes would be biased towards that force.

7. The Respondent submitted that it was a matter for the tribunal but did not think it right that Mr Hayes be debarred from hearing any police case due to his previous service. If he were not able to sit and another member could not be found then the case would not go ahead. In the Respondent's view there was no actual or apparent bias. There would only be an issue if the lay member had specific knowledge of the people involved in the case and Mr Hayes had made it clear that that was not so.

8. The Judge explained to the parties the significant delay there would be if the matter had to re-listed as cases are being listed into late 2021 and indeed into 2022. It was submitted on his behalf that the Claimant had such strength of feeling about the issue now raised that he would rather suffer that delay and for the matter to be heard by a new tribunal. It was argued that if the Claimant has such a strong sense of injustice he would always have the sense that there had been bias against him.

9. Counsel for the Claimant sought clarification as to exactly what Mr Hayes had said as to whether he had any recollection of knowing anyone involved in the case. The Judge re-read her note to the parties and Mr Hayes confirmed that he was clear that he did not have any knowledge of anyone involved in the case. Where he had said that he had 'no recollection' was of having had dealings with the Thames Valley force itself as an entity.

10. The tribunal adjourned to consider the matter and then gave its decision to the parties as follows.

The tribunal's decision on recusal.

11. It was as stated above clarified that the point made by Mr Hayes was that he could not recall if he had dealings with Thames Valley Police force but that he was clear that he had no knowledge of any of the witnesses or matters in issue in the case. Mr Hayes also sits as a Magistrate and in both roles has taken the judicial oath.

12. The tribunal considered all of the authorities set out in Harvey on Industrial Relations and Employment Law at section P[916] and in particular that the test is "whether the fair-minded and informed observer having considered the facts would conclude that there was a real possibility that the tribunal was biased".

13. The Claimant's objection to Mr Hayes seems to be made on the basis that the fair-minded observer would conclude, as he has, that due to the rank Mr Hayes held in Norfolk Constabulary he will be biased in favour of the Respondent police force and against the Claimant. That is not accepted by this tribunal which did not find grounds for recusal.

14. In all of the authorities where it was found at higher level that there should have been recusal there had been some connection or involvement of the judicial office holder with either one of the parties or the matters involved in the proceedings or had been closely connected to them. There is none in this case.

15. Mr Hayes is not alone on the tribunal panel. The tribunal sits as a panel of three. Mr Hayes could be out voted by the Judge and the other member were he to take an inappropriate line although we have no reason to believe that would be the case.

16. Although accepting that it was not the primary consideration the Claimant has said through his Counsel that he would accept any delay caused by Mr Hayes having to step down if the hearing could not then continue. However, the delay would not only be of concern to the Claimant, but also to the Respondent and its witnesses. The tribunal must also consider that issue and the aim of trying to ensure that a case that was issued in 2018 is dealt with fairly now and without further delay which could in the current climate be at least another year.

17. For the reasons given it was determined that the case would continue with the tribunal as presently constituted.

18. Having given those reasons the Claimant's Counsel was given time to take instructions from him and confirmed that he was content to proceed.

Anonymisation Application

19. Counsel for the Respondent indicated at the outset of this hearing that she would be making an application that the names of all officers who have worked in the Respondent's Protection Unit be anonymised in any written reasons.

20. Rule 50 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides as follows:-

> "**Privacy and restrictions on disclosure**
>
> (1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.

(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

(3) Such orders may include—

(a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;

(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;

(c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;

(d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.

(4) Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing.

(5) Where an order is made under paragraph (3)(d) above —

(a) it shall specify the person whose identity is protected; and may specify particular matters of which publication is prohibited as likely to lead to that person's identification;

(b) it shall specify the duration of the order;

(c) the Tribunal shall ensure that a notice of the fact that such an order has been made in relation to those proceedings is displayed on the notice board of the Tribunal with any list of the proceedings taking place before the Tribunal, and on the door of the room in which the proceedings affected by the order are taking place; and

(c) the Tribunal may order that it applies also to any other proceedings being heard as part of the same hearing.

(6) ”Convention rights” has the meaning given to it in section 1 of the Human Rights Act 1998.”

21. The application was made on the basis that reference is made to certain former officers who have since retired and current firearms officers will give evidence. The officers in the Respondent’s Protection Group provide security to the Royal Family, Government Officials and other VIPs. They are subject to National Memorandum whereby during operations they are not identified by name or collar number due to the sensitivities of their duties. They acquire detailed knowledge of the principals whose protection they are engaged in and of their domestic arrangements. To ensure the

security and privacy of the principals the officers are instructed to maintain low public profiles.

22. The tribunal was conscious that a rule 50 application is in effect a derogation from the principle of open justice or full reporting and it is for the person seeking that derogation to satisfy the tribunal that it is required. It must be established by clear and cogent evidence that harm will be done by reporting to the privacy rights of the person seeking the restriction on full reporting so as to make it necessary to derogate from the principal of open justice.

23. There was no doubt on the facts of this case and in relation to the various officers that this was an entirely appropriate case for an anonymisation order. It did not prevent the full exploration of the evidence and it was only required with regard to the names of the officers in any written reasons. A schedule of the names of retired and existing officers was agreed between the parties and they will be referred to by way of number in these written reasons.

24. The tribunal heard from the Claimant, his wife and federation representative, Robert Blackler on his behalf. For the Respondent it heard from five officers and from Joanne Clack, Criminal Justice Operational Manager and Zoe Beaupierre, Employment and Wellbeing Lead Adviser. It had a bundle in excess of 800 pages. References in the findings to page numbers are to the bundle. From the evidence heard the tribunal finds the following facts.

The Facts

25. The Claimant is a serving police constable with 29 years' service. In 1998 he joined the Respondent's Protection Group as a static protection officer performing protection duties at required locations within the force.

26. There is no dispute that the following policies are relevant to these proceedings.

Relevant Policies

27. Officer's pay is dealt with in the **Police Regulations 2003**. **Annex K** to those Regulations deals with sick pay (page 109 in the bundle). Paragraph 1 provides:

> Subject to paragraph (2), a member of a police force who is absent on sick leave, in accordance with Regulation 33(5), shall be entitled to full pay for six months in any one year period. Thereafter, the member becomes entitled to half pay for six months in any one year period.

Paragraph 3 states as follows:

> The chief officer of police may, in a particular case determine that for a specified period

a) a member who is entitled to half pay while on sick leave is to receive full pay, or

b) a member who is not entitled to any pay while on sick leave is to receive either full pay or half pay,

and may from time to time determine to extend the period.

28. In a document headed Memorandum and reached in the Police Negotiating Board ('PNB' – page 113) was **Guidance to the Chief Officers on the use of discretion to resume/maintain paid sick leave**. This provided that:

5. The decision to exercise the relevant discretion is one for the chief officer who must consider each case on its merits. A force cannot have a fixed policy that discretion always will or will not be exercised in a particular kind of case. It is however possible for forces to lay down guidelines to promote fairness and consistency in the decision making process, so long as the possibility of exceptions is not ruled out.

6. The PNB recommends that forces have a written policy on the exercise of discretion. Such a policy should:

- Set out the procedure by which decisions will be reached
- Include an appropriate opportunity for an affected officer to make representations prior to the decision being made
- Provide for a periodic review of decisions
- Setout guidelines in relation to the exercise of discretion, while emphasising that each case should be considered on its merits
- Have due regard to relevant legislation, including the Disability Discrimination Act

7. Whilst each case must be considered individually, the PNB considers it would generally be appropriate for chief officers to exercise the discretion favourably where:

- The chief officer is satisfied that the officer's incapacity is directly attributable to an injury or illness that was sustained or contracted in the execution of his/her duty or
- The officer is suffering from an illness which may prove to be terminal; or
- The case is being considered in accordance with the PNB Joint Guidance on Improving the Management of Ill Health and the police authority has referred the issue of whether the officer is permanently disabled to a selected medical practitioner
- The Force Medical Adviser advises that the absence is related to a disability as defined by the DDA* (*"A physical or mental impairment which has a substantial and long term adverse effect on the ability to carry out normal day-to-day activities.") and the chief officer considers that it would be a "reasonable adjustment" to extend sick pay, generally speaking to allow (further) reasonable adjustments to be made to enable the officer to return to work.

29. **Thames Valley Police Attendance Management Policy** (September 2016) (V2)', at Appendix A (page 195) states as follows:

> **"A1 Individual responsibilities**
>
> 1.1 TVP has a high expectation of its workforce. The force values of integrity, fairness, professionalism, providing a quality service and equality are expected at all levels throughout the force. Its staff is recognised by TVP as being its most valuable asset.
>
> 1.2 In order to achieve these expectations and to support staff, the managing attendance procedures are aimed at ensuring all are able to attend work on a regular and reliable basis. Staff must be properly supported by managers so that TVP has minimal levels of sickness absence and has a workforce that is performing to optimum level.
>
> …
>
> 1.15 A member of staff may not always need to be 'fully fit' to return to work. For example, they may be able to use Access to Work to obtain assistance in travelling to work. On returning to work a member of staff may be able to perform some of their role or carry out alternative activity until they are fully fit. This is the case for staff returning to work at the end of a period covered by a Medical Statement or at a point earlier than the date on the Statement.
>
> **A2 Line Manager Responsibilities**
>
> **…**
>
> 2.5 Managers are expected to use the relevant policy (police staff, police officer or student officer – see policies listed below) to help support staff back to work and or to improve attendance or performance in all cases where the levels of absence/performance has become unacceptable to the organisation. (Unacceptable attendance is defined in 2.16 below).
>
> 2.6 Managers must ensure consistent of use policy to achieve fairness. These policies are to help support staff and to manage sickness absence.
>
> - Police Staff Unsatisfactory Performance and Attendance Policy
> - Police Officer Unsatisfactory Performance and Attendance Policy
> - Regulation 13 – Managing the Performance of Student Officers for Police Officers.
>
> …
>
> 2.16 In respect of all staff who breach the following Attendance Standard because they:
>
> - Have had 14 calendar days sickness absence in a 12 month period and / or
> - Have had 3 periods of sickness in a 12 month period from the start of the current absence and / or
> - Give cause for concern because of their sickness record

Line managers (with advice from the People Services Advisor), will investigate the background to the absence and assess whether action needs to be taken.

