



EMPLOYMENT TRIBUNALS

Claimant: Ms K Moth

Respondent: The Chief Constable of Devon and Cornwall

Heard at: Exeter by CVP

On: 22 January to 2
February 2021

Before: Employment Judge Smail
Ms E. Smillie
Mr K. Sleeth

Representation

Claimant: Mr C Banham (Counsel)

Respondent: Mr M Ley-Morgan (Counsel)

JUDGMENT

1. In breach of s.20(3) of the Equality Act 2010, the Respondent failed to make reasonable adjustments to attendance management targets to take into account the Claimant's disability. Instead of repeatedly adopting a Bradford score formula that applies to all, the Respondent needed to arrive at an attendance target, taking into account advice from Occupational Health, which made some allowance for the Claimant's disability. This was especially so in the action plan for the UPP in July 2019.
2. In breach of s.15 of the Equality Act 2010, the Respondent subjected the Claimant to unfavourable treatment which it cannot justify by placing action points relating to achieving job related fitness training and officer safety training in the July 2019 action plan. The Respondent had been repeatedly told by Occupational Health that these were unachievable yet DS Marvelly insisted on persisting with the actions.
3. In breach of s.26 of the Equality Act 2010, the Claimant was harassed by DS Marvelly's comments about her weight and diet in the meeting on 9 July 2019, which were connected with her disability.
4. All other claims are dismissed.

Remedy

5. Unless the parties can agree compensation and recommendations in respect of the Claimant's employment, there will be a one day remedy hearing to be conducted by CVP on a date to be fixed. The Claimant is to notify the Tribunal if agreement has not been reached by 31 March 2021.

REASONS

1. By a claim form presented on 13 August 2019 the Claimant claims disability discrimination.

The issues

2. These are appended at Appendix 1.
3. The Claimant's absence record is appended at Appendix 2.

Findings of Fact on the Issues

Disability

4. It is not disputed that the Claimant is a disabled person at all material times relevant to the case. She is disabled with visceral hyperalgesia also known as regional pain syndrome. Anxiety and depression are attendant upon the conditions and constitute part of the disability. She also suffers from trigeminal neuralgia and fibromyalgia. The Claimant's condition has not substantially changed since her first diagnosis of visceral hyperalgesia in 2009.
5. The Respondent's knowledge of the disabilities was at the latest (a) since around October 2010 in respect of the visceral hyperalgesia; (b) 2011 for anxiety and depression; (c) April 2018 for trigeminal neuralgia; and (d) May 2018 for fibromyalgia. Both disability and knowledge are accepted by the Respondent.

Role

6. The Claimant joined the Respondent on 8 December 2003. She holds the rank of detective constable. She is allocated to Barnstaple police station. Her principal responsibility has been to work with the local investigations team.

Attendance management history

7. Starting with 2017 we have twelve periods of absence up to 26 February 2020. The entry as to whether or not an absence is related to disability is owned by the Claimant. When putting in their own absence history on computer records, is the responsibility of officers themselves to update their

sickness record. It seems there has been an absence of 179 days over four years averaging 45 days per annum.

8. There are extensive records of attendance management in our bundle going back to 2011. It is sensible however to focus on the more recent history for the purposes of this case. We take the position from November 2016. The Claimant's line manager was then DS Butler. There was an attendance management action plan called 'informal attendance support' with a review date of 13 February 2017.
9. On all the documents we have seen, there is reference to 'the attendance management framework' which provides that the overall aim is to achieve and sustain and improve level of attendance at work in line with the attendance management framework. This is in effect a proforma. The Bradford Scoring approach to measuring absence is adopted and the formula consistently applied throughout the matter is a Bradford Score of no more than fifty points within six months and a Bradford Score of no more than one hundred points within twelve months. If those scores are exceeded, then an automatic email is sent to the line manager. HR has told us that this system operates as a flag to managers. HR has adopted the position to us that it is their approach not to deviate from that formula for the purposes of raising flags. Raising flags is one thing: action plan targets are another.
10. It would only be of relevance to any recommendations that we might make that the Respondent no longer operates the Bradford Scoring system. HR functions have been joined with the Dorset Constabulary and the practice of the Dorset Constabulary in terms of measuring absences has been adopted. Be that as it may, the Bradford Scoring system was adopted throughout the relevant period for these proceedings.
11. It is perhaps worth recording what Bradford Scoring is. It is a compound formula for attaching a number of points to absences. The formula is: number of days absent multiplied by the number of occasions absent, squared. Its thesis is that intermittent absences are worse than one extended absence.
12. On 26 November 2016 DS Butler listed the following actions: to continue with appointments with a psychologist; and to continue appointments with the force medical advisor and occupational health when required. A phased return to work was targeted for 14 November 2016, around a fifty percent start. The Claimant was not expected to work past 10.00 at night. She was not expected to work alone. She could follow the duty pattern of her supervisor to assist with that. She was permitted to take half an hour during each tour of duty in the gym in the police station.
13. The duties of a DC in the local investigation team include being responsive to whatever challenges occur in the area of the relevant CID's operation. This can include being called out to scenes of crime and scenes of suicide and suspicious death. Mobility is certainly involved.
14. There was a review meeting by DS Butler on 3 April 2017. The actions appear to have been substantially met.

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15. The next action plan was under DS Bates on 16 January 2018. The usual Bradford targets were included. The actions were to attend GP appointments as required; engage with a phased return to work; follow any advice given by the GP; attend and engage with attendance management meetings. DS Bates referred the Claimant to occupational health in January 2018.
16. Adjustments had previously been made. In October 2016 the Claimant had been provided with a modified desk and chair, the position of which could be altered. Her desk position was also changed to ensure it was facing the office so that she did not have to turn.
17. Occupational health reported on 11 April 2018 which was in the course of the eighty-five day absence between February – May 2018. Professor Harrison reported that the Claimant was troubled by excruciating pain in the teeth of her lower jaw on the left hand side. This was probably neurological in nature.
18. There was a review of the action plan by DS Bates due on 12 March 2018 but the Claimant was signed off at the time so that could not progress. There appears to have been some contact between the Claimant and DS Bates at around this time in March 2018. DS Bates asked the Claimant what duties she could not do as part of the role. She informed DS Bates that restrictions had been in place for about the last two to three years and had not been reviewed. She informed him that she could not do officer safety training; her duties had to be non confrontational. She had been assessed as level 3 deployable. Therefore, she could self-risk assess whether she could be involved in specific tasks. She was not allowed to work beyond midnight and therefore could not do night duty. It had already been agreed that she did not work late and the reason for this was that she was taking a drug for pain, amitriptyline, which had the same effect as a sleeping tablet. These steps had been recommended by the previous force medical advisor Dr Farrell.
19. The Claimant returned to work in May 2018. By now she had been diagnosed with fibromyalgia. There is in the bundle a memorandum purportedly from the Claimant to DS Bates written around this time in which the Claimant sets out her view of her deployability following return to duty. This is a four page document. The Claimant says she either handed it directly to DS Bates or left it in a confidential envelope in his in-tray. DS Bates has no recollection of the document. The Claimant was cross examined along the lines that she was fabricating this document by Mr Morgan-Ley. That was a curious line of cross-examination of a DC by her Constabulary.
20. We apply the civil standard of proof. On the balance of probability the Claimant did write this, and the document was lost in the course of DS Bates' transfer to another section. We note that DS Marvely took over the management of the Claimant on 9 June 2018. It is not likely that the Claimant has concocted this document subsequently for the purpose of these proceedings. The end of the memo records that the Claimant was due to have an appointment with Professor Harrison on 21 May 2018 and she noted DS Bates' request for an attendance management meeting on 31 May 2018. It is most unlikely that the Claimant would go to extraordinary lengths to fabricate a document. The innocent explanation for what has happened here is that this was mislaid or overlooked by DS Bates in the course of the transfer. The Claimant did not date this document. However, we can glean

the approximate date from its contents. It was written some point in May 2018 prior to 21 May.

