Case Number: 3334957/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs R Maharaj	**v**	**The Commissioner of Police of the Metropolis**

Heard by CVP (and at Watford) **On**: 8-15 February 2021

Before: Employment Judge Manley
Members: Ms Kendrick
Mr Woodward

Appearances
For the Claimant: Mr Ward, Counsel
For the Respondent: Mr Martin, Counsel

JUDGMENT

1. The claimant was a disabled person at the material time.

2. The respondent did not treat the claimant less favourably than a non-disabled person.

3. The respondent did not treat the claimant unfavourably because of something arising in consequence of a disability.

4. The respondent did not fail in its duty to make reasonable adjustments.

5. The respondent did not treat the claimant unfavourably because of pregnancy or maternity.

6. All the claimant's claims fail and are dismissed.

REASONS

Introduction

1. The claimant brought claims arising from her dismissal in July 2018 in a claim form presented in November 2018. At a case management

preliminary hearing in January 2020 the claims were identified as being for disability and pregnancy/maternity discrimination. A list of issues was agreed by the parties and set out in the summary of that hearing. Some amendments have been made to the list because the respondent conceded that the claimant was disabled under Equality Act 2010 (EQA) and that it had knowledge from April 2016; some matters were withdrawn at the commencement of this hearing and some numbering had to be clarified. The issues being determined, after these various amendments will be set out later in our conclusions.

2. In summary, the disability discrimination claim was for direct discrimination; discrimination arising from disability and failure to make reasonable adjustments. There were six allegations of direct or something arising from disability discrimination, some from 2016 and ending with the dismissal in July 2018. There were three identified provisions, criteria, and practices (PCP)s, and three suggested adjustments for the reasonable adjustments claim.

3. The pregnancy/maternity discrimination was for direct discrimination for three matters. One between September and November 2016 and two in July of 2018 – one of which was the dismissal.

4. Because there appeared to be a gap in the allegations between 2016 and 2018 there were also time limitation questions.

5. There was a discussion at the start of this hearing. First, the claimant withdrew two of the alleged disability discriminatory acts dated September 2016 (numbered 9.5.1 and 9.5.2 in the PH issues). Secondly, there was a lack of clarity in the list of issues partly because the paragraph numbering seemed wrong but also because what had been recorded as "*disadvantage*" for the reasonable adjustments claim did not appear to be matters which could amount to a disadvantage. The respondent's representative also said the claimant had not identified the "*something arising*" for that claim.

6. The following morning, before we heard evidence, the claimant's representative identified two matters which were said to be "*something arising*" from the disability. One was the need for more toilet breaks and the other the need to take medication and side effects of the medication.

7. As for identification of "*disadvantage"* for the failure to make reasonable adjustments claim, he said there were three such disadvantages. One was having absences recorded as sick leave; the second was side effects of medication whilst on an action plan and the third was the dismissal.

The hearing

8. The hearing was by CVP which led to a number of challenges which, with goodwill and flexibility on all sides, we overcame. We set a timetable which slipped a little, but we finished in time. The first day was, for the most part, a reading day, there being a lengthy written statement, one for the claimant,

six respondent's witness statements and an electronic bundle of 1200 pages.

9. On the second day we had difficulty with the claimant's Wi-Fi connection and had problems hearing her evidence. We finished early that day hoping it would be resolved, but it was really no better on the following day. So, it was arranged for the claimant to travel to Watford to use the tribunal room there.

10. Mr Ward, the claimant's representative, agreed to accompany her and help her with getting the electronic bundle on her device. Although there remained some issues with hearing the claimant, we managed to complete her evidence and there were fewer technical issues with the respondent's witnesses' evidence.

11. For the respondent we heard from:

    - Mr Hewitt, who was formerly the Assistant Commissioner, who took the decision to discharge the claimant;
    - Inspector Hayes, who was her final Line Manager;
    - Inspector Gill, who was formerly Sergeant Gill, who was her Line Manager between 2016 and 2017;
    - Constable Ashworth, an experienced Officer who patrolled with the claimant in November 2017;
    - Constable Gaster, who was her Federation representative, and
    - Sergeant Sanghera, who was her Line Manager in 2017-2018.

12. We received written submissions and heard oral replies on Friday 12 February and gave oral judgment on the afternoon of Monday 15 February 2021.

Findings of fact

13. These are the findings of fact that we consider to be relevant to the issues to be determined. Of course, as is often the case, we did hear some allegations and facts but these were less relevant to the issues than those we set out here.