…

A5 Return to work

…

5.7 All members of staff will be assisted to return to some form of work after a period of sickness or injury, where they are unable to come straight back to all aspects of their substantive role. They are expected to return on their full contracted hours unless agreed by their line manager. Advice can be sought from Occupational Health and People Services if required.

5.8 The Chief Constable's intention is to support individuals in their attempts to return to work as soon as they are fit and ready to resume working again. It is recognised that over the years, the number of police roles which provided suitable opportunity for recuperative duties, has diminished, especially if longer term adjustments are required. However, it is clearly in the best interest of the Force and the individual to find suitable roles, where possible, and to support individuals in their attempts to return to work whenever practicable.

…

5.10 It is expected that with Occupational Health guidance, full hours should be reached within an eight week period. Further advice can be obtained by referring to the Recuperative/Adjusted Duties Guidelines.

30. **Extensions to Sick Pay'** (page 219) provided as follows:-

Guidance

Home Office guidance details how and when to apply discretion when applying extensions of sick pay to police officers. Thames Valley Police has decided that the same criteria will be applied to police staff when an individual reaches the pay cut off point under their conditions of service.

The criteria for extension are as follows:

- Terminal illness
- Injury on duty - classified in Thames Valley Police as carrying out the unique duties of a constable
- While in the process of the consideration of ill health retirement.

31. **The Police (Performance) Regulations 2012** (page 124) provides :-

Part 3

First stage

14. Circumstances in which a first stage meeting may be required

Where the line manager for a police officer considers that the performance or attendance of that officer is unsatisfactory, he may require the officer concerned to attend a meeting (in these Regulations referred to as a first stage meeting) to discuss the performance or attendance of the officer concerned.

32. The Respondents **Unsatisfactory Performance and Attendance Policy (UPAP)** commenced at p173. Appendix A contained 'Performance and Attendance Procedures' which provide :-

…

2.0 Management action / Informal procedures

2.1 The primary aim of the Unsatisfactory Performance and Attendance Procedures is to improve performance and attendance in a supportive way. Early intervention by way of management action at the lowest managerial level is key to improving and maintaining an officer's performance and / or attendance to an acceptable standard, without progressing to formal procedures.

…

2.3 Unsatisfactory Attendance

2.3.1 Attendance is also an important aspect of the performance of police officers. The primary aim of the procedures is to improve and maintain attendance in a supportive way, addressing any concerns at an early stage.

2.3.2 When dealing with poor attendance related to ill-health it is important to clarify the medical situation with Occupational Health and to take account of the Equality Act. However, this should not detract from taking the appropriate action in the particular case.

2.4 Informal management action

2.4.1 Managers are expected to discuss and agree action to address issues of performance and / or attendance as part of normal supervision of police officers with a note being kept of what was discussed and agreed. Management action may include:

- Pointing out how the behaviour fell short of the expectations set out in the Unsatisfactory Performance and Attendance Policy.
- Identifying expectations for future performance and / or attendance.
- Establishing an Improvement Plan with appropriate timescales,
- Addressing any underlying causes of the unsatisfactory performance and / or attendance, such as welfare issues.

3.0 Formal Performance and Attendance Procedures

…

> **3.2** **<u>Stage 1</u>** - If the line manager considers the performance and / or attendance of an officer to be unsatisfactory then s/he may require the officer to attend a Stage 1 meeting in order to discuss this further. The line manager must give notice in writing to the officer concerned requiring him / her to attend the Stage 1 meeting (using form UPP1A).

The Claimant's ankle injury – 25 June 2017

33. In an incident report that the Claimant accepted he personally would have partially completed it was recorded that on 25 June 2017 whilst walking through the vehicular access gates in the police yard the Claimant caught his foot on something and tripped falling forward to the ground and twisting his left ankle.

34. The report went on to record that the CCTV had been viewed, it is believed by Officer 8 the Claimant's then line manager.

35. In a log of contact that Officer 8 kept (with which the Claimant had little issue) it was noted that the next day he had a phone call with the Claimant who reported he had attended A&E where it had been confirmed that he had torn ligaments in his ankle and possibly fractured a rib. He had been prescribed painkillers and required complete rest for 24-48 hours. It was likely to take 10-14 days before the Claimant would be fit to resume duties.

36. On the 3 July it was noted that the Claimant was unable to put his shoes on and the doctor was issuing a sick note to take him to the 9 July.

37. On the 7 July it was recorded that the Claimant had a fractured left ankle and one completely torn ligament. Physiotherapy would not assist but only make it worse. The Claimant could not drive and was currently in a brace. The injury had been classed as a significant injury.

38. On the 26 July 2017 a referral was made to Occupational Health. The report of Occupational Health was dated the 21 August 2017 but referred to an appointment on the 9 August 2017 which it is understood took place by telephone. This report recorded that unfortunately the ankle injury had initially been diagnosed as a severe sprain but due to the ongoing pain the Claimant had had to take further advice. It was eventually identified by the fracture clinic specialist as being a "ruptured ligament and avulsion fracture". The Claimant had been given a brace to support the ankle and crutches to assist him with walking. He was unable to drive and was wearing the brace and using the crutches as required. He was signed off until the 3 September.

39. The report also recorded that the Claimant had planned surgery on 29 September for a long-standing medical condition to assist with chronic pain management and it was hoped that would still go ahead.

40. The Claimant accepted in evidence that at this point he did not know how long the issues with his ankle were going to last. He remained in contact with Officer 8 by text and phone but did not see him until November.

41. On 16 October 2017 the Claimant was signed off for two months and was due to return to his consultant on 23 November 2017.

42. The log at page 222 recorded on the 10 November 2017 that there had been no material change in the Claimant's circumstances. He had tried driving but applying the clutch had caused a lot of pain. He was advised that there was to be an email sent to him shortly about his pay being reduced to half pay if he had not returned to work by the 14 December 2017. The Claimant asked Officer 8 if he would attempt an appeal to prevent this happening. He duly wrote to Suneil Gill supporting the Claimant and asking if that individual could forward the matter to the Head of Corporate Health for them to consider suspending the decision to reduce the Claimant's pay.

Meeting at the Claimant's house – 21 November 2017

43. On the 21 November 2017 Officer 8 attended the Claimant's home to hand to him a letter confirming his reduction to half pay (as required by regulations). The log he kept of his interaction with the Claimant during this time noted that he discussed with the Claimant the forthcoming appointment with his consultant on the 23 November 2017 and asked that he update him after that meeting. Officer 8 recorded that he would be contacting HR regarding any possible assistance that could be given to get the Claimant back to the workplace.

44. The Claimant gave evidence (paragraph 43 of his witness statement) that at that meeting he asked Officer 8 whether he could be provided with a laptop and use his work phone to help with either close protection commitments or anything else needed to be done by that department which could be done over the phone from home. The tribunal has not heard from this Officer and the Claimant records that he was told there was nothing for him and it was unlikely that he would get a laptop as there were not any available to his knowledge.

45. That the laptop was discussed is confirmed in the Grounds of Appeal prepared by the Claimant's Federation representative dated 27 November 2017 against his reduction to half pay. On the second page under paragraph 1 it was noted that the Claimant had requested a laptop so he could work from home and as a trained firearms close protection officer he would "be able to perform the task of completing risk assessments, operation orders for visiting dignitaries and any other admin given to him but this has been declined by Officer 8 as there is no work that he can do available"

46. That this had been raised was acknowledged in the decision on appeal and it appeared from Counsel's submissions that the Respondent accepts that this was requested.

47. What the tribunal does not accept however is the Claimant's assertion in his witness statement that he at that time asked to do whatever Officer 3 was doing and nor did he specifically refer to any other officers at that time. The issue of Officer 3 was mentioned in the Claimant's ET1 but the other officers only in the Claimant's witness statement for these proceedings.

48. The Claimant was signed off sick by his GP for two months from the 23 November 2017. The fit note stated that he was not fit for work pending further investigation and that he was not able to weight bear or drive.

49. The consultation with Occupational Health took place by telephone on 30 November 2017 and merely recorded that the Claimant remained under the care of different medical specialists and his GP and "he has unfortunately had some complications which have set back his recovery and remains unable to drive and has been signed off for 2 more months whilst investigations continue". She arranged to review him again in mid-January. There was no suggestion that the Claimant was fit to do any duties at that time.

The Claimant's appeal against the reduction to half pay

50. This was prepared by the Claimant's Federation Representative on his behalf. There were three elements to the appeal:-

    (1) That the ill-health absence flowed directly from a fall caused by property owned by the Respondent.

    (2) That the Claimant was likely to be covered by the Equality Act 2010 and that to remain on full pay would be a reasonable adjustment.

    (3) That the half pay letter sent to the Claimant dated 14 November was not served on him until 21 November.

51. In relation to the accident it was further suggested that it was an injury on duty and that this should be taken into account.

52. The appeal was heard by Dr Steven Chase, the Director of People who wrote to the Claimant on the 6 December 2017 confirming that he could not grant the Claimant's request to remain on full pay from the 11 December 2017. It had been concluded that the Claimant's situation did not fall under the Home Office Discretionary Criteria. The pay was being extended until 31 December 2017 to recognise the slight delay in the Claimant receiving the half pay notification letter and to "enable you to engage with your line manager and case worker in identifying some recuperative duties to return to work". The appeals officer was satisfied that

the injury to the Claimant was not incurred whilst the Claimant was carrying out the unique duties of a constable.