21. We see that DS Bates asked the Claimant to supply such a list in a meeting on 15 May 2018. The Claimant thinks she wrote the document on 18 May 2018; that makes sense. It was recorded that the Claimant was restricted by her disability and unable to complete the officer safety qualification and therefore it has been explained to her that until there was clarification around her restriction, she would not be allowed to deal with situations likely to be confrontational, which included dealing with people in custody. The Claimant said she would challenge that position, however, DS Bates said it had been pointed out to her that this was for her own safety as well as that of her colleagues who could be placed at risk. The Claimant was on various medications that needed to be considered and which her next occupational health appointment would take into account when providing guidance to anyone supervising the Claimant. It was recorded that the Claimant was struggling with accepting the life-long condition and she was concerned how this would affect her job as a detective constable which she was keen to retain. The Claimant had agreed that she was able to support her colleagues with desktop investigation and also assisting in 'ABE' interviews wherever possible. The tribunal understands this as meaning 'achieving best evidence' interviews, particularly in child abuse cases.
22. On 5 June 2018, DS Bates signed off the action plan as achieved. HR has explained that that was controversial within the terms of the attendance management procedure because the Claimant had only just returned from an eighty-five day absence and it was premature to sign off the action plan.
23. DS Marvelly took over line management on 9 June 2018. He had recently been promoted to Sergeant. This was his first experience of management. He knew the Claimant because he had worked alongside her in the police station. It seems that there was little management induction - at least recorded in the bundle - between DS Marvelly and the Claimant until December 2018. DS Marvelly does, however, recall a conversation with the Claimant in the kitchen on 11 July 2018. He made a light comment about the salad the Claimant was eating saying 'that looks healthy'. They then had a conversation in which the Claimant told him she was trying to lose weight as she was going on holiday to Disney World in 2019 with her partner and wanted to be able to get on the rides at the theme parks. They discussed over lunch her condition and health issues, a topic DS Marvelly suggested the Claimant introduced. She told him she was fed up with people assuming that her weight contributed to her condition. DS Marvelly did say that to lose weight would in his opinion make her life easier to take the strain off her body in general. He also said that if people saw she was making an effort to lose weight they would may be have more respect and empathy for her. He says his comments were intended to be supportive. The Claimant does not make an issue of this conversation in the claim. This does, however, suggest that the Claimant's weight is a discussion point amongst fellow officers in the station.
24. DS Marvelly received an attendance flag in December 2018 and had a meeting with the Claimant on 23 December. The Claimant had been off for eighteen days with a chest infection between November and December 2018.

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Together with her eighty-five day absence between February – May 2018, that would push her beyond Bradford Score flags. DS Marvelly took a handwritten note of the meeting on 23 December 2018. It records that the Claimant was going to ask the force medical advisor if she could work from home when she was poorly as people with childcare responsibilities could do that. She was not interested in reducing her hours because that would not make any difference. She wanted to retain the present shift pattern. She noted that Inspector Naidoo worked from home. She wanted to have a laptop and work from home if she was not fit to come in. Occupational health had told her she could not do the alternative fitness test because of her back. She told DS Marvelly that she could not get out of bed some mornings without being helped by her partner. Even the feeling of a shower could hurt her. Her spine was crumbling and she was concerned she would end up in a wheelchair. DS Marvelly noted to himself that she might never be officer safety trained and they needed to reassess whether she could do the job. What was the impact on her of the custody block? he questioned himself. Where did that leave everyone else if the Claimant were injured? Should she be going out and seeing the public or to assist an officer in distress near by?

25. This generated a referral to occupational health dated 14 January 2019. He was aware that the Claimant was to have an appointment with Professor Harrison on 18 February 2019. He wished to highlight some concerns he had. He noted that she had informed him that she had over the twelve months been diagnosed with fibromyalgia and had a whole host of other health issues that she took quantities of medication for. In addition, her elderly father was also very poorly, placing additional pressure on her. He recorded that she requested as part of her reasonable adjustments a use of work laptop from home so that on days she did not feel she was up to coming into work she could work from home. He records that she explained to him that on occasions she could not get out of bed without the assistance of her partner and that she could not shower as when the water made contact with her skin it became too painful. He noted his position that he was not supportive of the laptop and it called into question for him her fitness for the role at all. He recorded that the Claimant did not want to reduce her hours.
26. He noted that the Claimant was out of breath just walking up two flights of stairs in the office, her hair was often wet with sweat from doing the same. In the last year she had been required to go out of the office to a scene of crime. He was told that she had to walk up a slight incline to get to the scene. When she returned to the office her lips were blue and she was sweating profusely and breathing heavily. The supervisor who was on duty at the time was so concerned he sent her home.
27. They also discussed the fitness test and the fact that she is not officer safety trained and had not been so for some time. He did ask if, with the right support and guidance in place, she would be able over a period of time to get herself physically and mentally in a position to undertake the alternative fitness test. Her response was that occupational health had told her not to because she has a bad back and this would make it worse. He got the sense that it was not an expectation for her that she would ever qualify for training or ever have to. She told him that she had not discussed these matters with her own GP. He then described what he put in her ongoing action plan.

28. He questioned what the existing adjusted duty of “dynamically risk assessing everything” meant in practice. For him it was too vague and too open ended and did not give clarity to the Claimant or him as supervisor or the organisation clear guidance and safeguards. He did not feel sufficiently informed as things stood. What he sought from occupational health was a more robust and structured approach to what she could do, and her adjusted duties reviewed and made clearer and more precise in light of her complex health needs in order to fulfil her role, and not place herself or her colleagues at risk of harm. He would be fully supportive of a professional meeting in order to discuss a way forward. In his view it would be a good idea to have occupational health, HR, the wellness team, the Claimant’s GP and the Claimant herself if she were willing to attend and sit down and discuss some options.
29. This, in the Tribunal’s, view was an entirely reasonable stance taken by DS Marvelly at this point in time. He was new to the role. He was line manager of an officer with severe challenges and he wanted to establish what was possible. He was taking his job seriously.
30. In January 2019, DS Marvelly in association with HR, opened up the action plan that had otherwise been signed off by DS Bates. They did so on the basis that sufficient period of time had not passed since the Claimant’s eighty-five day absence ending on 8 May 2018. They were entitled to adopt this stance.
31. On 18 February 2019, Professor Harrison provided occupational health’s view to DS Marvelly; DI Philip Gray who was the Claimant’s second line manager and DS Marvelly’s line manager; Sergeant Poole, the Federation Rep and the Claimant herself together with a representative from HR. Professor Harrison had seen the Claimant with Mr Poole that day. Her health status had not really changed, he reported. As a consequence of the regional pain syndrome, the Claimant was not fit to undertake job related fitness tests in any form: the regional pain syndrome would not change. The symptoms relating to fibromyalgia fluctuated. They caused the Claimant to experience pain in her joints, particularly the lower back. She did struggle to get going on some mornings. She told him that otherwise she was always the first to arrive at work. She also told him that she was currently working full-time which was a target for her when last seen. She has achieved this. Fibromyalgia is a chronic condition that requires the sufferer to learn to live with the condition and to modify lifestyle, he explained. She had benefitted from psychological interventions in the past.
32. Looking at reasonable adjustments. She has an adjustable chair and a riser desk. She has been placed on adjusted duties because of her symptoms with a deployability level of 3. That means working in a role with a low likelihood of confrontation. This was consistent with recommendations for people with similar conditions allowing some contact with the public face to face albeit those assessed as having a low level of risk of becoming violent. It was accepted that there could never be a zero risk of confrontation. In the unlikely event of a situation becoming violent, in Professor Harrison’s judgement, the Claimant was fit to be able to protect herself and come to the aid of a fellow officer. He regarded her as fit to go into the custody environment using the dynamic risk assessment approach. The Claimant did

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find it troubling to walk very far. This meant she had to come in early in order to park her car near the station. She was in the process of applying for a blue badge. If assistance could be given with parking that would assist her. They had also discussed the possibility of her being provided with a laptop and working from home on days that her fibromyalgia was sufficiently bad to make coming to work painful and difficult, Professor Harrison supported that. In answer to specific questions, Professor Harrison bullet-pointed the following:

- In his opinion she was disabled within the meaning of the Equality Act.
 - She was fit to work in her current role.
 - She was fit to drive.
 - She was not fit to undergo the job related fitness test and therefore could not undergo officer safety training.
 - She was fit to work on earlier and late shifts but not night shifts.
 - She could not use force safety equipment which means batons, handcuffs and spray.
 - She was fit to make an arrest and deal with a confrontational situation as described above.
 - She was fit to deal with the public.
 - Ill health retirement would only be addressed once all reasonable adjustments and deployment had been considered.
 - A case conference was planned for the following month.
33. There was a case conference held on 4 March 2019, the Claimant was present with Mr Poole of the Federation, DS Marvally was there supported by Katie Lyle of HR, together with Professor Harrison the Chief Medical Officer and Inspector Ben Shardlow who was the Force Disability Lead. Whether the Claimant was required to complete her officer safety training and fitness testing at any point during her substantive role in order to be fit for full duties was on the agenda.
34. Officer safety training is training on self defence. In order to get that training an officer has to have a minimal level of fitness. The normal fitness test is a bleep running test. There is an alternative test which is fast walking on a treadmill set at an incline. Without passing either fitness test an officer did not qualify for officer safety training and that meant there were implications for the officer's deployability.
35. Professor Harrison explained that fundamentally the Claimant's health had not changed and fibromyalgia had been diagnosed after complex health needs were found. Professor Harrison confirmed that the Claimant still remained at deployability level 3 and her adjusted duties would remain as with the latest twelve month review meeting in February 2019. Professor Harrison expressed the view that it was possible for the Claimant whilst on this level to make the judgement on what risks she could take in the workplace within her role.