14. The claimant joined the respondent on 22 February 2015 and spent three months in training at Hendon. The respondent is a large public sector employer with several relevant policies and processes.

15. For new constables the Police Regulations 2003 provides for a 24-month period of probation which, under Regulation 12, can be extended. The respondent's Standard Operating Procedures, otherwise known as SOPs, set out in some detail the processes to be followed where there are concerns about a probationer's performance. This includes providing for action/development plans to help improve performance; case conferences and the services of notices on the probationer. The process starts at borough level and the final decision is delegated from the Chief Officer to the Assistant Commissioner to make a final decision.

16. Regulation 13 provides there will be consideration of discharge if; "*The constable is not fitted physically or mentally to perform the duties of their office or that they are not likely to become an efficient or well conducted constable."*

17. Regulation 28 deals with sickness absence and again has detailed processes with periods of disability related and pregnancy related sickness having special provisions. There is a clear process for reduction in pay after a period of time and for the individual officer to be responsible for providing information.

18. Sergeant Gill's evidence, which we accept, was that any period of sickness absence should be relayed to HR and that there might then be an adjustment by HR or the Line Manager if information was received to redesignate sick leave at any time.

19. The respondent uses an outsourced Occupational Health (OH) facility which requires line managers to fill in what is known as a Service Request. As is common, the respondent does not have direct access to OH information, but it is provided with consent. As with most employer organisations, a reasonable level of attendance is expected. The process allows for some adjustment for pregnancy and disability absence.

20. All probationary officers have a number of steps to be completed to be confirmed in post. These include completing Student Office Record of Competencies known as SOROC. Whilst on street duties, probationers have Police Action Checklists (PAC)s, with 12 tasks to complete, many of which would need to be completed and signed off by a more senior officer. In order to progress and perhaps move to a specialist area such as a detective work or professional standards, officers had to pass all the basic levels as probationers. There is a shift system in place which includes a night shift.

21. Unsurprisingly, the respondent also records in writing many of the incidents which occurred during contact with the public, victims and suspects as well as fellow officers' concerns so there was considerable written material in this case.

22. The claimant was posted to Hillingdon Borough in 2015. The street duties with an experienced officer formed part of her probation and were expected to last for five weeks. Her Line Manager at that stage was Sergeant Ibbotson. The claimant's evidence is that she had concerns at a very early stage about various matters in the Borough and she wrote an email to herself later in October 2015 setting these out but she did not discuss them earlier than that. For example, there was a difference of opinion as to who had handcuffed a suspect, that is whether it was the claimant or the experienced officer who was with her.

23. Time was given for the claimant to complete her PACs as they had not been completed. In June 2015 she was issued with a Development Plan for one

month as she had failed to complete four of the 12 PACs. She was advised about conflict management and warned that action under Regulations 12 and 13 could follow. The claimant wrote in the comment section of the Development Plan that she did not agree with the action being taken.

24. In August she joined the Emergency Response Team but very shortly thereafter she twisted her ankle when moving house. She was off work for 19 days before returning on 21 September on recuperative duties and referred to OH. She was then on sick leave form 10 November 2015 for 62 days for a planned operation before returning to work in January 2016.

25. In January 2016 she was back on recuperative office-based duties with an OH appointment in February 2016. By April 2016 the respondent became aware of a diagnosis of endometriosis, which is a long-term condition which affects some women where tissue similar to the lining of the womb grows in other places. It can cause pain and other symptoms such as heavy periods. As with many such conditions, symptoms vary between individuals with some women experiencing severe symptoms and others less so.

26. At a Regulation 13 case conference on 24 May 2016, the claimant's record of sick leave and recuperative duties was discussed and it was recorded that the claimant needed to have more experience in operational duties to be able to pass probation. The level of one-to-one support the claimant had received was recorded and a Development Plan for attendance and performance put in place.

27. An OH report in June 2016 referred to the ankle injury and the diagnosis of endometriosis. It was said that the claimant was fit for operational duties, (page 342) which included standing for long periods and no adjustments were suggested. The claimant began operational duties in June 2016.

28. In September 2016 a Sergeant, who is now Inspector Gill, took over her line management. Her second Line Manager was Inspector Ballard. Sergeant Ibbotson had provided an oral handover about the claimant and Sergeant Gill saw the Development Plan referred to above.

29. There had been an incident where a member of the public had tried to hand in a knife and had reported to the press that they had been turned away. The claimant was the relevant officer and she later gave an explanation for her actions. Sergeant Gill also heard about some other performance concerns.