53. At this point the Claimant could not go back to work, there were reports from Occupational Health and fit notes from his GP and none of them stated he could return albeit with alternative duties.

The Claimant's appeal to the Chief Constable

54. By email of 12 December 2017 the Claimant's trade union representative appealed to the Chief Constable in respect of the pay reduction. It was again submitted that consideration should be given to the Claimant being on duty at the time of the accident. It was also stated that the Claimant had been asking to work from home using a laptop which had been refused as there was "nothing for him to do". It was submitted that the Claimant could facilitate any work that his role required and if the reduction in pay went ahead it would cause him great difficulty and distress.

55. By email of the 17 December 2017 the Chief Constable replied that he had asked for further information about the case and that he knew that they were trying to get the Claimant back to work in some capacity at an early stage.

56. In an email of 22 December 2017 the Chief Constable advised the Claimant that he was of the view that the correct decision had been made in terms of half pay. He found that there was no medical evidence submitted with the appeal papers to suggest the condition was substantial and/or that it would have that impact for 12 months or be expected to last for 12 months of more. With regard to it being sustained as in injury on duty it had not been incurred "in the execution of his duty" but was rather a work place accident.

57. The Chief Constable understood however that the opportunity for the Claimant to work remotely on recuperative duties was being looked at again by managers and he hoped that they would be able to find something meaningful in the new year.

58. By letter of the 11 January 2018 Mr Nicholas Gillham, Consultant Orthopaedic Surgeon treating the Claimant at Oxford University Hospitals wrote to the Nuffield Orthopaedic Centre asking that they see the Claimant who was still struggling with his left ankle. More than six months since the injury he continued to have significant pain which was complicated by his ongoing back problem. It was noted that a spinal stimulator had recently been inserted which had prevented a repeat MRI scan. Advice was sought on what could be done.

59. The Claimant was signed off by his GP as not fit for work on the 11 January 2018 for two months. He was spoken to by Occupational Health on the 15 January 2018 who agreed to review the Claimant in early March by which time it was hoped he would have been seen by the Nuffield Specialist.

60. A letter dated the 15 February 2018 (page 515) recorded that the Claimant had had four sessions of shockwave therapy but continued to experience ongoing pain with the plantar fasciitis. He was to have two more sessions and to continue with stretching exercises.

61. The Claimant was seen by Occupational Health on 5 March 2018. It was reported that he had been seen by the foot and ankle consultant at the Nuffield Orthopaedic Centre where it was intended to carry out an arthroscopic investigation to try to identify the cause of the delayed ankle recovery and what further treatment may be required. He was awaiting the date for surgery but remained in considerable discomfort and mobility remained limited. He remained signed off until early April and there was unlikely to be any significant change until the problem had been identified and addressed.

62. A certificate signed by the general practitioner at that point stated that the Claimant was not fit for work from the period 22 March to 22 April 2018 due to the arthroscopy and that the Claimant would be signed off post-operatively for a period also. The next sick note seen was that of the 14 May 2018 to the 25 June 2018 citing ankle surgery 20 April 2018. There was no suggestion that the Claimant was fit to work taking into account any advice on adjustments.

63. On 12 March 2018 Officer 2 joined the Protection Group. On or about 9 April 2018 it was agreed that Officer 10 would take on line management responsibilities for the Claimant. The Claimant acknowledged at his Grievance hearing in January 2019 that he felt supported from this time. It is around that time that email correspondence can be seen between Mark Pencherz, Employment and Wellbeing Advisor, Zoe Beaupierre, Employment and Wellbeing Lead Advisor, Officer 8 and Officer 10 about moving the Claimant to Stage 1 of the UPAP. There was discussion about suitable dates and taking into account the Claimant's surgery 20 June 2018 was agreed.

64. The notice to attend the Stage 1 meeting was served on the Claimant personally at his home on the 12 June 2018 (page 268). It stated that as the Claimant had not achieved the required improvements in attendance it was necessary to escalate to the formal stage of the process.

Stage 1 attendance meeting – 20 June 2018

65. The Claimant was accompanied by his Federation representative to this meeting (now J Williams).

66. The Claimant raised for the first time at this meeting the possibility of a role in the Fixed Penalty Support Unit in Banbury. He is recorded as stating that if the Respondent "were paying me I'd be allowed to recover but I've got no choice". The suggestion seemed to be that the Claimant did not necessarily wish to return to work but had no choice in view of his reduction

to half pay. Officer 10 is noted as stating that there would be a staged return to work and that the Claimant wouldn't be made to do anything he couldn't

67. There was also reference to a staff level job at "the new site". There had been a Health & Safety report on the site showing it would not be suitable for the Claimant at this stage. Having heard all of the evidence in this matter the Claimant did not pursue that allegation and therefore the tribunal does not need to make any findings in relation to it.

68. Following the meeting HR wrote to the Claimant stating they had spoken with the manager regarding the Banbury role and there would be further discussion with HR with regard to a recuperative plan with the Claimant thereafter. The Claimant had written on 20 June that the manager of the department had spoken to his wife that a job in the Fixed Penalty Unit would be suitable for the Claimant's flexible working pattern.

69. At page 372 of the bundle attached to an email of the 5 September 2018 the tribunal saw details of the Claimant's flexible working arrangement. This comprised early shifts of 2 or 4 days duration and then rest days of up to 3 days depending on the shift rotation. There had been some nights but these were changed to early shifts on the Claimant's return to work.

70. The tribunal heard from Joanne Clack who ran that unit who seemed now to accept in evidence that it might have been possible to accommodate the Claimant's flexible working pattern albeit after initial training had been carried out.

71. The support plan entered into following this meeting was seen at page 278 and anticipated a return to work as of 25 June 2018 although annual leave might affect that date. The Claimant was to work initially on 4 hours per shift but at the time this plan was drawn up the work role and location were yet to be provided.

Occupational Health Report – 18 June 2018 (page 536)

72. This report recorded that the Claimant had had left ankle surgery on 20 April. Since the surgery the foot had been feeling more comfortable, but he still had significant pain inside and outside the ankle and continued to need strong painkillers. He had a review with the ankle specialist the previous week who suspected tendonitis and had referred the Claimant for an ultrasound scan and to the orthotics department. He was likely to need a steroid injection and orthotic inserts to wear. The report also noted the Claimant's long-standing problems with foot pain and that an ultrasound scan of both feet had confirmed plantar fasciitis in both feet. Medical treatment to date had been of no benefit and the Claimant would need further surgery sometime in the future but that would need to wait until his ankle had recovered. It also noted the Claimant suffered with back pain and his foot and ankle issues had not helped with that. He was walking with a stick but having regular physiotherapy and had started a gym class to

help with his rehabilitation. It was likely to take several months for recovery. She noted that the Claimant was signed off until 25 June and then had a fit note from the Specialist advising amended duties/hours on his return to work.

73. The Occupational Health practitioner stated the Claimant would need a phased return starting with 4 hours (to include his commute) to be increased very gradually over the next few weeks subject to symptoms, medication effects and capabilities. He would need to be non-confrontational and not driving at work. With regard to getting to work, he would be able to drive subject to safety or cycling if his physiotherapist agreed. He may need to consider the Access to Work scheme for assistance. It would depend where he was working whilst on recuperative duties. A review would be carried out in 6 weeks time.

74. The fit note to which Occupational Health referred was that dated the 15 June 2018 from the Nuffield Orthopaedic Centre, Outpatients. This stated that the Claimant 'may be fit for work taking into account the following advice' which was that if available the Claimant be given amended duties but also noted:

74.1 Still undergoing physiotherapy

74.2 Non – confrontational light duties

74.3 No nights

74.4 No long distance driving.

That would be the case for 4 months i.e. to October 2018.

Appeal by Claimant 26 June 2018 against move to UPAP Stage 1 (page 281)

75. The appeal was made following the decision to formally escalate the Claimant from the informal stage of the UPAP to the stage 1 notice and the meeting held on the 20 June 2020. It was made on the following grounds:-

(1) That the Claimant's former line manager had failed to adhere to the Attendance Management Policy and to provide the Claimant with a copy of the SRP (Supportive Recovery Plan) and that prior to the stage 1 meeting the Claimant had not signed or dated the said SRP.

(2) That the notice of the stage 1 meeting showed a clear intention of Officer 10 to escalate prior to the meeting.

(3) A failure to comply with Police Regulations with regards to advanced disclosure of documents relied upon.

(4) The decision was unfair as the Claimant was disabled and this may constitute disability discrimination.

76. It was argued in the body of the appeal document that not all supportive approaches had been offered to the Claimant and that more careful consideration could and should have been given to him around identifying a police officer role as he was able to drive and perform an emergency stop but that any driving to be limited to short distances. Alternatively, a policing role should have been considered that could be performed remotely from his home via a laptop as this may facilitate or expedite a return to work. It alleged there was no evidence to suggest that other roles had been considered as it was clear that in the short to medium term the Claimant was unable to perform his close protection role.

77. At the end of the appeal document it identified three potential roles:-

    (1) Central Ticket Office, Banbury (understood to be the Fixed Penalty Support Unit).

    (2) Driving school.

    (3) New Royal residence (this is reference to the 'new site' not now being pursued as part of this claim).

78. On 27 June 2018 HR wrote to Joanna Clack asking if they could discuss a recuperative role for the Claimant in her team in Fixed Penalty Support.