Deployability

36. We could usefully describe the levels of deployability now. There are three levels of deployability meaning an interface with the public. Level 1 means the individual is required to work in an environment requiring interaction with

the public carrying a high or uncontrollable risk of confrontation with little time to undertake dynamic risk assessments or take mitigating actions. A dynamic risk assessment is an assessment of risk in a changing environment. Deployability level 2 means the individual is required to work in an environment requiring interaction with public carrying a medium risk of confrontation with sufficient opportunity in most cases to undertake dynamic risk assessments or take mitigating actions. Level 3 is that the individual is required to work in an environment or role requiring interaction with the public carrying a low risk of confrontation with sufficient opportunity to undertake dynamic risk assessments or take mitigating actions.

37. There are then three 'non deployable' levels with no or extremely limited exposure to the public. Level 4 means that following an occupational health assessment, the individual is required to work in an environment not requiring interaction with public carrying a negligible risk of confrontation with ample opportunity to undertake dynamic risk assessments and take mitigating actions. Level 5 means if an individual fails a job related fitness test and is therefore unable to undertake officer safety training and is non deployable as a result. Individuals will be managed in line with the procedure for job related fitness testing and will be risk assessed to identify those roles that they may safely undertake. Level 6 is if an individual is under management restriction and required to work in an office based role with no interaction with the public. Deployability as a concept relates to public exposure rather than employability.
38. Whilst Professor Harrison's assessment was level 3, senior officers in this case questioned the accuracy of that assessment.

The attendance management history resumed

39. Returning to the case management conference on 4 March 2019, the Claimant requested to be supplied with a laptop in order that she was able to work from home on occasions where the pain of her fibromyalgia symptoms were exacerbated. Inspector Shardlow as the disability lead said he was able to order this on the Claimant's behalf as long as DS Marvelly provided him with a budget code. HR suggested that in fact the senior management team would need to approve this. There was a discussion around Bradford points and the informal attendance management process. Inspector Shardlow felt this was not required, HR disagreed.
40. Inspector Shardlow advocated the opportunity for the Claimant to have a remote line manager, not presently provided in the force, but would enable in his view the Claimant to discuss her medical condition and any issues or concerns she may have more easily.
41. DS Marvelly asked Professor Harrison if in his medical opinion the Claimant would benefit from any health and nutrition wellness advice in relation to what information or guidance on food may trigger her condition and equally what may help and also form a fitness perspective. The Claimant made it clear she did not wish to discuss this, and it was agreed to leave that discussion for another time. It is fair to say that DS Marvelly had a belief that there should be focus on diet and fitness.

42. Inspector Shardlow said that he felt the Claimant should not be subject to an action plan because it called for anxiety and depression and that exacerbated her condition. HR held the view that the process of attendance management matched the force's expectations to support individuals who have exceeded intervention points.
43. As an outcome, DS Marvelly recorded that the Claimant would continue in her substantive role as Professor Harrison had confirmed that she was fit for full duties. We do not think that is quite right, Professor Harrison confirmed she was fit for those duties that she dynamically risk assessed as being safe at level 3 deployability. They would look into a disabled parking space at Barnstable police station. An application would be submitted to the senior management team for a laptop.
44. Professor Harrison confirmed that the Claimant would never get through a fitness test in her remaining time in the force which would be twelve years owing to her health issues. The current informal action plan would be reviewed at an interim review meeting, HR was to check the guidance on deployability levels, the issue of remote line manager would be considered and DS Marvelly recorded his own position that the Claimant was to take responsibility for her own health and wellbeing outside of work so that she could improve her attendance and achieve her informal action plan and continue to recognise the triggers with her health.
45. It was on 13 March 2019 when the Claimant sustained a fractured elbow when falling in her garden. She was off work for twenty-two days and this has not been presented as disability absence.

Laptops

46. On the subject of laptops, DI Gray wrote on 10 April 2019 in response to an enquiry from DS Marvelly as to what the protocol was on laptops. There were several laptops within CID at Barnstable. Inspector Gray and Inspector Naidoo were issued with laptops. A couple of sergeants had swapped their mains terminals for laptops. A member of the domestic abuse team had access to a laptop. All the individuals who have those, including the inspectors, were able to fulfil their roles whilst working remotely and often did so and it was widely encouraged now by the force. Inspector Gray expressed the view that the difficulty in respect of the Claimant was purely and only down to the role she was in. Should she wish to work from home more than one day at a time, how could she fulfil her role as a detective constable whose main duties are to investigate crime, visit witnesses, conduct suspect and witness interviews, arrest etc. Whilst he was sure they could provide work for her may be for a day or so, it could not be maintained for a longer period of time in her current role. This was to be discussed by Detective Chief Inspector Cavin shortly, no DC or PC in local investigations had been issued with a laptop and worked from home unless it was the odd day with permission from an inspector.
47. In evidence, DI Gray expanded on this. He told us that a core role of the DC in local investigations is to go out into the public responsive to crimes and suspicious incidents that take place external to the police station. He

contrasted this role to child abuse investigations and fraud investigations which are undertaken by separate departments and could well remain under one roof.

48. DCI Cavin confirmed this position. He emailed DI Gray stating that the role of detective constable was one which required access to custody, exhibits, briefings, sensitive materials and in many instances responding through attendance to crime scenes and dynamic responses to serious investigations. This amongst other reasons makes home working difficult to achieve when fully undertaking the role of detective constable. The provision of a laptop to facilitate home working therefore would not in his view be conducive to an officer undertaking the full role of a detective constable. He went on to say that had viewed the medical reports in relation to the Claimant and considered a request for provision of a laptop to facilitate home working. He was concerned that the provision of a laptop may put undue pressure on the Claimant to undertake some form of duty from home where ordinarily owing to her inability to attend her duty station she should be considered unfit for duty on that day and so report sick. It would not be fair to expect an officer to perform duties, he said, when the officer would normally be considered sick on those days. As part of the wider conversation, he recalled discussing with DI Gray the potential for providing further posting options for the Claimant.
49. We are aware that between January and April 2019 the Claimant acted up as a sergeant in prisoner handling which was a desk role.

Attendance Management history continued

50. The DS Bates action plan was extended for twelve weeks from 12 February 2019 – 15 May 2019 to allow the Claimant opportunity to improve her attendance at work without progression to formal stages of UPP (Unsatisfactory Performance Procedure). Within the twelve week extension she had two further absences one of which was disability related.
51. An informal final review meeting was held on 7 May 2019. The review meeting recorded why a laptop would not be suitable to an officer undertaking the full role of a detective constable and that home working was virtually impossible to achieve when fully undertaking the DC role. As to parking it had been confirmed that the Claimant would be reimbursed for car parking ticket costs from the neighbouring public car park on the days that she felt she needed to park rather than walking 400 metres from a free or a significantly cheaper parking location. Whilst that had been permitted the Claimant stated that she would nonetheless benefit from a car parking space at the actual police station. It was explained to her that her level of absence as reflected by the Bradford Score points had exceeded the expectation of the force with the points totalling 927 in a full year which was over the 100 tolerance. DS Marvally said that to a point the action plan had been achieved but based on her unsatisfactory attendance levels, the plan had been failed.
52. In the meeting the Claimant asked whether absences owing to disability were counted and if not whether she would still progress to formal stages. Ms Lyle of HR said that it was not the process which the force was expected to follow

and it would not be a fair process if they did not take disability-related absences into consideration. Therefore, all absences would be counted within the overall Bradford factor scoring.