30. On 24 September 2016 the claimant provided more details of the endometriosis diagnosis and treatment and produced a doctor's letter which said she should not wear a utility belt. Sergeant Gill considered whether to make another OH referral and was emailing the claimant for further information.

31. On 28 September a Development Plan was drawn up with respect to attendance and performance. As it happened the claimant went sick the next day, so it was never implemented.

32. There was then an exchange of texts on 29 September 2016 when the claimant informed Sergeant Gill that she would not be in work as she was not feeling well. She mentioned the medication and said that she would ring HR. Sergeant Gill replied, "*Hope you get well soon. Rest up. Please call HR asap if not done to report sick*."

33. There were further texts in early October and Sergeant Gill made an OH Service request for the clamant on his return from annual leave on 5 October.

34. There were some discussions of possible side effects from the medication but nothing specific. The claimant was on sick leave until 14 November 2016, that was 46 days, and she was on office based recuperative duties on reduced hours until 12 February 2017.

35. The claimant had been undergoing IVF treatment and sadly she had suffered a miscarriage at some point in the period October or November 2016. She did not tell Sergeant Gill about this when she returned. Her case is that she told Inspector Ballard, but he did not give evidence to us. It later came to light in March 2018. Sergeant Sanghera's evidence is that Inspector Ballard told him that he had not been told anything about the pregnancy or the miscarriage.

36. The claimant's case is that she told OH about the miscarriage but there is no record that we have seen about the IVF treatment, pregnancy or miscarriage in the notes or reports seen by those officers taking decisions in 2016 or 2017.

37. The claimant's evidence was that she told Sergeant Gill in January 2017, but he denies that and there is no record of any such conversation. The tribunal finds that Sergeant Gill was not told and did not know about the autumn 2016 pregnancy and miscarriage until some time later, which we will come to.

38. On 4 December 2016 the claimant was invited to a Regulation 13 case conference. This was held on 13 January 2017. Her probation was extended by 12 months to February 2018 by Assistant Commissioner Hewitt.

39. The Development Plan, drafted in September 2016, was issued on 23 January 2017 and this was as it was before for attendance and performance. It was due to end on 7 May 2017. There was no mention of pregnancy or miscarriage by the claimant at that meeting.

40. As stated, the claimant returned to work on recuperative duties on 12 February 2017. There was a short period of sickness of four days in July 2017 which might or might not have been a consequence of attending Grenfell Tower for a shift.

41. Some concerns about the claimant's performance were raised, including a matter in December 2016 which was investigated, and CCTV footage was

viewed. In essence, there was a dispute about another officer's version of events, which was critical of the claimant's actions. In these proceedings there was late disclosure of some emails which the claimant believed should be interpreted showing that her version of events was more correct. But, as we understand it, there was no audio attached to the CCTV footage and it is therefore not particularly conclusive. Other concerns were expressed by Sergeant Gill about the claimant's performance which related to incomplete PACs and inaccurate record keeping.

42. In August 2017 Sergeant Gill told the claimant there would need to be Regulation 13 case conference and he sent evidence of concerns about her performance. The claimant attended that case conference on 5 September with her Federation Representative, Constable Gaster. She was told that she had passed the attendance part of the Development Plan. Sergeant Gill offered support for the claimant to pass her probation and said he was confident that she could. Sergeant Gill was moving on to another post and he extended the Development Plan to December to compensate for some sickness.

43. For a week in November 2017 the claimant was on street duties with experienced officer Constable Ashworth. He later made a written report which included some positive comments about the claimant but also reported some concerns which he called negatives.

44. The claimant's case is that while she was out with that officer, he had made a comment that he had "*been instructed to make it difficult*" for the claimant. This is in relation to an incident when there was a chance for her to carry out a stop and search which was one of the matters, she was short on her SOROC. Constable Ashworth had previously denied making this comment but in cross examination he was a little less definite, saying that he could not recall it. It is very difficult for the tribunal so long after the event to say definitely whether that was said or not without the wider context. However, given that Constable Ashworth denied it when he was asked about it by Sergeant Sanghera fairly soon after the event, we find that it is not likely that it was said. Even if it was said, the claimant accepts that Constable Ashworth had no knowledge of her endometriosis and any such comment cannot therefore have been anything to do with that condition.

45. Line Management moved to Sergeant Sanghera on 11 November 2017. He looked at the OH report of 15 November 2017. This appears at pages 569 to 570 of the bundle. This said that the claimant was fit for operational duties and could carry out a full role on response. The report made a suggestion about flexibility during her painful periods. The report stated an opinion was that the claimant was not covered by the Equality Act as far as disability was concerned.