79. Officer 10 was absent on annual leave and the Claimant's position dealt with by Officer 12 in his absence. On the 9 July he confirmed to Officer 2 the action that had been taken by him. He had spoken to the Claimant the previous week and made little progress. He reported that the Claimant was unwilling to work Monday to Friday 8-4 in the Fixed Penalty Office or to work his current shift pattern in the iHub. The Claimant did not think that 8-4 Monday to Friday in Fixed Penalty would work around his current flexi pattern. With regard to the iHub he felt that he was "de-skilled" and would not be able to do that work although Officer 12 was satisfied that with some tuition which could be provided there was no reason he could not start at the iHub and keep to his current shift pattern. It was noted that the Claimant was not prepared to give an answer until he had sought legal advice and had the outcome of his appeal.

80. The Claimant's appeal against the UPAP stage 1 was acknowledged on the 3 July 2018 and he was given a date for the hearing of that of the 14 August 2018. The Claimant was however on leave on that date and the appeal took place on the 20 August.

81. In an email of 3 July 2018, the Claimant's trade union representative set out concerns that they had about the roles being offered to the Claimant. It was reminded that Occupational Health had indicated that any requirement to work should encompass the Claimant's journey to and from home. His phased return should not be less than for 4 months. There was no expectation due to the side effects of the plethora of medication that the Claimant was on any requirement to work night shifts.

82. Dealing with the Fixed Penalty Unit, they understood that the Claimant would be able to work his flexible working pattern there albeit on reduced hours during the week and over the weekends performing early and late turn duties.

83. Whilst accepting that the iHub may be an option it was stated that consideration must be given around the fact that the Claimant was de-skilled and would therefore require a Needs Analysis Assessment to be conducted with associated training to be provided if he were to perform that role. He was unfamiliar with the NICHE system as he had not been required to utilise it within his former close protection role. Another significant factor was the effect of medication on any role offered and a medical opinion would be required to determine capability.

84. The Claimant's appeal against the stage 1 took place on 21 August 2018 and Officer 2 made the decision to return the Claimant to the informal stage of the procedure as there was no evidence that he had received a written copy of the original Supportive Recovery Plan (SRP). This was a plan seen in the bundle at p223-4 when the Claimant's line manager was Officer 8. It started after the Claimant's ankle injury on 25 June 2017 and noted events in the Claimant's recovery up to February 2018.

85. The new Supportive Recovery Plan issued after the appeal was seen in the bundle at page 370 and prepared on the 5 September 2018. The agreed actions were set out at page 4 and comprised:-

    (1) To complete/achieve a recuperative return to work in line with the plan. This will be to increase the working hours. Review in 3 months from the date set.

    (2) To improve attendance in line with policy triggers of 14 days.

    (3) To attend all medical appointments and comply with all medical recommendations.

    (4) Ensure the Claimant maintained his fitness for work.

86. At this point the Claimant was advised that he would be working in the iHub at Banbury on the "Smarter Resolutions" aspect viewing CCTV and other relevant tasks. He was to receive NICHE training from one of the team and he would be working on his old flexible working pattern. He would not be required to work nights. He would initially start on 4 hours a shift with travel time allowed to and from work of 15 minutes each way. The plan was to increase his hours by one hour every fortnight.

87. Although the Claimant had concerns about this role stating he felt de-skilled an appraisal for the 9 April 2019 (page 746) showed that he had performed well in the role.

Occupational health report – 13 September 2018

88. This report recorded the Claimant's return to work as of 20 August. It advised however against increasing the Claimant's hours if possible. The Claimant was not able to sit comfortably due to the implanted device (for pain relief) and ongoing chronic pain, his mobility was limited and he was currently using a stick to walk. He was on strong pain medication which could cause significant drowsiness, tiredness and reduce concentration. This limited driving and he could only manage short distances subject to the effects of the medication.

89. Occupational Health advised that the Claimant work during the day to allow him to maintain a regular medication regime and bedtime regime. She advised against working more than five consecutive days in a row so he had at least two rest days in between. The chronic pain affected his sleep and the knock-on effect of that added to his fatigue which affected his overall wellbeing and resilience. The Claimant was still being regularly monitored by his GP and had a neuroscience appointment forthcoming. He was booked in to see the foot surgeon the following week and they would discuss the surgery for the plantar fasciitis which had not responded to the conservative treatment to date. The occupational health practitioner stated that in her opinion the Claimant's medical conditions were likely to bring him within the protection of the Equality Act.

90. The Claimant had a medical procedure on 24 October 2018 for the plantar fasciitis. He was in a medical boot for two weeks and signed off until 12 November.

91. A note in the Supportive Recovery Plan for 12 November noted that it had been suggested that the Claimant increase his hours to five per shift however his doctor had advised against that. The Claimant had another procedure at the end of the month to have his pain regulator moved within his body. He would again take annual leave and rest days in lieu to recover rather than accumulate sick leave.

92. Officer 10 wrote to the iHub explaining the Claimant's situation and that he would not be extending the SRP by any great timeframe. He wanted to know if the Claimant could continue to work in the team for another 3 months.

93. It was on 2 November 2018 that the Claimant had issued his ET1 claim form.

94. The Claimant had a pre-planned operation for repositioning the DRG stimulator on 29 November 2018 and was signed off sick until the 3 January 2019.

The Claimant's other conditions

95. The Claimant had experienced chronic pain since 2014 dealt with in his Impact Statement (page 78). He had also suffered from plantar fasciitis in both feet from 2013 onwards. It is not disputed but that by virtue of those conditions he is disabled within the meaning of the Equality Act 2010.

96. The Claimant attended a medical for his authorised firearms position in April 2017 which he passed. He therefore had been fully operational for a few months prior to his ankle injury in June 2017. No adjustments had been needed for his chronic pain or in relation to his feet.

Officer 3

97. In the Claimant's grievance and in his ET1 he refers to another officer who had been retained in the Protection Group after her firearms authorisation was withdrawn and asserts she remained in the team until about January 2018. He asserts she was doing an administrative role and he considered that he would have been able to perform a similar role remotely. From the Respondent's evidence the tribunal accepts this was not a role that the Claimant could have performed. Officer 6 gave evidence that allowing her to be retained temporarily in the Close Protection Unit enabled the following to occur:-

    (1) Allowed time for her to potentially appeal the decision to de-authorise her.

    (2) Find a suitable role on a Local Policing Area (LPA) near her home.

    (3) Agree a training/support plan with her supervisors to support her working/moving into non-firearm officer roles.

    (4) Prevent her from having to be moved twice (once to a temporary alternative role and then again to her new permanent role).

    (5) In conjunction with the Respondent's resourcing department identify a suitable permanent role.

    (6) Allow the role to be backfilled.

98. The tribunal accepts the evidence given on behalf of the Respondent that this officer was still able to carry out approximately 90% of her close protection role and was able to provide support to her colleagues. She was able to visit sites (such as sites which were to be visited by relevant principals for an event or meeting) and undertake risk assessments and liaise with other relevant police forces. From this she could assess the resources required for the assignment and prepare firearms request paperwork for approval. The tribunal accepts that the role cannot accurately be described as an administrative one as she was able to undertake a significant amount of the on the ground work over the

temporary period which utilised her existing skills and experience. The Claimant accepted when cross examined that he did not know what she did in that 10 week period.

99. In her closing submissions at paragraph 49 the Claimant's Counsel suggested that Officer 6 'confirmed when asked that a large element of her role was office-based in this period'. The tribunal does not accept that as an accurate reflection of what he said. When it was put to him that during this period her time spent on site visits very minimal, this was not accepted. Officer 6 gave evidence, which the tribunal accepts that it was not solely an administrative role but she was planning visits for principals. She did the full CPO role other than deploying on the ground with a firearm which tends to be the smallest part of the role. When again pressed that the vast majority of her time was office based as opposed to being out and about Officer 6 explained that a large element of her role would be travelling across the Respondent's area to talk to hospitals, schools, private venues and liaising with colleagues. He described it as a 'very nomadic' across three counties and Hampshire. His knowledge came from being an ex-firearms officer himself and therefore his personal understanding of the role. He gave evidence that he had never heard her say that the majority of her time was office based as the Claimant alleged she had said to him.

100. The tribunal does not find that Officer 3 was in a similar situation to the Claimant in that she was able to do all of the firearms officer role save for the actually carrying of a firearm which was not the case with the Claimant.

New civilian post within the department

101. Officer 2 gave evidence that by the time he had been in post for approximately 6 months, by late 2018, he had been able to observe the inefficiencies and practices of the department. As a result of this he submitted a business case for the conversion of an officer role to a staff role within the Protection Group. This was designed to provide operational support to the group in the management, planning and allocation of resources including liaison with relevant stakeholders and partners to ensure the firearms resource met operational needs. The business plan was seen at page 657 of the bundle. These duties had up until this point been performed by a number of sergeants within the Protection Group.

102. The Claimant has suggested in these proceedings that these responsibilities are in part the responsibilities that should have been allocated to him. The role did not however exist at the time of the Claimant's discussions with his line managers in December 2017 or July/August 2018. As has been noted the team was particularly stretched in 2018 with the various demands made upon it and it had become apparent later in that year that it was increasingly difficult for the sergeants to dedicate adequate time to line management and their other responsibilities together with the resource allocation aspect of their role. It was therefore felt that creating a staff role to undertake resource allocation

and planning would alleviate pressure on the sergeants. As the work was essentially administrative in nature it was felt that those responsibilities could be undertaken by a civilian staff member with strong administrative and organisation experience as opposed to requiring a police officer with warranted powers. That allowed the Protection Group to rebalance its staffing, freeing up more police officers for operational duties and making it easier for the group to ensure that minimum staffing levels were maintained in relation to relevant principals and locations.

103. The Claimant would have been aware of the creation of this police staff role as vacancies are advertised on the Respondent's intranet to which he had access. The Claimant did not express any interest in the role and as it was a staff role it would have required him to resign from his post as a police officer.