53. The outcome of the meeting was a decision to progress to a first stage formal unsatisfactory performance procedure owing to the attendance falling below the standards expected by the police.
54. DS Marvelly then drafted the attendance management action plan at formal stage 1 UPP dated 9 July 2019 with a review date of 1 October 2019. The usual Bradford Score proforma was present, i.e. a Bradford Score of no more than fifty points within six months and a Bradford Score of no more than one hundred points within twelve months. The actions were as follows:
 - In terms of personal responsibility to demonstrate progress towards the job related fitness test and officer safety training taking into account advice and guidance from occupational health. The required outcome by 1 October 2019 was to seek guidance as to whether given a period of time with the right support it could be achieved.
 - Again, in terms of personal responsibility the action was take responsibility to improve your general health and weight and to evidence this by linking in with health professionals and the force wellbeing team. The required outcome again by 1 October 2019 was to gain support from people who can offer advice on nutrition and exercise and assist you to lose weight and improve your general health as a result.
 - To comply with the attendance management policy making sure you update your line manager on the days you are absent. The outcome was to let your line manager know if you are going to be off absent or intend to work from a different location.
 - To achieve and sustain and improve level of attendance at work in line with the attendance management framework, fifty points in six months and a hundred points in twelve months. The outcome was to improve your level of attendance at work.
55. The UPP level 1 actions were contained in a written improvement notice dated 29 July 2019.
56. The Police Federation approached Professor Harrison on 14 August 2019 prompting Professor Harrison to write that day that he had spelt out in his letter in February 2019 that the Claimant has a condition that prevents her from taking the job related fitness test and thus officer safety training level 1. He wrote "I am not sure how much plainer I can be. Her condition will not change, and she will not be able to undertake the JRFT, in any of its forms either now or in the future".
57. It was noted by senior management and indeed Ms Lyle of HR that the relationship between DS Marvelly and the Claimant was deteriorating such that Ms Lyle had mooted the need for mediation. Only the Claimant was interested in mediation and DS Marvelly was not.

58. A formal first stage UPP meeting was dated 9 July 2019. DS Marvelly stated his position in the course of the meeting about concerns around her general health and felt that she needed to take more responsibility over her personal health and in particular to look at her diet which could be affecting her weight which in turn could be preventing her from being able to undertake the fitness test. The Claimant replied that her weight was not down to her diet it was due to the medication she had to take for her condition. This she elaborated upon in evidence before us - the pain killers she takes desensitise her nerve endings including those in her stomach meaning she does not feel full when eating and so eats excessive amounts. In the UPP meeting the Claimant said she had asked DS Marvelly to research her condition because he would see the medication was contributing to weight gain. DS Marvelly replied that he was not disputing that, but he did feel the Claimant's diet should be considered because he has seen her for instance drink lots of coca cola during the day which he did not think would help her general health. The Claimant became visibly upset stating at this point that she knew that DS Marvelly drank alcohol. He replied not everyday and the Claimant drank gallons of coca cola. The Claimant told us in evidence that she drinks zero calorie coca cola and decaffeinated. Be that as it may, the exchange between the two of them is recorded in the notes.
59. It was that meeting which confirmed the Claimant's intention to bring a claim to an Employment Tribunal.

Temporary Sergeant Application 17 May 2019

60. On 17 May 2019 the Claimant filled in an expression of interest for a temporary sergeant role. She did so without first consulting her line manager DS Marvelly or her second line manager DI Gray. When DS Marvelly learnt of the application he had to comment that he did not have advance notice and he did make reference to her unsatisfactory attendance and the fact that this was the subject of an unsatisfactory performance procedure. DI Gray observed that it was unsatisfactory that DS Marvelly had not been consulted in advance, as he also had not been consulted, and that given the fact the Claimant was on an unsatisfactory performance plan for unsatisfactory attendance, there was no real basis for her application. It was also observed that she had used significantly in excess of the tolerated number of words for each section of her application.
61. In the Tribunal's judgement there was no prospect of the Claimant obtaining this temporary appointment. She had unsatisfactory attendance. She had matters to grapple with in sustaining her existing role and rank. There is no basis to the suggestion that there was any aspect of disability discrimination to the decision not to support her application. Even if there were, it was plainly justifiable.

Application for Leadership Academy Programme June 2019

62. DI Gray sought the views of DCI Cavin on the Claimant's application. He decided not to support it that year. The programme involved extra work that would have needed to be done in the Claimant's own time and also time away from the workplace. He recalled that the Claimant was also caring for her

parents at that time. He was concerned that the extra work and pressure that would place upon her would be too much for her to cope with. The Claimant was advised by him that it would be reviewed in twelve months when the opportunity for applications came up.

63. Again, the Tribunal does not find the Claimant establishes any prima facie case of disability discrimination here. We accept that the course is for officers with a disability. Notwithstanding that, there will have to be a background of satisfactory work in the existing rank. Inspector Gray in his email dated 24 June 2019 did make reference to the fact that she was currently going to attend a meeting with her first line supervisor and HR whereby a decision would be made regarding moving onto UPP so that adequate support and adjustments could be considered with a review to improving her current poor attendance. The Tribunal regards it as self-evident that matters of satisfactory attendance have to be resolved before there is prospect for the Claimant to be promoted.

Tai Chi

64. The Claimant put in her report of May 2018 – the one that got mislaid – that she would benefit from a Tai Chi course that was available during work hours. It was a form of tai chi involving the participant sitting down. As we know, DS Bates either mislaid or for some reason overlooked this report and the Tai Chi idea was not progressed. That said, the Claimant did not pursue the request in any other way. She was allowed to attend the gym during work hours. The suggestion to undertake Tai Chi was made by Dr Mark Jackson a consultant in pain, medicine and anaesthesia in April 2018. However, we see no further reference to this thereafter. There is none that we have seen in 2019 for example. On any view this allegation is well out of time and in any event the request was not pursued by the Claimant.
65. The Claimant did not appeal the UPP level 1. We see a telephone note between Katie Lyle and Mr Jones the Federation rep dated 11 July 2019, when Katie Lyle was informed by the Federation rep that the Claimant was not going to submit an appeal as she felt the outcome given was right and that she hoped she would receive more support from management if she was at a formal stage of the process. That sits inconsistently with this Tribunal application.
66. We were told that rather than appealing the Claimant had resolved to bring a claim to the Employment Tribunal. Indeed, she consulted solicitors on the afternoon of the UPP meeting in July.

The DI Alexander review

67. DI Alexander became involved by 16 August 2019. He was taking over second line management from DI Gray. There was a handover between them. There was a specific request he was dealing with to assess the duties that the Claimant was undertaking in her DC role in respect of reasonable adjustments to meet the organisational need. DI Alexander records that this was not something that DS Marvally was able to conduct at his rank. He

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wrote in an email dated 16 August 2019 that the role profile for a DC is established at force level and applied to all the DCs in force and as such that is the requirement for any individual holding the post. Clearly there are variations and accommodations that are made in these on a relatively short term basis with a focus on an individual returning to full unrestricted duties. Anything short will leave that shift and department understrength in terms of deployable resources which in turn has an impact on other officers/staff within that team. His understanding was that the opinion of the medical professionals was that the Claimant would not be able to fulfil the full range of duties expected of a detective constable because of her disability and as such any accommodation would be a permanent one. This would mean they would not be able to count her against their minimum threshold (establishment), thereby undermining the operation or effectiveness of the department. While the Claimant would be able very competently to complete some tasks, she would not be able to complete all tasks. In the absence of officer safety training, the tasks excluded were significant. A reasonable adjustment meeting was organised for 29 October 2019.

68. At this time the Claimant had been on secondment to the IRC, the Incident Resolution Centre, where she had done essentially a desk job. The Claimant was due to return to local investigation on 2 December 2019. With view to that she was subject to the reasonable adjustments meeting with DI Alexander.
69. DI Alexander put together a package which was contained in an email dated 1 December 2019. He wrote he had taken the Claimant off threshold and as such she did not form part of the 1 detective sergeant and 3 detective constable minimum threshold they maintained across the department. This impacted on the operational resilience of the department and he needed to be sure that reasonable adjustments made up for that in other areas. He had agreed with her an alternative shift pattern which would be reviewed along with all the other reasonable adjustments on a quarterly basis. She would be working in Barnstable in support of the department across both North and West Devon in the following ways.
70. 1 Gatekeeping level 1 domestic abuse encompassing the following:

- (a) When on duty DC Moth should be the first choice for in-custody gatekeeping.
- (b) Investigations where the suspect is on bail.
- (c) Investigations where the suspect is RUI.