46. On 30 November 2017 the claimant failed her job-related fitness test which meant that she could not take her Officer Safety Test. The claimant says that, at some point, Sergeant Sanghera made a comment to the effect that he would be the one to take her warrant card. It was suggested that this was said a number of times but Sergeant Sanghera accepts that he said it

once but it was not intended to be a threat. The claimant says now that she perceived it as such but agreed that she had found Sergeant Sanghera to be very supportive throughout his line management. He was certainly trying to find ways to help her pass probation but had some concerns. Sergeant Sanghera worked shifts with the claimant and arranged for an experienced officer to work with her.

47. Unfortunately, there was an incident where that experienced officer was assaulted whilst he was working with the claimant and her actions were called into question about the incident. That is at page 665. Sergeant Sanghera arranged for one-to-one training for the claimant to help her pass her Officer Safety Training. He also asked for an independent opinion on the stop and search that she had carried out to see if it could be signed off as competent, which that officer said it could not and that is at page 623.

48. The claimant was told that she had failed her Development Plan on 8 December and Sergeant Sanghera spoke to her about a number of concerns he had including that she was not "*victim led*" and "*seemed to have an issue with female victims*", as well as some basic errors including omitting a car registration number from the report. Sergeant Sanghera said he was concerned that she was not a team player. The claimant was based in the front office as she was on recuperative duties but Sergeant Sanghera spoke to her and told her crime reports "*were awful*". He said he could not support her as a Police Officer and suggested she consider being Public Access Officer or a 999-call taker but the claimant was not interested.

49. On 21 September Sergeant Sanghera held another Regulation 13 case conference to consider amongst other matters whether to extend the probation again. The claimant provided detailed submissions saying she understood not all parts of the Development Plan were met but that there had been improvements. Sergeant Sanghera pointed to the many documents (most of these later were put into what was called the Blue Folder), which were extensive, about 72 pages, and he gave it to the claimant. He reminded her that she had three Development Plans, not completed her SOROC and was still was not signed off as an independent single patrol officer. Missing from the SOROC were two stop and searches which witnesses have told the tribunal were particularly easy to achieve. When this was discussed, the claimant raised the issue of the allegation about Constable Ashworth making the comment referred to above at paragraph 44 and he was asked about it and denied it.

50. Examples of what Sergeant Sanghera considered to be not supporting or showing empathy with victims were discussed with the claimant. When the issue of sick leave and recuperative duties was discussed, the claimant said that she managed her condition with vitamins and lifestyle. She did not say any adjustments were needed.

51. Sergeant Sanghera's evidence was that the claimant's performance dipped at what he called an "*alarming rate*" in December 2017. We have heard evidence of two relatively serious matters where she failed to properly

complete the computerised system (Merlin) for a missing vulnerable 15-year-old and circumstances around an unborn child.

52. Sergeant Sanghera began to prepare the Blue folder for consideration at a Regulation 13 case conference with the senior officer, Chief Superintendent Wingrove. On any account, Sergeant Sanghera carried out an extensive exercise checking many documents with incidents and concerns being raised by many different officers at various levels. He looked at the claimant's pocketbook and pass as well as SOROC, Development Plans and so on.

53. In January 2018, probation was extended by Assistant Commissioner Hewitt, mainly for the Regulation 13 process to take place which he said should be expedited. The claimant was, at that stage, unable to complete her Officer Safety Training.

54. In February 2018 Sergeant Sanghera held a Regulation 13 case conference where the possibility of a further Development Plan was to be considered. By then, the claimant had passed her Officer Safety Training. Sergeant Sanghera told the claimant he was referring the matter to Chief Superintendent Wingrove for a decision. He recommended that she be discharged from the respondent.

55. The claimant's case is that she told Sergeant Sanghera about the 2016 miscarriage, but he says he was not told at this point but a later point which we shortly come to. We accept Sergeant Sanghera's evidence about when he was told as there really be no reason for him to give that date if that was not the correct date.

56. In any event, various preparations were made for the Regulation 13 case conference with Chief Superintendent Wingrove to be held on 19 March 2018. The claimant made submissions in a letter which we have looked at between pages 767 to 768. She made a number of points including that she believed she was fully operational. She made no link between endometriosis and its symptoms and work or the impact on her performance. It was in this letter that the claimant referred to the 2016 miscarriage, mentioned that she wanted it to be kept confidential and that she had told Occupational Health but made no suggestion that she had told any of her line managers.

57. Chief Superintendent Wingrove held the meeting and told her that he would recommend in a short letter that her employment be terminated. That letter appears at page 769.