104. The tribunal however accepts the evidence given on behalf of the Respondent that the Claimant would not have been able to undertake the responsibilities and duties of that role on his limited hours and it would not have been practicable to arrange for those responsibilities to be shared between the Claimant and another person. The role was advertised and recruited as a full-time role. That was required to deal with changes in operational needs as they arose often on short notice and to be able to liaise with internal and external stakeholders as required. The majority of the resource allocation work and liaison necessarily takes place during office hours. This would not have fitted with the Claimant's flexible working pattern.

105. The tribunal further accepts the evidence given on behalf of the Respondent that it would not have been appropriate for the role to be undertaken by the Claimant alongside anyone else as the frequent handover and lack of continuity would be likely to result in errors and would make it difficult to establish the good working relationships which are key to successful liaison with internal and external stakeholders in the role. It also required flexibility in times of national crisis and the ability to work extended hours at short notice.

106. In closing submissions at paragraph 51.1 the Claimant's Counsel made reference to Officer 2's answer to a question from the employment judge as to whether the Claimant could have done the tasks within the new civilian role but remotely. She stated that Officer 2 had said 'it would have introduced complexities, but could not say it wouldn't have been possible'. That is not to give all the detail that Officer 2 gave in his answer. He did say that it was possible that the role could have been performed remotely but that there would have to have been built in a handover. The role is a 12 hour shift. The Claimant was only able to work 4 hours on OH advice on his return to work. By the time he had briefed the next officer and they were taking it on, inefficiencies would have made it 'virtually unworkable'. He could not say that a handover wouldn't be complex. The role involves the allocation of officers to the sites. It is unlike anything else in the police. Principals come and go and their requirements cannot be forecast. They

will go where they please. There can be great demand or very little demand. Unlike core policing the nature of close protection work is such that demand can fluctuate within minutes. To then hand that on within a few hours would be he said and 'ludicrously inefficient'. The tribunal accepts that evidence as an accurate statement of why it would not have been effective for the Claimant to do that role remotely from home on reduced hours.

107. The Claimant referred to other officers who he suggested had been in comparable positions to himself but had been retained on the team. In paragraphs 43 and 107 of his witness statement he referred to Officer 5 who he stated had been retained on close protection in a supportive administrative role because his firearms authorisation ticket had been withdrawn. He was however physically attending work.

108. The Claimant also referred at paragraph 111 of his witness statement to Officers 1 & 4 who had been firearms officers but had been working in the HQ Armoury and Officer 7 who he stated had problems with his knees but was utilised on non-firearms duties in the force firearms range. These officers had not been raised by the Claimant prior to his witness statement.

109. The Respondent's evidence in relation to Officer 1 was that the Claimant was not comparing like with like. This officer had back problems, but no other issues and commuting was not an issue for him. It was accepted by the Respondent that he did go to work in the Force Armoury but he did not have the same restrictions and state of fitness to work as the Claimant had.

110. Officer 4 had had a heart attack possibly in the 2002 and the Claimant believed that he was posted to Static Protection before being unable to carry firearms. The tribunal accepts the evidence of Officer 9 that that was an ill-judged decision and cannot be used as an appropriate comparison to the Claimant when all of the circumstances and facts are not known.

111. The Claimant's Federation Representative gave evidence on his behalf. Robert Blackler had retired in March 2018. He was a Federation Representative from 2014 until his retirement. He left the Protection Group in 2008 and the tribunal accepts the Respondent's evidence that his knowledge of the working practices within the team are out of date. The tribunal does not accept that his evidence that the Claimant could still do 90% of his protection role was credible on the evidence it has heard. Neither was the suggestion that the Claimant would have been able to go to sites to carry out risk assessments in a taxi stopping en-route for breaks within the four hours Occupational Health were advising should be the limit to his time at work (including travelling) on his return.

The Claimant's role in close protection

112. The tribunal accepts the evidence given by the Respondent's witnesses in particular Officers 2 and 9 that consideration was given to whether the Claimant could be accommodated within the Protection Group. At

paragraph 5 of Officer 9's witness statement he set out the various permutations that were considered. The rationale is accepted by the tribunal.

(1) Full duties in firearms role working full hours on agreed flexible working pattern.

This was clearly not possible in view of Occupational Health advice and existing restrictions.

(2) Restricted duties role within Protection Group locations with reduced hours based on agreed flexible working pattern.

This would have included providing working support to site duties that were not public facing but relevant to the policing operation. Occupational Heath advice indicated the Claimant was unable to travel to work beyond that in close proximity to his home address and also that travel time should be included in any duty hours. The Claimant had been based at a site which was approximately 1 hour from his home and that would have needed to have been taken into account with his restriction to four hours in total. The shifts operated by the officers at the site were 12 hours and the Claimant would not have been able to work the whole shift. If the Claimant only worked for a few hours of that shift then the other hours still had to be covered. It was also clear from the Occupational Health advice that the Claimant was suffering from fatigue, crippling pains and had stated the need to keep his travelling to as near to home as possible.

(3) Restricted duties in an administrative role for the Protection Group away from sites with reduced hours based on agreed flexible working pattern.

The Claimant's suggestion was that he could have focused on resource management and duties of officers and staff in the department. Whilst that was a function that could be conducted at a location away from the Protection Group sites it was precluded on the basis that the number of hours the Claimant was permitted to work was insufficient to make this viable. Evidence was heard about how in 2018 the group was particularly stretched in view of the location of new principals into the region. It was submitted by Officer 2 that it was an over simplification to suggest that the operational support role was merely the taking of calls or messages of change of movements of the principal. Whilst that may indeed take place it was not just a simple change to someone's duties one day but involved the whole running of department. It was a leadership tasks that required supervision skills. It also required national level liaison and for that to be full time and flexible. The officers needed to be able to attend on duty in the event of a national emergency, for example a terrorist alert.

RELEVANT LAW

Relevant provisions of the Equality Act 2010

113. Section 123 of the Equality Act states as follows:-

> **"123 Time limits**
>
> (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
>
> (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

114. Section 6 of the Equality Act 2010 states as follows:-

> **"6 Disability**
>
> (1) A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

115. Schedule 1, Part 1 under 'Determination of Disability' it states as follows at (2):-

> "(1) The effect of an impairment is long-term if—
>
> (a) it has lasted for at least 12 months,
>
> (b) it is likely to last for at least 12 months, or
>
> (c) it is likely to last for the rest of the life of the person affected.
>
> (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
>
> (3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.
>
> (4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term."

116. Section 15 of the Equality Act 2010 states as follows:-

> "15 Discrimination arising from disability
>
> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

117. 'Guidance on the definition of disability (2011)' in the Section C under the heading 'Meaning of 'likely'' it states as follows:-

> "C3 The meaning of 'likely' is relevant when determining:
>
> - whether an impairment has a long-term effect (**Sch 1, Para 2(1), see also paragraph C1**);
> - whether an impairment has a recurring effect (**Sch 1, Para 2(2), see also paragraphs C5 to C11**);
> - whether adverse effects of a progressive condition will become substantial (**Sch 1, Para 8, see also paragraphs B18 to B23**); or
> - how an impairment should be treated for the purposes of the Act when the effects of that impairment are controlled or corrected by treatment or behaviour (**Sch 1, Para 5(1), see also paragraphs B7 to B17**).

In these contexts, 'likely', should be interpreted as meaning that it could well happen.

C4 In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age)."

118. Section 20 of the Equality Act 2010 'Duty to make adjustments' states as follows at sub paragraph 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."

119. In Schedule 8, Part 3 under 'Limitations on the duty' it states as follows:-

> **"Lack of knowledge of disability etc**
>
> 20 (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
>
> (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;
>
> (b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

120. The Code of Practice on Employment 2011 states as follows:-

> "**When can an employer be assumed to know about disability?**
>
> 6.21 If an employer's agent or employee (such as an occupational health adviser, a HR officer or a recruitment agent) knows, in that capacity, of a worker's or applicant's or potential applicant's disability, the employer will not usually be able to claim that they do not know of the disability and that they therefore have no obligation to make a reasonable adjustment. Employers therefore need to ensure that where information about disabled people may come through different channels, there is a means – suitably confidential and subject to the disabled person's consent – for bringing that information together to make it easier for the employer to fulfil their duties under the Act.
>
> …
>
> **What is meant by 'reasonable steps'?**
>
> 6.23 The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to

make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

6.24 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.

…

6.28 The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- whether taking any particular steps would be effective in preventing the substantial disadvantage;
- the practicability of the step;
- the financial and other costs of making the adjustment and the extent of any disruption caused;
- the extent of the employer's financial or other resources;
- the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
- the type and size of the employer.

6.29 Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case."

121. The tribunal was provided with a bundle of authorities from which the following principles can be drawn.

122. In Tesco Stores Ltd v Tennant UKEAT/0167/19 the EAT reminded that s.2(1)(a) of Schedule 1 of the Equality Act requires the tribunal to look at the date of the act of discrimination or harassment which is being addressed and to ask whether, as at that date, there has been 12 months of effect. It does not seem to be disputed that it is also necessary to ask the question of when the Respondent knew, or could reasonably have known, that the condition was likely to last for 12 months.

123. In Dunn v Secretary of State for Justice and another [2018] EWCA Civ 1998 it was held that it is a condition of liability for disability discrimination both under s.13 and s.15 that the complainant should have been treated in the manner complained because of either (under s.13) his or her disability or (under s.15) the 'something' which arises in consequence of that disability. That will typically, though not invariably, involve establishing (with the benefit of s.136 (burden of proof) if required) that the disability, or the relevant related factor, operated on the mind of the putative discriminator, as part of his or her conscious or unconscious 'mental processes'.

