EMPLOYMENT TRIBUNALS

Claimant: **Mr T Williams**

Respondent: **Ministry of Defence**

Heard at: **Cardiff (by video)** **On: 5, 6, 7, 8, 9 and 12 October 2020 and in chambers on 13 and 16 October 2020**

Before: **Employment Judge R Harfield**
Members **Mr M Pearson**
Mr M Lewis

Representation:
Claimant: Mr D Hutcheon (Counsel)
Respondent: Ms J Williams (Counsel)

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

(a) The claimant's complaints of a failure to make reasonable adjustments, discrimination arising from disability, direct disability discrimination and harassment related to disability succeed to the extent set out below;
(b) The claimant's complaints of indirect disability discrimination do not succeed and are dismissed;
(c) The claimant's successful complaints will be listed for a remedy hearing.

REASONS

Introduction

1. The claimant is an Armed Firearms Officer ("AFO") in the Ministry of Defence Police ("MDP") based at the Hereford Garrison. By way of a claim form presented on 27 June 2019 the claimant brings a claim of disability discrimination. The respondent filed a response form denying the claim

and seeking further particulars of the claimant's specific complaints. By agreement the claimant filed further particulars of claim setting out complaints of direct discrimination, indirect discrimination, discrimination arising from disability, a failure to make reasonable adjustments and harassment related to disability. The respondent filed amended grounds of resistance. A case management preliminary hearing took place before Employment Judge Camp on 12 November 2019 [82- 84]. The case was transferred from the Birmingham Employment Tribunal to the Wales Employment Tribunal. A further case management preliminary hearing took place before Employment Judge Jenkins on 28 January 2020. The case was listed for hearing on 5 – 9 and 12 October 2020. With the agreement of the parties the hearing was held fully remotely by video using the Tribunal's CVP platform.

2. We had before us a hearing bundle extending to 704 pages. In this Judgment references in brackets [ ] are references to page numbers in that bundle. During the hearing we also admitted into evidence the claimant's fit notes dated 18/1/19, 2/7/19, a Force Order and Staff Notice dated 7/1/16, and an extract from the Ministry of Defence Act 1987. We also had before us an agreed list of issues and a cast list. We had written witness statements from, and heard oral evidence from, the claimant and from his partner, Ms Hinchey. For the respondent we received written witness statements from, and heard oral evidence from, Ms Kemp (Payroll Operations Manager), Ms Foster (Attendance and Capability Manager), Mr Terry (at the relevant time the Deputy Chief Constable but now retired), Ms Batt (Force Welfare Officer), Chief Inspector Carr (at the relevant time an Inspector), Mr Musto (at the time the claimant's second line manager and an Inspector, but now retired) and Inspector McIlwraith (the claimant's second line manager, after Inspector Musto retired). In this written Judgment we refer to individuals by the rank they held at the relevant time.

3. On conclusion of the evidence we received written submissions and oral submissions from both parties. In this Judgment we have not repeated the submissions made by both parties, but we took them fully into account. We were unable to conclude our liability deliberations in time to deliver an oral judgment and reconvened to complete our deliberations on 16 October 2020. Judgment was therefore reserved to be delivered in writing which is limited to liability issues. Employment Judge Harfield apologises for the delay in handing down this reserved Judgment which was in part due to the demands of other judicial work, the impact of the Covid 19 restrictions and the length of the list of issues to be decided.

The issues to be decided

4. The agreed list of issues ("LOI") to be decided is as follows:

1) Introduction

a) The Claimant brings the following claims under the Equality Act 2010 ("the Act"):

a. Claims for direct disability discrimination ("Direct Discrimination") (contrary to sections 13 and 39(2) of the Act);

b. Claims for discrimination arising from disability ("DARD") (contrary to sections 15 and 39(2) of the Act);

c. Claims for indirect disability discrimination ("Indirect discrimination") (contrary to sections 19 and 39(2) of the Act);

d. Claims for failure to make reasonable adjustments ("Failure to Make RAs") (contrary to sections 20-21 and 39(5) of the Act);

e. Claims for harassment related to disability ("Harassment") (contrary to sections 26 and 40 of the Act).

2) Disability

a) The Claimant's case is that at all material times he suffered from depression which constituted a disability within the meaning of section 6 of the Act.

b) The Respondent does not contest that the Claimant was disabled at all relevant times by virtue of his depression, but does contest knowledge of disability, stating that it only had knowledge from 27th February 2018.

c) Insofar as relevant:

i) Did the Respondent know at all material times that the Claimant had the disability?

ii) If not, could it reasonably have been expected to know that?