58. It was shortly after that meeting that the claimant mentioned the 2016 pregnancy and miscarriage to Sergeant Sanghera. He was surprised because he had seen no mention of it at all in the many documents he had looked through. It was at that point that he spoke to other officers who denied having any knowledge of it.

59. In June 2018 Inspector Hannah Hayes became the claimant's Line Manager. The recommendation for discharge from Chief Superintendent Wingrove had gone to Assistant Commissioner Hewitt and a meeting had already been set up for 9 July. This was delayed from a meeting which should have been held in May.

60. On 6 July 2018 the claimant informed Inspector Hayes she was pregnant. The claimant complains that Inspector Hayes did not inform HR but there is no evidence what, if any, difference such notification would have made. The claimant could have informed HR herself. She also complains that no risk assessment was carried out. Inspector Hayes says the claimant worked in the station for three days, including 6 July, and there was no time to carry out a risk assessment and no need as the claimant was based in the station. The claimant did not suggest to Inspector Hayes that a risk assessment was needed.

61. We have been shown seen a text (page 1083) the clamant believed she had sent to Inspector Hayes which mentions paint fumes and moving offices on 10 July 2018. Inspector Hayes gave evidence that she did not get that text and it is not a phone number she recognises. We accept that Inspector Hayes never saw that text message.

62. On 9 July 2018 the claimant attended the final Regulation 13 meeting with Assistant Commissioner Hewitt. He had various documents but what he used was an important summary from Inspector Brooker who was assisting him. This appears at 629 to 632 and is a summary of the Blue Folder. It summarises the history from the claimant joining the respondent, the three Development Plans, extensions of probation and time away on sick leave and away from operational duties which totalled 500 days. It said that the claimant was marked as not yet competent. There then follows examples of performance concerns over two pages between May 2015 through to December 2017. The claimant attended the meeting with Constable Gaster, the Federation representative, who assisted her in a number of meetings, and she handed in short representations which we see at page 805 of the bundle.

63. Although the claimant's endometriosis was referred to there was no suggestion or link between that and any of the performance issues raised. She told Assistant Commissioner Hewitt that she had found out that she was pregnant three days earlier but made no mention of the 2016 pregnancy or miscarriage. The discussion at that meeting was mostly about what the claimant found difficult about policing and she mentioned the seven-day shift pattern, the constant calls and not having enough time to do reports. The claimant's Federation representative said her attendance had improved and that a fresh start in another team might solve the issues.

64. Assistant Commissioner Hewitt decided to dismiss the claimant. He considered the recommendations by Sergeant Sanghera that he could not recommend her for frontline policing and Chief Superintendent Wingrove had also recommended discharge. He considered the evidence before him and could not see how the claimant was going to be a fully functional and

deployable officer. He told the employment tribunal that his decision related to serious concerns about performance despite two extensions to probation taking it to over three years instead of the two years anticipated and three Development Plans.

65. The tribunal accepts that no part of Assistant Commissioners Hewitt's decision had any connection to any concerns about toilet breaks or medication and its side effects. Nor indeed was there anything directly connected to disability except that her attendance was mentioned. We have no evidence how medication or its side effects might have affected her attendance nor was there any discussion about that at the meeting.

66. The tribunal find that the fact of the claimant's pregnancy played no part at all in Assistant Commissioner Hewitt's decision. All preparation for the case and all the evidence of performance proceeded the claimant's pregnancy and informing the respondent of it.

67. By an outcome letter at page 811 of the bundle, the claimant was informed that Assistant Commissioner Hewitt had decided that he would discharge her, having taken account of what the Line Manager and Borough Commander's views were. She was given one month's notice, so that her employment terminated in August 2018.

The law

68. The claims fall under the provisions of the EQA. We are concerned with sections 13, 15 and 20 & 21 for the disability discrimination claims. These are reproduced below:-

13 Direct discrimination

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

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.

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule

apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(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.

69. For the pregnancy/maternity discrimination claim, section 18 EQA is the relevant provision. This provides that a person discriminates against a woman if they treat her unfavourably because of pregnancy or illness suffered by her as a result of pregnancy.

70. Other relevant sections are those that relate to the three-month time limit and the burden of proof as now reproduced below:-

123 Time limits

(1) 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.

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

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

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

73. In essence, the tribunal has to find and consider the primary facts to determine whether they show that discrimination might have occurred. If there are such facts, the tribunal looks to the respondent for an explanation.

74. For the something arising from disability claim the respondent can rely on the defence of justification if it can show that there was a proportionate means of achieving a legitimate aim for any discrimination found.