124. The Court of Appeal concluded that the EAT had been right to conclude there was no realistic prospect that the claims under either s.13 or s.15 could succeed. It was necessary to show that the line manager had acted as she did because her thought processes were influenced, consciously or unconsciously, by the fact that the Claimant was depressed or by something which was a consequence of that.

125. In O'Hanlon v Commissioners for HM Revenue & Customs [2007] EWCA Civ 283 the court found that it would be wholly invidious for an employer to have to determine whether to increase sick payments by assessing financial hardship suffered by the employee, or the stress resulting from lack of money; stress which no doubt would be equally felt by a non-disabled person absent for a similar period.

126. It held that the EAT had been right in pointing out that although it had been suggested that Mrs O'Hanlon would suffer hardship as a result of the reduction in pay, it had not been alleged that she was in any essentially different position to others who were absent because of a disability related illness. It followed that the full pay argument failed.

127. In relation to the Appellant's argument for enhanced sick pay the court cited large sections from EAT decision including the following:

> 67. In our view, it will be a very rare case indeed where the adjustment said to be applicable here, that is merely giving higher sick pay than would be payable to a non-disabled person who in general does not suffer the same disability-related absences, would be considered necessary as a reasonable adjustment. We do not believe that the legislation has perceived this as an appropriate adjustment, although we do not rule out the possibility that it could be in exceptional circumstances. We say this for two reasons in particular.
>
> 68. First, the implications of this argument are that Tribunals would have to usurp the management function of the employer, deciding whether employers were financially able to meet the costs of modifying their policies by making these enhanced payments…
>
> 69. Secondly, as the tribunal pointed out, the purpose of the legislation is to assist the disabled to obtain employment and to integrate them into the workforce. All of the examples given in s.18B(3) are of this nature…none of them suggests that it will ever be necessary simply to put more money into the wage packet of the disabled. The Act is designed to recognise the dignity of the disabled and to require modifications which will enable them to play a full part in the world of work. It is not to treat them as object of charity which may in fact sometimes and for some people tend to act as a positive disincentive to return to work.

As the appellant had relied upon the decision in Nottinghamshire County Council v Meikle [2004] IRLR 703 it stated that it was important to see how the Claimant's case had been put and went to the decision of Keene LJ in the Court of Appeal (paragraph 55)

> 70. The Claimant was a teacher who suffered from deteriorating vision. The employers were asked to make various adjustments to accommodate her

> difficulties …but they failed to do so. She was absent for lengthy periods and suspended because of these absences. She was put on half pay because...the policy of the employers was to reduce the pay after a certain length of sickness absence. She claimed, amongst other matters, that he failure to keep paying her full pay when she was absent sick constituted a failure to make reasonable adjustments… and the placing her on half pay was a substantial disadvantage.
>
> 73. The EAT upheld the appeal. The employer conceded that the reduction to half pay constituted less favourable treatment by reason of her disability. The question was whether it was justified. Because of what is now s3A(6) that had to be considered on the assumption that any relevant reasonable adjustments had been made. Had they been made in this case, Mrs Meikle would not have been absent for anything like as long as she was and the reduction in pay would not have occurred. Accordingly the EAT held that the employers were not justified in reducing her pay to half pay. The Court of Appeal agreed with that analysis…
>
> 74. It is important to note, however, that the court did not find that the payment of full pay was a reasonable adjustment independently of the other specific adjustments which ought to have been made and would have resulted in the employee returning to work without having to take such length absences. It was never suggested that the adjustment lay simply in granting full pay. Liability arose because of the failure to make reasonable adjustments to accommodate back into the classroom. This had the knock-on effect of rendering the failure to give her full pay unjustified…'

128. The reasonable adjustment must alleviate or avoid the substantial disadvantage identified. The purpose of a reasonable adjustment is to keep an employee in work and not to make provision for her to leave work. (Hill v Lloyds Bank plc [2020] IRLR 652)

129. This had also been emphasised in Thameside Hospital NHS Foundation Trust v Mylott UKEAT/0352/09 in which it was held that 'the whole concept of an adjustment seems to us to involve a step or steps which make it possible for the employee to remain in employment and does not extend to, in effect, compensation for being unable to do so.'

130. In Buchanan v Commissioner of Police of the Metropolis UKEAT/0112/16 a police motorcyclist was involved in a serious accident while responding to an emergency call, the brakes on his motorcycle having failed. He developed PTSD and was unable to return to work. When he had been absent for eight months the force began to take steps under its unsatisfactory performance procedure which was derived from the Police Performance Regulations 2012. The Claimant was given a series of dates to return to work as his case moved through the steps of the procedure, but did not return on those dates. The police force was fully aware from medical advice that he was unable to comply with the dates as he remained seriously ill. The Claimant brought claims of discrimination arising from disability under s15 EA 2010. The employment tribunal accepted that his treatment constituted unfavourable treatment and that it was because of something arising from his disability. The main issue was justification. The tribunal concluded that the application of the scheme was a proportionate means of achieving a legitimate aim.

131. The EAT held that the tribunal had erred in considering whether the general procedure was justified. It should have considered whether each step taken had been justified. Section 15(2)(b) requires the putative discriminator to show that 'the treatment' is a proportionate means of achieving a legitimate aim. The focus is therefore upon 'the treatment' and the starting point must be that the tribunal should apply s.15(2)(b) by identifying the act or omission which constitutes unfavourable treatment and ask whether that act or omission is a proportionate means of achieving a legitimate aim.

132. In some cases it may depend on whether the general rule or policy is justified. It will however be rare in disability cases concerned with attendance management for that approach to be applicable. Generally the policies and procedures applicable to attendance management allow for a series of responses to individual circumstances. The tribunal was required to consider whether each of the steps taken by the police force and found by the tribunal to have been unfavourable treatment arising from disability was justified. In addition to the usual aims of attendance management, which in the case of those who are absent long-term no doubt include supporting them so far as reasonable, considering termination fairly where absence can no longer reasonably be supported, the tribunal might wish to consider whether there was a particular aim in the present case to assist and support those who had been injured on duty.

133. In Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265 the Claimant had 62 days disability related illness absence. The employer held an attendance review meeting on her return. The policy provided that it would consider formal action against an employee if their absence reached an unsatisfactory level known as 'the consideration point'. That consideration point was set at eight days per year, but could be increased 'as a reasonable adjustment' for disabled employees. The employer decided not to extend the consideration point but gave her a written improvement warning, which was the first formal stage for irregular absences under the policy. The Claimant raised a grievance contending that her employer should have made two reasonable adjustments. Firstly, that her 62 days disability-related absence be disregarded for the purposes of the attendance management policy and the written warning consequently withdrawn. Secondly that in future the consideration point be extended with 12 days added to the eight already conferred upon all other employees. The Claimant lost her claim in the employment tribunal and her appeal to the EAT was rejected. The Court of Appeal held that the duty to make reasonable adjustments had been engaged as the attendance management policy had put the Claimant at a substantial disadvantage. However the proposed adjustments had not been steps which the employer could reasonably have been expected to take.

134. It had been open to the tribunal to find that the proposed adjustments had not been reasonable. That is a matter for the employment tribunal and has to be determined objectively.

135. In Garrett v LIDL Limited UKEAT/0541/08 a suggestion was made by the employer that the Claimant move to another store which was considered a safer working environment. The Claimant did not agree to this indicating she wanted to remain working where she was with adjustments. She further indicated she would not return to work until adjustments had been investigated at her original store. The Respondent stopped paying her.

136. The EAT held that:

> 'The tribunal had in mind the correct objective test, and indeed, did ask themselves the correct question in determining whether, first of all, those adjustments could have been achieved at the Appellant's existing place of work. Whilst within a large organisation it seems to us that there is no fetter on the adjustments best being achieved at an alternative place of work, it clearly makes good industrial sense for employers to consider first of all whether, if possible, those adjustments can be put in place at the existing workplace. However, we do not consider it unreasonable for employers to conclude, particularly where there is a mobility clause and the employee has worked at several stores, that the adjustments required can best be achieved by a move to another place of work.'

137. A tribunal is not precluded, as a matter of law, from deciding that swapping roles would be a reasonable adjustment, or from holding that it would be a reasonable adjustment to create a new job for a disabled employee, if the particular facts of the case supported such findings. Each case will turn on its own facts, and the scope of the duty of reasonable adjustments on employers cannot be precisely defined. For example, it may well not be a reasonable adjustment for an employer to require a woman working flexible hours due to childcare responsibilities to swap her job with that of a disabled person working longer hours. Equally, it may not be reasonable to force someone out of a job for which they are well suited to one that they are not, in order to accommodate a disabled employee. (Chief Constable of South Yorkshire Police v Jelic [2010] IRLR 744). Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664 EAT could be distinguished. In that case the EAT held that there was no obligation on the employer to create a post specifically, which was not otherwise necessary, merely to create a job for a disabled person. In Jelic however, there were two jobs both considered necessary at the time and both being carried out by the Claimant and another officer. The tribunal was entitled to conclude that swapping jobs would have been a reasonable adjustment. In particular, it was entitled to have regard to the nature of the police forces as a disciplined service and to the fact that even if PC Franklin had objected to the adjustment, the employer could have ordered him to swap jobs with the Claimant.

138. The main issue in this case on justification is the issue of proportionality, the Claimant accepting the Respondent's stated legitimate aims as such. In the Supreme Court in Homer v Chief Constable of West Yorkshire Police and West Yorkshire Police Authority [2012] UKSC 15, [2012] IRLR 601 in Lade Hale stated:

> "The approach to justification of what would otherwise be indirect discrimination is well settled. A provision criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination … [and] can encompass a real need on the part of the employer's business."