The Claimant would be completing the gatekeeping decision only. If a charge etc is made and a file submitted that file will need to be submitted via a supervisor for them to quality assure and sign. The Claimant was not being asked to perform a supervisory function.

71. 2 Crime allocation hat peg

In support of detective sergeants, he had asked DC Moth when on duty to review the crime that is on the allocation hat peg. In brief he had asked her

to quality assure the crime reports, screen any matters that do not require allocation and identify and flag acute safeguarding concerns. He had not asked her to write investigation plans. That remained a matter the officers in charge. The Claimant would, having reviewed the crimes, speak to the duty sergeant as to whom crimes were allocated to. Again, he was not asking DC Moth to perform a supervisory function.

72. 3 Investigation

The Claimant has a wealth of experience and skills and because he had taken her off the threshold, she would not be carrying an investigator's workload and this should make her available to support investigations held across the department, be they acute in custody matters or matters on workloads by completing witness statements, ABE interviews and other enquiries.

The Claimant at this time was not able to conduct suspect-related enquiries, arrests/interviews etc because he had not been able to put in place, controlled measures that sufficiently mitigated risk towards her and discharge his responsibilities towards her, other members of staff or the public under health and safety legislation. He hoped that position would change and colleagues would be informed if they were able to extend the range of enquiries the Claimant could conduct.

The duty sergeant would task as required as dynamic actions if colleagues had actions for crimes on workloads. They were to submit them via the sergeant rather than direct to DC Moth. There had to be some management of the number and nature of actions passed to DC Moth to avoid her receiving more than could be processed.

73. In the course of the consideration of what her duties should be, it was observed that when working within IRC, she had only worked at home on two occasions with one being requested as overtime. DI Alexander said that he had reservations about working from home and did not want it to be the norm as the core business was office-based and he wanted to ensure that she had interaction with the team for her wellbeing. Certain tasks could be undertaken from home using a laptop, e.g. conducting gatekeeping and crime allocation tasks.
74. DI Alexander confirmed that Sergeant Heather Smith would be the Claimant's line manager upon return. He observed that the Claimant had previously been managed by Heather Smith, and so this provided some consistency. DI Alexander outlined that there was an expectation that this was an opportunity for both the Claimant and the team. In his statement to the Tribunal DI Alexander explained that the role was unique and tailored to her whilst ensuring she was able to make a contribution to the operational effectiveness of the department. The two biggest areas of contribution being that of gatekeeping domestic abuse investigations to determine if they should be passed to the Crown Prosecution Service for a charging decision or not and the pre-allocation reviews. Neither of those two functions were within the role profile for a local investigation detective constable. If the Claimant were to move from the department the role that had been designed for her would not be maintained or filled by another. The function did have value and removed

some demands from detective sergeants. The Claimant worked in that way until March 2020 when Covid started. From then it was necessary for her to shield and since then she has been at home working. The Tribunal was told in clear terms that the Claimant has been performing a valued role both before and after Covid.

75. The Tribunal observes that the DI Alexander review involved detailed technical planning to make the Claimant's employment work. It is hoped that any absence management plans display similar ambitions and a similar command of detail.

The Law

76. Reasonable Adjustments are provided for under Section 20 of the Equality Act 2010. Subsection (3) provides as follows in respect of the requirements of the obligations:

The first 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.

77. Discrimination arising from disability is provided for under Section 15 of the 2010 Act. That provides at subsection (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.

78. Harassment is dealt with in Section 26 of the Equality Act 2010. By subsection (1) -

A person A harasses another B if

- (a) A engages in unwanted conduct related to a relevant protected characteristic and
- (b) The conduct has the purpose or effect of
 - (i) Violating B's dignity or
 - (ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

By subsection (4) in deciding whether conduct has the effect referred to each of the following must be taken into account:

- (a) The perception of B
- (b) The other circumstances of the case
- (c) Whether it is reasonable for the conduct she had the effect.

79. The burden of proof is important in discrimination cases. Section 136 of the 2010 Act provides as follows at subsection (2)

If there are facts from which the court could decide in the absence of any other explanation that a person A contravened the provision concerned, the court must hold that the contravention occurred.

By subsection (3) subsection (2) does not apply if A shows that A did not contravene the provision.

What this means in practice is that the Claimant has to adduce facts which give rise to a prima facie case of discrimination. If she does that then the burden transfers to the Respondent to show that discrimination played no role whatsoever. That is the approach approved by the Court of Appeal in the case of Igen v Wong [2005] IRLR 258 (CA).

- 80. Mr Banham referred in particular to four cases to assist the tribunal. There is the important Court of Appeal authority of Griffiths v The Secretary of State for Work and Pensions [2015] EWCA Civ 1265. In that case the Claimant developed post viral fatigue and fibromyalgia. Following a sixty-six day absence from work, sixty-two of which were the result of an illness arising out of her disability, she was given a formal written improvement warning in May 2011. That was in accordance with the terms of the Respondent's attendance management policy which envisaged the possibility of disciplinary sanctions after a specified period of absence from work.
- 81. The Claimant raised a grievance and asked for two adjustments. First, she asserted that given that the lengthy absence which gave rise to the written improvement warning was the result of her disability, and moreover was when the disability was first diagnosed and a treatment plan put in place, the employer should not treat that absence as counting against her under the policy with the consequence that the written warning should be withdrawn.
- 82. Secondly, she wanted the policy modified to allow her in future to have longer periods of illness absence before she faced the risk of sanctions then would be permitted for employees not subjected to disability related illnesses.
- 83. The Court of appeal agreed with the minority decision of the Employment Tribunal that application of an attendance management policy can subject a disabled person to a substantial disadvantage if they are more likely to be off. However, the Court of Appeal did not interfere with the decision of the majority of the Employment Tribunal and the Employment Appeal Tribunal that it was not reasonable to ignore the entirety of disability-related absence and moreover in respect of adjusting the periods of tolerance the Court of Appeal did not interfere with the majority decision that there was no obvious period by which the consideration point for intervention should be extended.

84. The policy of the DWP that fell for consideration provided as follows at 2.4.
- “If the consideration point is increased it is known as the disabled employee’s consideration point. The disabled employee’s consideration point will be made up of the normal eight days for non disability related absences and an additional number of days of absences related directly to the disability. Formal action will begin when absences that are not related to the disability reach or exceed eight working days or the combination of disability related and any non disability related absences reach or exceed the disabled employee’s consideration point. This means that whether an employee is disabled or not, formal action will begin at eight days for absences unrelated to disability but disabled employees have the flexibility to use these eight days or some of them as well as the additional number of days which has been agreed for absences related to their disability if needed”.
85. On the facts of this case the additional period of days allowed was twelve, allowing a consideration point of twenty days. This was therefore an allowance of twenty days in a rolling twelve month period. Whilst the Claimant managed to establish that the policy was a substantial disadvantage to her potentially, the Respondent justified its adjustment and the Court of Appeal rejected the suggestion that any other period would be more rational.
86. The case confirms that it was reasonable for the employer to expect that the employee must maintain a certain level of attendance at work.
87. In Whiteley v Commissioners for HMRC UKEAT/0581/12/MC, 2013, the following observations were made about possible adjustments. Mr Justice Mitting said that there were in principle at least two possible approaches to making allowances for absences caused by a disability that interacts with other ordinary ailments. One is to look in detail and with care and, if necessary, with expert evidence at the periods of absence under review and to attempt to analyse with precision what was attributable to disability and what was not. The alternative approach which he anticipated would be of greater attraction to an employer was to ask and answer with proper information the question what sort of periods of absence would someone suffering from the disability reasonably be expected to have over the course of an average year due to her disability. He went on that the proposal in the light of a medical expert assessment of likely periods of absence from asthma being a few days, three or four times a year and applying that to the fifteen days consideration point would have been a permissible approach. He suggested what was not permissible was to wholly discount relevant periods of absence. In that case the Tribunal was criticised for misunderstanding the medical evidence before it.
88. In Northumberland Tyne and Wear NHS Foundation Trust v Ward UKEAT/0249/18/DA a decision given in 2019, the Respondent was criticised for removing an adjustment to its sickness absence management policy whereby the Claimant could have up to five absences in a twelve month period before triggering the policy instead of the standard three absences. That adjustment had been in place and operated successfully for a period of almost four years. It was abruptly removed in 2015. The Claimant in that

case suffered from ME/chronic fatigue syndrome. The Respondent was unable to justify the unilateral change.