75. The time limit provisions in section 123 contain a standard three-month time limit to bring a claim unless the claimant can show that there was conduct extending over a period or that it is just and equitable to extend time.

76. As indicated the representatives provided helpful written submissions. It is not necessary to repeat them here. In large part the legal tests were not in dispute, but the representatives took our attention to different parts of the evidence which they submitted supported their respective cases.

77. The respondent's representative reminded the tribunal of the need for the claimant to show causative links and cases where guidance has been given on that aspect (see Dunn v Secretary of State of Justice [2019] IRLR 298 and Sheikholeslami v University of Edinburgh [2018] IRLR 1090). For the reasonable adjustments claim we were reminded of the guidance in Environment Agency v Rowan [2008] IRLR 20 to identify the PCPs and the substantial disadvantage suffered by the claimant.

78. The claimant's representative made submissions on the just and equitable extension of the time limit referring us to guidance in Virdi v Commissioner of Police of the Metropolis [2007] IRLR 24 and the well known case of Robertson v Bexley Community Centre [2003] IRLR 434 which say that extensions to the time limits should be granted in exceptional circumstances. The cases of Igen v Wong [2005] IRLR 258 and Madarassay v Nomura International plc [2007] IRLR 246 set out the principles to be applied when the tribunal is considering the burden of proof provisions. In brief, the tribunal must consider the totality of the evidence and there must be more than a mere difference in treatment and difference in protected characteristic for the burden to shift.

Conclusions

79. The claimant's disability has been accepted with knowledge by the respondent from April 2016. The tribunal agrees that the claimant meets the test of a person with a disability under EQA.

80. We now provide our conclusions by reference to the numbered issues. Where there is no conclusion, it is because it has become unnecessary.

81. First, our conclusions for the claims for direct and/or something arising disability discrimination under issues 9.3.1 to 9.5.6. These can be taken together because the incidents relied upon are pleaded in the alternative.

82. The first incident relied upon is at **Issue 9.5.3 – Being advised by PS Gill in September 2016 to call in sick (such factual allegation is denied by the Respondent)**. Our first finding in relation to this matter is that it has clearly been presented out of time. It has no connection to later matters; it is not part of conduct extending over a period, and no reasons have been suggested for us to consider that a just and equitable extension. That claim is out of time and we have no jurisdiction to hear it.

83. However, for completeness, and if we are wrong about that, we should say that the claimant cannot hope to succeed on the facts in this claim. This now appears to turn on the text quoted above at paragraph 32. The tribunal cannot categorise the words that Sergeant Gill uses there as "advising" the claimant to ring in sick. The tribunal is quite satisfied that it is completely normal procedure (and indeed was suggested by the claimant herself) that she should ring HR. She was reminded of that rather than advised. In any event, the question for the tribunal is first, for the direct discrimination claim, was it less favourable treatment than a non-disabled hypothetical comparator? There is absolutely no evidence to that effect. From the policy we have seen, anyone on sick leave of any sort must ring HR whether they are disabled or not.

84. The second question would have been, if we had found the claim in time, which we have found it is not, is whether it could amount to unfavourable treatment for something arising in consequence of the disability. The difficulty here is that the identified "something arising" aspects are toilet breaks and the need to take medication and side effects. There was absolutely no evidence to suggest toilet breaks are relevant here. The claimant did make reference to side effects of medication in her email, but there is nothing unfavourable about ringing HR to report sick leave. It is standard procedure. This allegation is not made out at all. Even if the burden was to shift to the respondent, it is able to show there was no discrimination arising from the need to inform HR and if necessary, it would show such a procedure was a proportionate means of achieving a legitimate aim. Recording sick leave with a provision for amending how it was recorded to take account of pregnancy or disability leave would amount to a proportionate means of achieving that aim.

85. Turing then to **Issue 9.5.4 PS Ashworth in November 2017 told the Claimant that he had been instructed to "make it difficult" for the Claimant**. We have found as a fact that this did not occur. For completeness, we should say that we have found that this allegation is also out of time. It has no connection to later matters, and it is not just and equitable to extend time for this single matter to proceed. Even if it was said, it can have nothing to do with the claimant's disability as Constable

Ashworth was completely unaware of her endometriosis or indeed any disability. The burden cannot shift to the respondent. It can neither be direct nor something arising disability discrimination.

86. Turning then to **Issue 9.5.5**, **issuing the Claimant with a on 23 January 2017**. On the face of it, this is also out of time but the tribunal can see that there is some connection here to the later Development Plans and then to the dismissal, as it was one of the matters that Assistant Commissioner Hewitt took into account. So, we do accept that it could amount to part of conduct extending over a period. In any event, if we were wrong about that, the tribunal accepts that it would be just and equitable to extend time because Assistant Commissioner Hewitt referred to it.