3) Reduction and cessation of Claimant's pay while on sickness absence

a) It is common ground that in November 2017, while the Claimant remained on sickness-related absence, the Respondent reduced the Claimant's pay to half pay and then stopped the Claimant's pay in May 2018 (i.e., reduced it to nil pay).

b) Was this DARD? As to this:

i) Did this constitute unfavourable treatment?

ii) Did this happen because of something arising in consequence of the Claimant's disability, namely his disability-related sickness absence?

iii) If so, was this treatment a proportionate means of achieving a legitimate aim? The Respondent relies on the legitimate aim of upholding the Respondent's limits on sick pay for non-standard occupation group ("NSOG") staff, contained within the Ministry of Defence Statement of Civilian Personnel Policy: Pay Details and Enquiries, and ensuring that these limits were applied consistently across all NSOG staff to which they applied.

c) Further and in the alternative, did the treatment identified at para 3(a) above reflect a Failure to Make RAs? As to this:

i) It is accepted that the Respondent applied a "provision, criterion or practice" ("PCP") by which NSOG staff on sickness absence were not entitled to more than six months in all on full pay during any period of 12 months; thereafter half pay for no more than six months (subject to a maximum of 12 months paid or unpaid absence in any period of four years or less).

ii) It is also accepted that the Respondent applied a PCP by which it did not maintain full pay/half pay for more than 6 months at a time for those employees on sickness absence.

iii) Did the PCPs put the Claimant at a substantial disadvantage in comparison with persons who were not disabled? The Claimant claims that having his pay reduced to half pay and then no pay amounted to a substantial disadvantage in his case, since his disability made such absences (and the associated reduction and then cessation in pay) all the more likely.

iv) Did the Respondent fail to take such steps as were reasonable to avoid the disadvantage? The Claimant suggests that reasonable steps would have included (i) extending the period before which the reductions in pay were implemented and/or (ii) discounting disability-related sickness absence from the calculation.

d) Further and in the alternative, did the treatment identified at para 3(a) above involve Indirect Discrimination? As to this:

i) The PCPs are those set out at paras 3(c)(i) and (ii) above and it is common ground that they were applied to disabled and non-disabled employees;

ii) Did the PCPs put those with the Claimant's disability at a particular disadvantage compared to those who do not share that characteristic, namely the disadvantage of being on half pay and then no pay?

iii) If so, did it put the Claimant at that disadvantage?

iv) If so, was the PCP a proportionate means of achieving a legitimate aim? The legitimate aim relied on by the Respondent is that at para 3(b)(ii) above.

4) The Respondent's handling of a possible Security Vetting role for the Claimant

a) It is common ground that in May/June 2018, the Claimant and the Respondent's Inspector Carr had a conversation or conversations regarding the possibility that existed for the Claimant to take up a seconded Security Vetting role with the Respondent ("the SV Role").

b) In the course of those conversations, did Inspector Carr:

i) Make the comments set out at paragraph 13 of the Claimant's Further Particulars of Claim?

ii) Tell the Claimant that the role could not be done part-time (see para 35 of the Particulars of Claim); and/or

iii) Pressurise the Claimant against putting himself forward for the SV Role?

c) It is also common ground that when the Claimant subsequently informed the Respondent that he did not wish to be considered for the SV Role, the Respondent did not question, ask to discuss or give or seek feedback about the reasons for that decision.

d) Did the Respondent's acts and omissions as set out at para 4(b) (to the extent the ET finds that they took place) and 4(c) above constitute Direct Discrimination? In particular:

i) Did they constitute less favourable treatment of the Claimant?

ii) Did they happen because of the Claimant's disability?

e) Further and in the alternative, did those acts and omissions amount to DARD? As to this:

i) Did they amount to "unfavourable treatment" of the Claimant?

ii) Did the treatment take place because of something arising in consequence of the Claimant's disability, namely the Claimant's sickness absence and/or his tendency to experience stress and/or self-doubt?

iii) Was the treatment a proportionate means of achieving a legitimate aim? The Respondent relies, in respect of the para 4(b) issues, on the legitimate aim of managing the Claimant's expectations as to the requirement of the SV role and, in respect of the para 4(c) issues, respecting the Claimant's decision in order to avoid placing undue pressure on the Claimant to change his mind.

f) Further and in the alternative, did those acts and omissions constitute Harassment? As to this:

i) Did they amount to "unwanted conduct"?

ii) Was that conduct related to the Claimant's disability?

iii) Did that conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading humiliating or offensive environment for the Claimant?

g) Further and in the alternative, did those acts and omissions reflect a Failure to Make RAs? As to this:

i) It is common ground that the Respondent applied PCPs of (i) communicating set requirements for job roles and a set way of working or carrying out those requirements without deviation and (ii) accepting a person's decision not to put themselves forward or to withdraw from a job application process without giving or seeking feedback.

ii) Did those PCPs put the Claimant at a substantial disadvantage in comparison with persons who were not disabled, namely becoming upset and demoralised, and missing out on a secondment to the SV role that would have afforded him the chance to return to paid work?

iii) Did the Respondent fail to take such steps as were reasonable to avoid the disadvantage? The Claimant suggests that reasonable steps would have included: (i) identifying potential benefits to the Claimant in taking up the role; (ii) encouraging the Claimant to believe that he could perform the role given the right support; (iii) speaking with the Claimant after he indicated he would not put himself forward for the SV Role to ask him about his decision and give him an opportunity to reconsider and/or (iv) considering and implementing alternative ways to make the role work for the Claimant, such as reallocating parts of the role, making arrangements for part-time work, a job share or a phased return to the SV Role.