89. In Buchanan v The Commissioner of Police of the Metropolis UKEAT/0112/16/RN a Judgment handed down on 30 September 2016, His Honour Judge David Richardson, in a case concerning the application of the unsatisfactory performance procedure under the Police (Performance) Regulations 2012 made pursuant to the powers in the Police Act 1996, and so of direct interest to us in this case, disagreed with the Tribunal's approach which was to consider the reasonableness of the performance management policy and its implementation as a whole rather than looking at particular aspects of the implementation that was said to be discriminatory. The case was sent to a new Tribunal to look at each individual allegation of discrimination rather than assessing the reasonableness of the implementation of the policy as a whole. We hope not to make the same mistake.

Conclusions

Reasonable Adjustments

90. Turning to the PCPs alleged in the list of issues. The following are proved:
- (1) The requirement for CID officers to work in the police station rather than from home.
 - (2) Parking spaces are allocated to specific vehicles at the police station. They are few in number.
 - (3) The line manager for a DC in the local investigation team is the DS with operational responsibility for the work done.
 - (4) The Bradford Score requirement is applied to absences as a matter of routine.
91. The Claimant does not prove that there was a policy to refuse officers time for exercise in work hours. The Claimant was permitted thirty minutes to attend the police station gym. She did not pursue the tai chi classes. The PCP is not established.
92. In terms of substantial disadvantage in relation to home working: on the facts, the Claimant did not put in regular requests for home working. The odd request was that on the occasions, which were rare, when she would struggle to get into work, she would be permitted to work from home with a computer.
93. We have endeavoured to ascertain how often that was. We look at the sickness record: the twenty-four days ending on 15 January 2018 was down to influenza. The eighty-five days ending 8 May 2018 was down to malaise and fatigue associated with fibromyalgia. She had chest infections for eighteen days over November and December 2018. The broken elbow in April 2019 is of no relevance. There are colds in effect of seven days ending 20 April 2019. Miscellaneous for two days August 2019. Malaise and fatigue

two days 27 November 2019. Fatigue again in January 2020 and a cold again in February 2020.

94. In the Tribunal's view, these entries are consistent with being unable to work from home as well as being unable to work from the office. It is not therefore clear that home working on the facts of this case would have increased the ability to do the work. The Claimant was running an alternative case that a car parking space would also meet the difficulties she experienced in terms of mobility in getting to work. These entries do not suggest that mobility per se was the reason for the absences. There was sickness also. On the facts of this case the Claimant does not prove she was subject to a substantial disadvantage by reason of the ban on home working.
95. That said, the position now may be different with the experience of the response to Covid. Home working has become more of a norm such that going forward, it may be a good idea. In terms of the issues in the case, however, she does not establish that it was a substantial disadvantage to her at the relevant times.
96. If we are wrong about that, for the purposes of a DC in local investigations even on deployability level 3, the Respondent was not under an obligation as a reasonable adjustment to permit home working. It was explained to us that the local investigation team is responsive to a changing environment. The team is coordinated from the police station and operates as a team in response to changing positions. The Respondent explains the desirability of the team operating out of the office even if, in the Claimant's case, she had to interact with the public. The same justification would not apply to other departments of detective work which could be predominantly computer based and would be subject to work from home. That includes fraud enquiries and child abuse enquiries. That would also include any bespoke role that it was sensible for the Claimant to perform as for example, that organised in the DI Alexander review.

Parking spaces

97. Whilst the PCP was to allocate the few parking spaces at the station to specific vehicles only. The Respondent did make an adjustment of paying for the Claimant's car park costs. The car park is immediately adjacent to the police station. We believe twenty metres away. An adjustment has been made which suffices. That adjustment having been made the Claimant is not under substantial disadvantage from the proven PCP and the Respondent is under no obligation to do anything further than it has.

Line management by DS with operational responsibility

98. This PCP does not of itself cause the Claimant a substantial disadvantage. The Tribunal cannot see that she could sensibly be line managed by someone other than the sergeant responsible for the delivery of the police duties in relation to which the Claimant worked. That said, such sergeant needs to be fully versed in the Claimant's disability and the adjustments that are needed.

The Bradford Score

99. The application of the Bradford Score does subject the Claimant to a substantial disadvantage because she is more likely to have absences than a non-disabled person and so score badly. This is so in terms both of frequency and duration. Was the Respondent under any obligation however, to apply something different?
100. We note the good faith in which Katie Lyle from HR said that the Bradford Score is a flagging system only. That said it was adopted in the action plans as targets and not just as plans. Not to have any adjustment to it whatsoever in relation to a disabled person who is more likely to go off is simply too inflexible. It would be reasonable to expect the Respondent to rationally adjust attendance targets taking into account likely patterns of absence. We see examples of that in Whiteley and in Griffiths. In our present case there was no adjustment whatsoever. We note in FAQs relating to reasonable adjustments produced by HR it was said that consideration would or could be given to adjusting attendance targets. As a matter of practice, it did not happen. Apparently, that is at the direction of the head of HR. We did not hear from the head of HR in the course of the case.
101. In our judgement some amendment needs to be made so as to generate confidence in the employee that there is appreciation that their attendance pattern is unlikely to be the same as a non-disabled person. There should have been involvement from occupational health with view to including a specific bespoke target for the Claimant as a disabled person. That is not to say she would necessarily have met that target but nonetheless adjustment would show a reasonable appreciation by the employer that her position was different from the non disabled officers. Mr Banham submitted, after repeated invitation to state a case, that the adjustment should be first, to ignore fifty percent of all disability-related absence; alternatively, to agree a variation in line with occupational health advice. The former has no real rational basis to it; the latter would be reasonable, indeed required, in our judgment.

Discrimination arising from Disability

102. We accept that sickness absence arises from the disability hence the application of attendance management is a consequence of the disability. Nonetheless, the Respondent is entitled to manage attendance, and therefore, we do not criticise the Respondent for applying the attendance management policy. There was no reality in the Claimant's application for a temporary sergeant role. She was not fulfilling satisfactorily her role in her existing rank given the extent of her absences. The Respondent justifies not progressing that application.
103. Similarly, the Respondent justifies not progressing at that point in June 2019, the Claimant's application to participate in the leadership academy programme which is designed for disabled people. She needed to resolve performance issues – including attendance - in respect of her existing rank and duties before it would be sensible for her to seek to progress. The Respondent in each of those cases shows that their refusal was a proportionate means of achieving a legitimate aim. The legitimate aim would be promoting officers at a time suitable for their career progression. It was

proportionate not to promote the Claimant to a temporary sergeant role and put her on a leadership course at that point in time. Her attendance issues were too significant

104. The Claimant does establish that it was unfavourable treatment which the Respondent cannot justify to put in an action in the formal stage 1 UPP dated 9 July 2019 that she demonstrate progress towards the JRFT and OST taking into account advice and guidance from occupational health. Professor Harrison had been crystal clear back in February 2019 that this was not going to be achieved by the Claimant. It was unjustifiable in the light of that information for the action plan to include that action. It would put unnecessary pressure on the Claimant, it was not rooted in rational justification. The Claimant wins this point.
105. We do not say in other respects that it was unjustifiable that the Claimant be subject to the unsatisfactory performance procedure. There were genuine issues about her attendance which need to be addressed. Whilst we accept it is unfavourable treatment, the Respondent justifies it as a proportionate means of achieving a legitimate aim. The legitimate aim is to promote attendance at work, it is proportional to adopt performance procedures to bring that about. That said, any attendance target has to be rational as discussed under reasonable adjustments above. Simply re-applying an inflexible set Bradford score formula does not work.