87. We therefore then turn to the next question of whether it amounts to less favourable treatment because of the claimant's disability. There is no evidence at all that any officer with that level of attendance either for a disability or a non-disability reason would not have been given such a Development Plan. In any event, the claimant met the attendance part of the plan by September 2017. It is not direct discrimination.

88. The next question therefore is whether it can be said to be unfavourable treatment for something arising in consequence of the claimant's disability, in this case the need for medication and side effects.

89. In part, there might have been some arguments for this, but the tribunal heard very little evidence as to what happened during any periods of sick leave. Some of them may well have been connected to her condition, some might not. Information with respect to the IVF treatment and the pregnancy and miscarriage was not information given to Sergeant Gill.

90. The claimant cannot show that there was any particular part of her poor attendance was something arising in consequence of her disability. We are not satisfied that the burden of proof passes to the respondent. Even if it does, there were a number of other attendance issues for example, the ankle injury and if it needed, the respondent can clearly show a proportionate means of achieving a legitimate aim; that is to have a clear process to assist those officers who are struggling with probation to get through it and to be successful. There is nothing wrong with having a process to encourage good attendance by those officers on probation which is clearly a legitimate aim.

91. The final part of both the direct and something arising claim therefore is **Issue 9.5.6 dismissing the claimant on 9 July 2018**, which claim is in time. We have found that Assistant Commissioner Hewitt's decision was based on recommendations made about the claimant's performance by officers at Borough level. Attendance played a very small part in his considerations and only part of that, that is her attendance, could conceivably amount to something arising in consequence of her disability. There is no evidence that shows it to be less favourable treatment because of the condition itself.

92. We also cannot find that it is unfavourable treatment for something arising in consequence of her disability. There is certainly insufficient evidence about how much of that absence might or might not have been caused by side effects of medication. In any event, the decision was clearly about the claimant's performance. If the burden of proof does pass to the respondent, it has shown a legitimate aim of having police officers who become competent during the probationary period through the proportionate means of a system of reviewing progress and Development Plans.

93. The claimant's claims for direct discrimination and something arising from the consequence of disability must fail and are dismissed.

94. Turning then to the failure to make reasonable adjustments, we consider now **Issues 9.7 - the PCPs**. The tribunal finds here that this claim is almost certainly made in time as the suggested PCPs and adjustments would seem to cover the time up to her dismissal and amount to conduct extending over a period. We therefore consider them as in time claims.

95. The first PCP is at **Issue 9.7.1 - the requirement to work a night shift.** The tribunal accepts, as does the respondent, this happened very rarely in practice. There was a possibility of such a shift, and we do accept it as a PCP.

96. Similarly, with **Issue 9.7.2** – **the claimant attend duties as a response officer, give assistance to crowd control which could involve standing for long periods of time**. Again, this requirement did not occur that often in practice but was a possibility and we accept it as a PCP.

97. The last PCP is at **Issue 9.7.3. - Attendance not to fall below acceptable standards**. Again, the respondent accepts this could amount to a requirement and we accept it as a PCP.

98. If the tribunal finds such PCPs, as we have, we next consider the next **Issue 9.8 - did the respondent know or could it reasonably have been expected to have known that the claimant was disabled and the PCPs concerned put the claimant at the disadvantage alleged by her?** The respondent accepts knowledge of her condition from April 2016. The next question is more problematic as it asks us to consider whether the respondent knew that the PCPs put the claimant at a disadvantage and the evidence here is not sufficient to support the claimant's case.

99. The disadvantages identified by her were having the absences recorded as sick leave when it was caused by medication (and we have insufficient evidence about this) and dismissal. The claimant can show no disadvantage on the evidence before us of the recording, or possible mis-recording of sick leave which is connected to her disability, and she can certainly show nothing as compared to any other officer with or without a disability. Nor can the claimant show that the dismissal was a disadvantage caused by the PCPs except in the very limited sense that the extent of her absence was a very minor part of the consideration at the

dismissal meeting. The claimant has not told the tribunal which part of any of her absences were a consequence of her disability nor caused by the side effects of medication. On the evidence before the tribunal, the claimant did not ask to recategorise any periods sick leave to disability leave nor does the tribunal know what difference that would have made to the attendance records. The tribunal cannot find that the respondent was aware of the disadvantages identified by the claimant and the duty to make reasonable adjustments did not arise.