139. It is not enough that a reasonable employer might think that a measure is justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the measure. Although the Regulations refer only to a 'proportionate means of achieving a legitimate aim' this has to be read in the light of the Directive which it implements. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so.

140. In Homer the tribunal did not approach the question of justification in a suitably structured way and had not asked itself the right questions. It had failed to compare the impact of the measures taken upon the affected group as against the importance of the aim to the employer. To some extent it depended upon whether there were non-discriminatory alternatives available.

141. In Hensman v Ministry of Justice UKEAT/0067/14 Singh J applied the guidance given by the Court of Appeal in Hardy and Hansons plc v Lax [2005] ICR 1565 in which the main Judgment was given by Pill LJ, in particular, paragraphs 31 – 33 of that Judgment, which set out the correct approach to be adopted by the Employment Tribunal when assessing questions of proportionality:

> 31. It is for the employment tribunal to weigh the real needs of the undertaking, expressed without exaggeration, against the discriminatory effect of the employer's proposal. The proposal must be objectively justified and proportionate."

> 32. I accept that the word 'necessary' . . . has to be qualified by the word 'reasonably'. That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the Appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject [the employer's] submission . . . that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.

142. It was therefore stated in Hensman that the role of the Employment Tribunal in assessing proportionality is not the same as its role when considering

unfair dismissal. In particular, it is not confined to asking whether the decision was within the range of views reasonable in the particular circumstances. The exercise is one to be performed objectively by the tribunal itself. The EAT also accepted that the Employment Tribunal must reach its own judgment upon a fair and detailed analysis of the working practices and business considerations involved. In particular, it must have regard to the business needs of the employer. This is particularly so in a case where the Employment Tribunal had already found that the Respondent had legitimate aims to be served.

143. The burden of proof in respect of showing justification lies upon the Respondent.

Submissions

144. Both Counsel handed up written submissions and spoke orally to them. It is not proposed to recite those submissions here but reference will be made to them where appropriate in the tribunal's conclusions.

Conclusions

145. **Disability – the Claimant's ankle**

The tribunal must consider not only whether the Claimant's condition had lasted for 12 months but whether it was likely to do so. It must then consider whether the Respondent knew or ought reasonably to have known it was likely to last for 12 months. The tribunal has concluded that it was only from the Occupational Health report of 18 June 2018 that the Respondent had that knowledge. Only at that point and with the sick note of 15 June signing the Claimant off for 4 months but which stated he may be able to attend work with amended duties, did the Respondent become aware that the condition was likely to be long term within the statutory definition.

146. Before that it had the report of the 5 March 2018 which merely stated that further investigations were being carried out and that the Claimant would be reviewed after his arthroscopic investigation. The sick note issued on 22 March 2018 stated the Claimant was unfit to work for a month. The Respondent did not know at that point and could not reasonably be expected to know that the condition was likely to last for 12 months.

147. It follows from that conclusion that the Respondent could not be under a duty to make reasonable adjustments before that date, there being no suggestion that adjustments were required in relation to the claimant's other conditions. The tribunal will however, in case it were found wrong in that conclusion, give its conclusions on the reasonable adjustment claims assuming that the Respondent did have knowledge at the relevant time.

Failure to make reasonable adjustments – s.21(1) Equality Act 2010

Issue 1 – UPAP (Unsatisfactory Performance and Attendance Policy)

148. The Respondent accepts that it applied the following PCPs to the Claimant:

148.1 the UPAP;

148.2 the Respondent's Attendance Management Policy.

and that as a result of his disability, the Claimant was/is more likely to have sickness absence, to reach UPAP triggers and be subject to the UPAP and to exhaust his sick pay entitlement.

149. Although the Stage 1 meeting was on the 20 June 2018 it is clear from the tribunal's findings that discussion about the need to move to Stage 1 of the UPAP has started shortly after Officer 10 took over line management of the Claimant in early April 2018. That is before the Respondent had knowledge that the Claimant's ankle injury was likely to last more than 12 months and therefore to amount to a disability within the meaning of the Equality Act 2010. It was only due to other work commitments of Officer 10 and the Claimant's ankle surgery that the Stage 1 meeting did not take place in April/May which dates were originally being mooted. The policy had however been invoked even earlier following the Claimant's injury by Officer 10 starting the SRP (referred to in the policy as an Improvement Plan) the initial informal stage of the policy. That was commenced well before there could be any question of the Respondent having knowledge of the Claimant's disability by virtue of his ankle injury.

Adjustments contended for by the Claimant

150. The adjustments contended for by the Claimant will still be considered assuming, contrary to the tribunal's conclusion on disability, that the Respondent had knowledge of disability in relation to the ankle sooner than 18 June 2018.

151. *Postpone the UPAP until the Claimant's disability-related health issues improved and exercise discretion under the UPAP in the Claimant's favour* (dealt with together as the Claimant's Counsel did in her submissions as they are connected). The tribunal does not find that these would have been reasonable adjustments. The activation of the UPAP was not punitive and was to offer support to the Claimant. The tribunal accepts the oral submissions made on behalf of the Respondent that there is nothing in the policy that says that action would not be taken as long as the Officer's sickness was genuine. Moving to stage 1 of the policy did not mean that the Respondent doubted the Claimant's condition or that it was suggesting he was not engaging with his doctors. The fact that the conditions were genuine did not mean that the UPAP was an inappropriate tool. The use of the policy was to formalise the position where there had been a significant sickness absence. This was clearly set out in Officer 8's email to the Claimant of 28 February 2018 (page 249) that the purpose of the UPAP is

to “formalise the support that needs to be put in place e.g. potential adjusted duties, re-deployment or even worse case ill-health retirement”. The tribunal accepts it would not have been reasonable to postpone the use of the policy indefinitely.

152. The second adjustment contended for is that discretion should have been exercised not to issue a written improvement notice. In fact, however, the employer had exercised this by not invoking the policy after a 14 day period of absence. The Court of Appeal in Griffiths accepted that the tribunal in that case had been entitled to find that disregarding 62 days disability related absence and moving the “consideration point” were not on the facts of that case reasonable adjustments.

153. *Disregard the Claimant's disability-related absence.* The Claimant’s Counsel in oral submissions accepted that case law was against her on this point and that it would not be permissible to suggest the Respondent should have disregarded the sickness absences in their entirety.

154. *Record the Claimant's absences as disability leave rather than sick leave.* The Claimant’s Counsel also fully accepted that whether recorded as disability leave or not is an administrative matter and was not a point that she could push strongly and accepted in those circumstances it was not an adjustment being contended for in this claim. The tribunal accepts the submissions made on behalf of the Respondent that recording the absences as disability related does not make a difference as that does not state whether the policy will be applied or not.

155. It follows therefore that even if the Respondent had knowledge of the Claimant’s ankle injury as a disability at a date earlier than the 18 June 2018 it did not fail in its duty to make reasonable adjustments in relation to the UPAP.

Issue 2: Sick Pay

156. The Respondent accepts that it applied its sick pay policy to the Claimant but does not accept the first substantial disadvantage contended by the Claimant that as a result of the delays/failure to provide remote duties or suitable recuperative duties the Claimant had to remain on sick leave (part of which was on reduced or nil pay), use his annual leave or other accrued leave and move to an area in which he had no experience or skills; as this relies upon disputed facts.

157. The Respondent does accept the disadvantage suffered by the Claimant that as a result of his disability, the Claimant was/is more likely to have sickness absence, to reach UPAP triggers and be subject to the UPAP and to exhaust and did exhaust his sick pay entitlement.

158. The Claimant claims it would have been a reasonable adjustment to have exercised discretion under the extension to sick pay policy in the Claimant's favour in December 2017. The tribunal does not accept that would amount

to a reasonable adjustment applying the decision in O'Hanlon. The tribunal accepts the submission made on behalf of the Respondent that Dr Chase gave evidence that he considers approximately 10 appeals every month against pay reductions and that in such circumstances a fair and consistent application of National Policy and the Respondent's guidelines is vital. An extension of sick pay would not have removed the first disadvantage alleged by the Claimant which the case law reminds the tribunal is the key test. It was submitted on behalf of the Claimant that the court in O'Hanlon did not overrule or disapprove of the decision in Nottinghamshire County Council v Meikle. That is of course strictly correct. On the facts of the case before this tribunal, to advance such an argument as was made in Meikle the Claimant would have to establish that the Respondent had been under a duty to make a reasonable adjustment of work at home in late 2017 such that he could then argue the reduction to half pay was in fact because of the lack of work to do from home. The tribunal however for the reasons set out below does not accept that argument. Counsel for the Claimant did accept in closing submissions that the argument about extending sick pay was secondary to her arguments about reasonable adjustments.

Issue 3: Remote working

159. The Respondent accepts that it required the Claimant to work in a location away from his home and that amounted to a PCP applied to him. It further accepts that this caused substantial disadvantage to the Claimant in that he was unable, because of his disability(ies), related symptoms and restrictions, to perform his full substantive role, being limited in the duties which he is able to perform and the location from which he can perform them.

160. The Respondent does not accept the second substantial disadvantage contended for that as a result of the delays/failure to provide remote duties or suitable recuperative duties the Claimant had to remain on sick leave (part of which was on reduced or nil pay), use his annual leave or other accrued leave and move to an area in which he had no experience or skills. The tribunal does not accept this substantial disadvantage either. It is based on the assumption that there were delays and a failure to provide remote or suitable recuperative duties to the Claimant meaning he had to remain on sick leave and that is not a factual matrix accepted by this tribunal. The tribunal does not find this would have been a reasonable adjustment. What the Respondent did do was make a reasonable adjustment by moving the Claimant to the iHub which was a role commensurate to his capabilities.