Harassment

106. There is an overlap between the section 15 claim about DS Marvelly's remarks about weight and the harassment. By the time it came to the 9 July 2019 meeting, DS Marvelly was fully informed by occupational health and the Claimant herself as to what was possible and was not. At around this time and before, Katie Lyle of HR had noted a collapse in the relationship between DS Marvelly and the Claimant such that she was suggesting mediation. There was an unfortunate passage in the meeting on 9 July 2019, towards the end of the meeting, when DS Marvelly stated that he had concerns around the Claimant's general health and felt that she needed to take more responsibility over it and in particular to look at her diet which could be affecting her weight which in turn could be preventing her from being able to undertake a fitness test. The Claimant reiterated that her weight was not down to her diet it was down to the medication which she had to take for her condition. DS Marvelly said he would need to seek guidance from occupational health as he was concerned for her health. That guidance from occupational health had been given in February 2019 in a letter from Professor Harrison and then in a case management conference. DS Marvelly went on to say that he did feel that the Claimant's diet should be considered because he had seen her drink lots of coca cola. We are told that the coca cola in question is a low calorie one. The Claimant became visibly upset at this point in the meeting.
107. We had little doubt that this was a humiliating experience for the Claimant. She should not have been subjected to this line of discussion because the matter had been ventilated previously with occupational health and in the case management. DS Marvelly had not acted upon the information he had been given. He insisted on pursuing this line when he should not have done

so given what he had been told. He was not acting in bad faith but he did not have a basis upon which to continue to challenge the Claimant along these lines. It foreseeably had and did have the effect of humiliating her. It was unfortunate. Referring to the Claimant drinking gallons of coca cola indicates an unprofessional tone in the discussion.

108. Some of the other allegations of harassment predate this and technically would be out of time. In our judgement it is the situation of the UPP meeting progressing to stage 1 which reinforces the humiliating nature of the discussion and we confine our findings to that event. For example, the alleged incident in December which did happen was not the subject of a complaint at the time. There should not have been an action in respect of weight in the July 2019 action plan. It ignored what DS Marvally was being told by Professor Harrison.

Remedy

109. There will need to be a remedy hearing unless the parties can agree both compensation for injury to feelings and recommendations between themselves. The Tribunal would propose to make recommendations all of which would need to be SMART as to:

- (1) Permanent amended duties.
- (2) Adjustments to attendance targets which will now be under the new attendance regime.
- (3) Recommendations as to disability training for managers.
- (4) Recommendations as to protocols for handovers in respect of management obligations of disabled officers.

110. If the parties cannot agree these matters between themselves, we will be happy to meet for a one day remedy hearing over CVP on a date to be fixed.

Employment Judge Smail

Date: 01 March 2021

Judgment & Reasons sent to the Parties: 02 March 2021

FOR THE TRIBUNAL OFFICE

Appendix 1 – The Issues

1. Introduction

1.1. The Claimant pursues complaints of:

- a. Failure to make reasonable adjustments (s.21, EqA 2010);
- b. Discrimination arising from disability (s.15, EqA 2010); and/or
- c. Harassment (s.26, EqA 2010).

1.2. The Respondent denies these claims.

2. Time Limits

2.1. Have the Claimant's claims been brought within the primary time limits?

2.2. If not, do the matters relied upon by the Claimant amount to a continuing course of conduct or a continuing act of discrimination?

2.3. If any of the allegations are out of time, it is just and equitable for the time limit in respect of such allegations to be extended?

3. Disability (s.6, EqA 2010)

3.1. The Respondent admits that the Claimant was disabled (within the definition of s.6 of the EqA 2010) at all material times.

4. Failure to make reasonable adjustments (s.21, EqA 2010)

4.1. Did the Respondent have the practices set out below and did they amount to a "provision, criterion or practice" ('PCP') for the purposes of s.20 of the EqA 2010?

- a. The requirement for CID officers to work in an office, rather than from home (PCP 1);
- b. Allocating parking spaces only to specific officers (PCP 3);
- c. Changing line management and/or refusing to post officers to specific line management (PCP 4); and/or
- d. Applying the Bradford Score requirement to absences (PCP 5);
- e. Refusing officers time during working hours to attend groups (in the Claimant's case, Tai-chi classes) and/or refusing 'flexi-time' to officers in order to permit their attendance at such groups (PCP 6).

4.2. If so, did the PCPs put the Claimant at a substantial disadvantage in comparison with persons who are not disabled?

4.3. The Claimant states that she was unable to come into work due to the pain from her disabilities (PCP 1). The Claimant states that the following instances of disadvantage occurred (PCP 1):

- a. An increase in the Claimant's stress levels;
- b. A deterioration in the Claimant's mental health;
- c. The need to take further sickness absence from work;
- d. An increase in the Claimant's Bradford Score;
- e. The Respondent took further management action against the Claimant;
- f. The Claimant was made the subject of the Respondent's attendance management procedure ['UPP']; and/or
- g. The harassment by DS Marvally.

4.4. The Claimant states that the following instances of disadvantage occurred (PCP 3):

- a. An increase in the distance the Claimant needed to walk to the office;
- b. An increase in the Claimant's symptoms (pain);
- c. The need to take further sickness absence from work;
- d. An increase in the Claimant's Bradford Score;
- e. The Respondent took further management action against the Claimant;
- f. The Claimant was made the subject of the Respondent's attendance management procedure ['UPP']; and/or
- g. The harassment by DS Marvally.

4.5. The Claimant states that the following instances of disadvantage occurred (PCP 4):

- a. Disruption because of the change of supervision;
- b. An increase in the Claimant's stress levels;
- c. A deterioration in the Claimant's mental health;
- d. The need to take further sickness absence from work;
- e. An increase in the Claimant's Bradford Score;
- f. The Respondent took further management action against the Claimant;

- g. The Claimant was made the subject of the Respondent's attendance management procedure ['UPP']; and/or
- h. The harassment by DS Marvelly.

4.6. The Claimant states that the following instances of disadvantage occurred (PCP 5):

- a. The Respondent took further management action against the Claimant;
- b. The Claimant was made the subject of the Respondent's attendance management procedure ['UPP']; and/or
- c. The harassment by DS Marvelly.

4.7. The Claimant states that the following instances of disadvantage occurred (PCP 6):

- a. An increase in, rather than an alleviation of, the Claimant's symptoms (pain);
- b. The need to take further sickness absence from work;
- c. An increase in the Claimant's Bradford Score;
- d. The Respondent took further management action against the Claimant;
- e. The Claimant was made the subject of the Respondent's attendance management procedure ['UPP']; and/or
- f. The harassment by DS Marvelly.

4.8. If so, did the Respondent take such steps as were reasonable for it to take in order to avoid the disadvantage pursuant to section 20(3) of the EqA or did the Respondent fail in its duty? The Claimant relies on the following instances of the Respondent's failure to make reasonable adjustments:

- a. Failing to allow the Claimant to work from home (PCP 1);
- b. Failing to allocate a parking space to the Claimant (PCP 3);
- c. Failing to ensure continuity of line management (PCP 4);
- d. Failing to adjust or remove the Bradford Score requirement (PCP 5);
- e. Failing to allow the Claimant time off work to attend a Tai-Chi group (PCP 6).

4.9. What were the consequences for the Claimant of any failure to make reasonable adjustments?

5. Discrimination arising from disability (s.15, EqA 2010)

5.1. Did the following constitute “something arising in consequence of” the Claimant’s disability?

- a. The need for CBT treatment;
- b. Sickness absence (partly or wholly);
- c. Difficulty returning to the workplace;
- d. The ability to maintain a certain level of fitness (for the JRFT and/or OST);
- e. Weight gain;
- f. The need for reasonable adjustments.

5.2. Did the Respondent treat the Claimant unfavourably because of any of the matters mentioned above? The Claimant relies upon the following alleged acts as instances of unfavourable treatment:

- a. The Respondent took further management action against the Claimant;
- b. The Respondents rejected the Claimant's application for a Temporary Sergeant role on 17 May 2019 on the basis that the Claimant was subject to UPP procedures;
- c. The Respondent rejected the Claimant’s application for training in the Leadership Academy Programme on 24 June 2019 on the basis that the Claimant was subject to UPP procedures;
- d. Requiring the Claimant to progress towards the JRFT and/or OST;
- e. The Claimant was made the subject of the Respondent’s attendance management procedure [‘UPP’];
- f. Remarks from DS Marvally about the Claimant’s weight;
- g. The harassment by DS Marvally; and/or
- h. Refusing to make reasonable adjustments.

5.3. Insofar as there was such treatment, was this treatment a proportionate means of achieving a legitimate aim? The Respondent relies upon the following legitimate aims:

- a. Ensuring that the Respondent’s resources are used as efficiently and as safely as reasonably possible.