100. But for completeness, as we have heard the evidence, we have decided to consider the matter as if the duty did arise as set out at **Issue 9.9** to see what the outcome would be. So, we have looked at **Issue 9.10.1**, which is the first suggested reasonable adjustment – **Allocate the claimant to another department such as CID, CPU, or put on restricted duties so she would have access to a bathroom**.

101. There was very little evidence at the hearing from the claimant or the respondent's witnesses about this possible step that it is suggested could have been taken. The evidence is clear that probationers must be able to meet basic competencies before they move on. For reasons which the tribunal cannot find were connected to the claimant's disability she was not able to meet that basic minimum standard. There is no evidence upon which the tribunal could find that this would have been be a reasonable adjustment.

102. The second suggested adjustment is **Issue 9.10.2 – Allow flexi-time working to accommodate her days off**. Again, there was virtually no evidence on this point at the hearing. It is not clear what it means or how it would work at all, let alone how it might alleviate any disadvantage connected to the PCPs or the claimant's disability.

103. The third suggested adjustment is at **Issue 9.20.3 - Extend the acceptable level of absenteeism.** It is clear that, in some circumstances, this might amount to a reasonable adjustment but it is not so on the facts of this case where the claimant's absence in September to November 2016 was not in the later Development Plan. In any event, the claimant had passed that attendance aspect by Se0ptember 2017. So, it made no difference at that point.

104. The evidence the tribunal has heard does not help with how or by how much an extension of the acceptable level would have assisted the claimant and cannot find how it would have alleviated any disadvantage she now suggests she had. Apart from the steps the respondent took to extend probation no further adjustment was needed or reasonable.

105. There are therefore no reasonable adjustments that the respondents failed to make even if the duty arose. Her claim for reasonable adjustments therefore fails.

106. Turning lastly to the claim for pregnancy and maternity, these were at issue 10 of the list of issues.

107. The first one is at **Issue 10.2.1 Between 28 September 2016 – 13 November 2016, following a miscarriage, placing her on an action plan for absence.** This claim is plainly out of time particularly as the claimant passed the attendance part by September 2017 and the later development plans were not about attendance. There is nothing to suggest to the tribunal that it would be just and equitable to extend time. Even if this claim had been made in time, it had no connection to pregnancy and maternity as Sergeant Gill had no knowledge of any such pregnancy. The claimant has no chance of showing discrimination in that particular aspect.

108. The next one is at **Issue 10.2.2** – **In July 2018, the claimant having informed her line manager that she was pregnant, the respondent failing to conduct a risk assessment and/or record her pregnancy under the HR systems**. These matters did occur and the claims made in time. Inspector Hayes accepts she was told about the pregnancy and did not tell HR or carry out a risk assessment. As our findings of fact make clear we are satisfied there is no unfavourable treatment in not telling HR as nothing arose from that. There is no detriment that we can identify from that. It was open to the individual officer, the claimant, to notify HR if she wished to do so.

109. As for the failure to carry out a risk assessment, it is not clear to the employment tribunal why it is said to be a detriment given the very short time before the Regulation 13 meeting. We have found as a fact that the claimant did not raise the issue with Inspector Hayes. She was working in the station and we are satisfied that the risk assessment would have carried out if she had not been dismissed. She cannot show a detriment from such a short delay and no discrimination is shown.

110. Finally, then we look at the dismissal at **Issue 10.2.3**, which of course is also a claim made in time. As our findings of fact make clear, we accept Assistant Commissioner Hewitt's reasons for the dismissal have no connection to the claimant's pregnancy. It did not play any part in his decision making at all. Many months of the respondent's witnesses gathering information, following the processes and making recommendations occurred before the fact of the pregnancy. There is nothing to suggest that that was in Assistant Commissioner Hewitt's mind when he dismissed the claimant. He denied it in his witness statement, and it was not challenged. No such discrimination is shown.

111. In summary then, some of the claimant's claims for disability discrimination and one of pregnancy discrimination are out of time and it is not just and equitable to extend time. Even if we had considered those matters along with those which were in time, the claimant has failed to shift the burden of proof to the respondent and where she has, or might have, we are satisfied there is no discrimination or it can be justified.

112. Although the tribunal has sympathy for the claimant, who clearly wanted to make a success in a career as a Police Officer, she was unable to meet

the basic competencies and that was the reason that she was discharged. Her claims for disability and pregnancy discrimination must fail and are dismissed.

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Employment Judge Manley

Date: …28 March 2021……..

Sent to the parties on: .....

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For the Tribunal Office