161. The tribunal is satisfied from having heard all of the evidence from the Respondent and in particular Officers 2, 6, 9 and 10 that there were not suitable duties that it would have been feasible for the Claimant to have carried out at home. Whilst the Claimant's Counsel endeavoured to suggest to these witnesses that they were making the tasks unduly complex in suggesting that there would be difficulties with a handover, the tribunal accepts their evidence that that would indeed have been the case. The

Claimant on his return was limited to 4 hours only and any handover would have had to have been included within that time period. It would not be known on a day to day basis what events could occur, the details of which would have to be handed over to someone else when the Claimant's allotted hours came to an end. The tribunal accepts the evidence of Officer 2 who said that such would be "ludicrously inefficient". The Respondent's duty is to make a reasonable adjustment and the case of Garrett v Lidl makes it clear that this does not have to be the role that the Claimant likes or prefers.

162. The other point that the Respondent had to take into account was that the medical advice from Occupational Health confirmed that the Claimant's medication had side effects which would cause "significant drowsiness and tiredness and reduce concentration". As Officer 10 said in his evidence, given the high pressure and real-time changes that would occur in the role it was not an appropriate role for the Claimant to move to after a lengthy absence given his restrictions and medication regime.

163. The Claimant claims it would have been a reasonable adjustment to have provided the Claimant with a secure laptop and duties which he could perform from home. The tribunal accepts the Respondent's evidence that in view of the role that had been performed by the Claimant it was not as simple as just providing him with a laptop. There was not an infinite amount of work that could be done remotely. The tribunal has found that the position of Officer 3 and the Claimant's other comparators were not comparable to that of the Claimant.

Issue 4: Role at work

164. The Respondent accepts that it applied the following PCP(s):

164.1 requiring the Claimant to be fully operational to work in his role in the Protection Group; and/or

164.2 requiring the Claimant to work in his full substantive role on the Protection Group.

165. The Respondent accepts that the PCPs placed the Claimant at a substantial disadvantage in that the Claimant was unable, because of his disability(ies), related symptoms and restrictions, to perform his full substantive role and being limited in the duties which he is able to perform and the location from which he can perform them; and/or

166. The Respondent does not accept that as a result of the delays/failure to provide remote duties or suitable recuperative duties the Claimant had to remain on sick leave (part of which was on reduced or nil pay), use his annual leave or other accrued leave and move to an area in which he had no experience or skills.

167. The Claimant claims the following reasonable adjustments should have been made:

167.1 providing the Claimant with a restricted role on the Joint Operations Unit;
For the reasons set out above in the tribunal's findings, it does not accept that Officer 3 is an appropriate comparator. There was no restricted role on the Joint Operations Unit that the Claimant could undertake.

167.2 providing the Claimant with a suitable restricted role on another team which enabled him to be deployed in a way that is commensurate to his capabilities in line with the Guidance to support changes to the Management of Police Officers on Limited Duties;
The Claimant was provided with a suitable restricted role on another team in the iHub. This was commensurate to his capabilities as has been demonstrated by the way in which he has successfully performed the role. The tribunal does not accept for the reasons given in its findings that the new civilian role would have been appropriate/suitable for the Claimant. It further accepts that it had not been considered as a role until late 2018 and did not exist at the time of the Claimant's discussions with his line managers in December 2017 or July/August 2018. From 7 September 2018 a suitable alternative role had been found for the Claimant in the iHub.

167.3 providing a suitable alternative role for the Claimant elsewhere in the force;
The Claimant was provided with a suitable alternative role elsewhere in the force (outside of the Joint Operations Unit) in the iHub.

167.4 allowing the Claimant to work his agreed flexible working pattern on the fixed penalty unit; and/or
As can be seen from page 313, a role in the Fixed Penalty Unit on a Monday to Friday pattern was offered to the Claimant but all of the senior officers were of the view that the iHub was a better use of the Claimant's skill set as a warranted officer than the Fixed Penalty Unit which was essentially administrative in nature. The tribunal has concluded however that it was reasonable for the Respondent to take the view that if the Claimant insisted on the Fixed Penalty Unit he would need to work alongside the team particularly given his mobility issues and side effects of medication as well as the need to provide training and support.

The Claimant has also argued before this tribunal that the Armoury could have provided a suitable role for the Claimant to undertake and the tribunal accepts the Respondent's position that that was not a reasonable adjustment. The Claimant may have been a trained fire arms officer but that is different to armoury qualifications and dealing with the live weapons in the armoury.

167.5 moving another officer from a role which was suitable for the Claimant, thereby freeing up the role for him.
This would appear to be relying on the case of Jelic but in that case there was a specifically identified post which there has not been in this case before this tribunal.

Discrimination arising from a disability – s.15(1) Equality Act 2010

168. The "something(s) arising" from the Claimant's disability, which he relies upon are:

a. his sickness absence

b. his requirement to have reasonable adjustments

c. his need to work from home/his mobility issues

d. his need to work restricted duties.

The Respondent accepts these arise from his disability caused by his ankle injury save for the need to work from home at c above.

169. The tribunal has concluded as set out above that the Respondent had knowledge that the Claimant's ankle injury was likely to last for more than 12 months and therefore fall within the definition of a disability from the 18 June 2018. The above matters did not arise due to the Claimant's disabilities of chronic pain or plantar fasciitis.

170. The Respondent argues that the tribunal does not have jurisdiction to deal with the s.15 claim, but the tribunal accepts the submissions made on behalf of the Claimant that the claims form a continuing act. As submitted on behalf of the Claimant all the matters complained of are within the same factual matrix and all are inextricably linked.

171. Did the Respondent treat the Claimant unfavourably because of something arising in consequence of his disability by virtue of the following acts:

171.1 giving the Claimant formal notice of the UPAP stage 1; *The Respondent accepts the Claimant was given the formal notice.*
This the tribunal accepts was unfavourable treatment but only for a few months until this was overturned on appeal. The Respondent in submissions at paragraph 53(d)(i) accepts that the notice to attend the UPAP stage 1 meeting was dated 9 June 2018 which although more than 3 months before the ACAS Early Conciliation commenced accepts that it is part of a series of acts along with the meeting which took place on 20 June 2018 which is within time. The Respondent argues that this treatment was justified and for reasons set out below the tribunal accepts that argument.

171.2 failure to exercise discretion to extend the Claimant's full sick pay beyond 31 December 2017; *The Respondent accepts only that this is factually correct.*

The tribunal has already made its findings on disability and at the date of this decision, December 2017 the Respondent did not and could not reasonably have known the Claimant was disabled. In any event the tribunal accepts that the decision was justified where the Claimant's injury was clearly not sustained in carrying out the unique duties of a constable.

171.3 failure to exercise discretion to extend the Claimant's half sick pay beyond 11 June 2018; *This is also accepted as factually correct.*
The tribunal has found that the Respondent could not reasonably have known that the Claimant was disabled till the report dated 18 June 2018.

171.4 not permitting the Claimant to work from home.
The tribunal has concluded that the need to work from home was not something arising from the Claimant's disability. It was an adjustment that the Claimant was seeking but in any event the tribunal does not find that the Respondent had knowledge until 18 June 2018.

171.5 not permitting the Claimant to return to his role in the Protection Group
This appears to refer to the Claimant not returning to being a fully authorised fire arms officer which the Claimant has never sought to contend he could perform in the light of his of disabilities.

171.6 not identifying a suitable alternative role for the Claimant. *This is not accepted by the Respondent and is very much in issue in the case.*
The Respondent did identify a suitable alternative role for the Claimant in the iHub.

172. If yes, was the treatment complained of a proportionate means of achieving the following legitimate aims:

172.1 having officers perform their duties;

172.2 managing attendance effectively;

172.3 protection of the public (by having processes in place to ensure a sufficient number of officers working at appropriate times for the force to operate effectively and efficiently);

172.4 effective and efficient use of public funds;

172.5 proper consideration of the application of its Attendance Management Policy;

172.6 proper consideration of the application of the UPAP;

172.7 proper and consistent application of the guidance in PNB Circular 05/01; and/or

172.8 placing officers on recuperative duties to appropriate and safe roles when they are unable to carry out their substantive roles?

The Claimant does not dispute that these were legitimate aims, but the issue is of proportionality.

173. The sole issue with regard to justification is proportionality as the Claimant does not dispute that all of the above were legitimate aims. The Claimant denies that the means chosen by the Respondent were a proportionate means of achieving a legitimate aim as per the test set out in Homer and Hardy & Hansons. This is not accepted and the tribunal finds that the Respondent was justified in the way it responded to the Claimant's disabilities.

174. The Claimant was given the formal notice of the UPAP stage 1 in pursuant to that policy and the legitimate aim of it and an attendance management policy. The policy itself states that action should be considered after 14 days and the tribunal accepts that it was proportionate to move to a formal stage after 360 days absence. The tribunal accepts the submissions made on behalf of the Respondent that a lot of the questions put to the Respondent's witnesses in cross examination were based on the assumption that in some way they were disputing that the Claimant's ill-health was genuine and that he was not co-operating with his medical advisors. That has never been the Respondent's position but that is not the issue under the policy. The policy applied to the Claimant and the Respondent was justified in using it.

175. The Claimant could not be returned to his substantive role which was the carrying of firearms and the Respondent was acting in accordance with a legitimate aim of placing such an officer on recuperative duties as appropriate and safe where the Claimant was unable to carry out his substantive role. The advice from Occupational Health was followed with the Claimant doing a phased return of 4 hours including his commute being non-confrontational, non-driving and office based. It would have been in breach of the Respondent's duty to make reasonable adjustments to have returned the Claimant to his firearms role and he has not contended that it should have been done.

176. For all these reasons the claims brought by the Claimant do not succeed and are dismissed.

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Employment Judge Laidler

Date: 11 January 2021

Sent to the parties on: .13/01/2021

Jon Marlowe
For the Tribunal Office