6. Harassment (s.26 of the EqA)

6.1. Did the Respondent engage in unwanted conduct related to the Claimant's disability? The Claimant relies upon the following alleged incidents of unwanted conduct::

- a. DS Marvelly reopening the Claimant's completed action plan on 23 December 2018 that was started on 16 January 2018 with DS Bates and had been completed and closed;
- b. During the action plan review meeting on 23 December 2018, DS Marvelly said to the Claimant, "Do you think if you lost weight people would be more sympathetic?" and telling the Claimant in that meeting that she should change her diet;
- c. During a case conference meeting on 4 March 2019 with DS Marvelly, the Claimant, and her Federation Representative, DS Marvelly again brought up the topic of the Claimant's diet and questioned whether it would help from a fitness perspective for her to make changes;
- d. DS Marvelly ignoring the FMO reports that clearly indicate that the Claimant is fit to complete her role and that she is not able to complete the JRFT because of her disability;
- e. DS Marvelly telling the Claimant, "I need to refer you to a nutritionist to see if you lost weight if you could do the fitness test";
- f. DS Marvelly telling the Claimant, during the Stage 1 UPP meeting on 9 July 2019, that he has placed the condition to see a nutritionist on her UPP documentation meaning she must comply with this action;
- g. During the meeting on 9 July 2019, after the Claimant pointed out that on her action plan she is required to follow medical advice which includes taking her medications which have a side effect of weight gain, the Claimant asked DS Marvelly which plan he wanted her to ignore. DS Marvelly replied, "Well you drink Coke and it is bad for you." The Claimant replied, "Well you drink alcohol and that's also bad for you", to which DS Marvelly replied, "Not every day and you drink gallons of the stuff".

6.2. Did this alleged conduct have the purpose or effect of violating the Claimant's dignity / creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

7. Remedy

7.1. Should the Tribunal make a declaration that the Claimant was discriminated against?

7.2. What award, if any, is the Claimant entitled to recover for injury to feelings?

7.3. What award, if any, should be made in respect of deterioration in health, allegedly caused by the Respondent's treatment of the Claimant?

7.4. What award, if any, is the Claimant entitled to recover for financial loss?

7.5. What award of interest, if any, is the Claimant entitled to recover?

7.6. Should the Tribunal make any recommendation, including:

- a. That the Claimant be allowed to remain with the same line manager;
- b. That the Respondent be required to have a greater understanding of the Claimant's disabilities and the effect they have on her attendance at work; and/or
- c. That the current WIN be amended or removed and that, going forward, the Respondent applies an adjusted Bradford Score requirement to any further periods of sickness absence by the Claimant.

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Appendix 2 – the Claimant’s absence record

ResID(T)	Absence Category(T)	Reason for absence(T)	First day of absence	Last day of absence	Absence Related to	Total Days Absent up until Today	Days
MOTH, Kerry Louise	Mental Health		10/02/2004	22/02/2004		13	9
MOTH, Kerry Louise	Data Transfer		14/02/2005	17/02/2005		4	4
MOTH, Kerry Louise	Data Transfer		05/06/2005	31/07/2005		57	41
MOTH, Kerry Louise	Respiratory		24/11/2006	24/11/2006		1	1
MOTH, Kerry Louise	Respiratory		02/03/2007	11/03/2007		10	6
MOTH, Kerry Louise	Respiratory		09/09/2007	17/09/2007		9	6
MOTH, Kerry Louise	Digestive		31/12/2007	24/01/2008		25	16
MOTH, Kerry Louise	Miscellaneous		26/07/2008	12/02/2009		202	144
MOTH, Kerry Louise	Swine Flu		18/07/2009	21/07/2009		4	4
MOTH, Kerry Louise	Respiratory		08/10/2009	10/10/2009		3	2
MOTH, Kerry Louise	Musculo-Skeletal		10/03/2010	19/03/2010		10	8
MOTH, Kerry Louise	Ear/Eye		16/08/2010	30/08/2010		15	11
MOTH, Kerry Louise	Musculo-Skeletal		29/11/2010	03/12/2010		5	5
MOTH, Kerry Louise	Respiratory		19/12/2010	06/01/2011		19	14
MOTH, Kerry Louise	Mental Health	Anxiety	19/01/2011	31/12/2011	N/A	347	347
MOTH, Kerry Louise	Miscellaneous	Personal - Prefer not to say	20/06/2012	21/06/2012	N/A	2	2
MOTH, Kerry Louise	Miscellaneous	Unaccounted surgery (inc. complications arising from surgery)	09/07/2012	15/07/2012		7	7
MOTH, Kerry Louise	Miscellaneous	Miscellaneous	03/10/2012	11/10/2012		9	9
MOTH, Kerry Louise	Ear/Eye	Ear disorder (inc. infection)	12/12/2012	31/12/2012	DISABILITY	20	20
MOTH, Kerry Louise	Musculo-Skeletal	Back condition (inc. injury, spondylosis, disc disorder, sciatica)	19/05/2013	21/05/2013	DISABILITY	3	3
MOTH, Kerry Louise	Respiratory	Influenza	23/10/2013	25/10/2013	DISABILITY	3	3
MOTH, Kerry Louise	Respiratory	Cough, Cold, Sore throat(inc sinusitis,	28/11/2013	28/11/2013	DISABILITY	1	1

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		tonsillitis, acute bronchitis)					
MOTH, Kerry Louise	Respiratory	Chest Infection (inc Pneumonia)	02/12/2013	05/12/2013	DISABILITY	4	4
MOTH, Kerry Louise	Respiratory	Cough, Cold, Sore throat(inc sinusitis, tonsillitis, acute bronchitis)	05/02/2014	07/02/2014	DISABILITY	3	3
MOTH, Kerry Louise	Digestive	Vomiting/Diarrhoea (inc. food poisoning)	07/06/2014	10/06/2014	DISABILITY	4	4
MOTH, Kerry Louise	Genito-Urinary	Urethritis	12/07/2014	15/07/2014	DISABILITY	4	4
MOTH, Kerry Louise	Musculo-Skeletal	Back condition (inc. injury, spondylosis, disc disorder, sciatica)	13/04/2015	24/05/2015	N/A	42	42
MOTH, Kerry Louise	Respiratory	Cough, Cold, Sore throat(inc sinusitis, tonsillitis, acute bronchitis)	22/12/2015	23/12/2015	DISABILITY	2	2
MOTH, Kerry Louise	Miscellaneous	Miscellaneous	16/04/2016	08/05/2016	DISABILITY	23	23
MOTH, Kerry Louise	Mental Health	Anxiety	12/07/2016	11/10/2016	DISABILITY	92	92
MOTH, Kerry Louise	Miscellaneous	Miscellaneous	17/10/2016	13/11/2016	N/A	28	28
MOTH, Kerry Louise	Miscellaneous	Miscellaneous	28/10/2017	03/11/2017	DISABILITY	7	7
MOTH, Kerry Louise	Respiratory	Influenza	30/11/2017	04/12/2017	DISABILITY	5	5
MOTH, Kerry Louise	Respiratory	Influenza	23/12/2017	15/01/2018	DISABILITY	24	24
MOTH, Kerry Louise	Miscellaneous	Malaise or Fatigue (inc. chronic fatigue syndrome, ME, fibro-myalgia)	13/02/2018	08/05/2018	DISABILITY	85	85
MOTH, Kerry Louise	Respiratory	Chest Infection (inc Pneumonia)	24/11/2018	29/11/2018	DISABILITY	6	6
MOTH, Kerry Louise	Respiratory	Chest Infection (inc Pneumonia)	10/12/2018	21/12/2018	DISABILITY	12	12
MOTH, Kerry Louise	Musculo-Skeletal	Upper limb condition (inc. Injury, surgery or treatment)	13/03/2019	03/04/2019	N/A	22	22
MOTH, Kerry Louise	Respiratory	Cough, Cold, Sore throat(inc sinusitis, tonsillitis, acute bronchitis)	13/04/2019	19/04/2019	DISABILITY	7	7
MOTH, Kerry Louise	Miscellaneous	Miscellaneous	21/08/2019	22/08/2019	DISABILITY	2	2
MOTH, Kerry Louise	Miscellaneous	Malaise or Fatigue (inc. chronic fatigue syndrome, ME, fibro-myalgia)	26/11/2019	27/11/2019	DISABILITY	2	2
MOTH, Kerry Louise	Miscellaneous	Malaise or Fatigue (inc. chronic fatigue syndrome, ME, fibro-myalgia)	09/01/2020	10/01/2020		2	2

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MOTH, Kerry Louise	Ear Nose and Throat	Other	22/02/2020	26/02/2020	DISABILITY	5	5
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