5) The possibility of the Claimant returning to work in some modified capacity

a) It is common ground that in June 2018 the Claimant requested that the Respondent allow him to return to work on reduced hours and that, around this time, he held discussions. It is also common ground that the Respondent did not offer the Claimant the opportunity to work part-time, or a job share arrangement. It is the Claimant's case that he was not afforded a phased return to work.

b) Did the Respondent subject the Claimant to DARD by failing to consider and/or to offer him these kinds of alternative working arrangements? As to this:

i) Did this constitute unfavourable treatment?

ii) Was the reason for the treatment something arising in consequence of the Claimant's disability? The "thing arising in consequence" was the fact that the Claimant was not in a position to carry out his full range of duties and/or to work his usual hours. Alternatively, it was because he was not able to pass fitness and tactics training.

iii) Did the Respondent's failure represent a proportionate means of achieving a legitimate aim? The Respondent relies on the legitimate aims of having regard to Occupational Health advice/medical advice, and requiring OH advice/medical advice to set out that an employee is at least fit for work in some capacity in order to consider and/or make any offer of an alternative working arrangement as a reasonable adjustment.

c) Further and in the alternative, did the Respondent's failure to consider and/or to offer the Claimant those kinds of alternative working arrangements reflect a Failure to Make RAs? As to this:

i) The Claimant relies on PCPs of (i) requiring officers to be fully operational and fit for their full range of duties; (ii) requiring officers to be fully operational and to pass a fitness test and tactics training before considering an application for part-time working and/or job share; and/or (iii) only submitting requests to front line operations where officers were fully operational and/or had passed fitness and tactics training.

ii) Did those PCPs put the Claimant at a substantial disadvantage in comparison with persons who were not disabled, namely (i) facilitating a continuance of sickness absence on no pay (or reduced pay); and/or (ii) increasing the likelihood of, or subjecting the Claimant to, attendance management warning and meetings that brought him closer to dismissal?

iii) Did the Respondent fail to take such steps as were reasonable to avoid the disadvantage(s)? The Claimant suggests that reasonable steps would

have included considering and/or offering the Claimant an alternative working arrangement such as part-time working, working from home (or in another role temporarily), a longer phased return, part-time working, and/or advancing his application to front line operations for their consideration.

d) Further and in the alternative, did the Respondent's failure to consider and/or to offer the Claimant those kinds of alternative working arrangements reflect Indirect Discrimination? As to this:

i) Are those matters set out at para 5(c)(i) capable of amounting to PCPs?;

ii) If so, were those PCPs applied to disabled and non-disabled employees?

iii) Did the PCPs put those with the Claimant's disability at a particular disadvantage compared to those who do not share that characteristic?

iv) If so, did they put the Claimant at that disadvantage?

v) If so, was the PCP a proportionate means of achieving a legitimate aim? The legitimate aims relied upon are those set out at para 5(b)(iii).

6) The Respondent not offering a respite break

a) It is common ground that on 8th May 2018 the Respondent's Welfare Officer, Claire Batt, discussed the possibility of arranging and funding a respite/weekend break for the Claimant and his family, indicating that she would look into this and would report back to the Claimant with the outcome and the notes of their discussion. In the event, she did not do so, leaving the Claimant without a respite break.

i) Did the treatment identified at para 6(a) above reflect a Failure to Make RAs? As to this:

ii) The Claimant relies on PCPs of (i) not progressing discussions with employees about benefits tailored to wellness to the point of submitting a formal request; (ii) not providing funding and funding benefits tailored to wellness to those on sick leave (either for mental health reasons or otherwise); and/or (iii) disallowing or not funding benefits tailored to wellness (or more specifically respite/weekend breaks) to those on sick leave.

iii) Did those PCPs put the Claimant at a substantial disadvantage in comparison with persons who were not disabled, namely leaving him without a respite break and causing (or leaving him liable to suffer) a flare-

up of his symptoms of depression, leading to increased sickness absence without pay?

iv) Did the Respondent fail to take such steps as were reasonable to avoid the disadvantage? The Claimant suggests that reasonable steps would have been (i) for the Respondent to progress and submit a formal request for a respite break and to report this back to the Claimant and/or (ii) for the Respondent to have offered the Claimant a respite break funded by the Respondent.

7) Applying the absence management process without adjustments

a) The Claimant alleges discrimination in relation to the Respondent's staged absence meetings, the warnings that arose from those, and the Respondent's handling of the Claimant's absences in the intervening periods. The relevant period for the purposes of these complaints is 20th February 2018 to 29th January 2019 inclusive.

b) It is common ground that a Stage 1 review was held on 20th February 2018, that a Final Written Improvement Notice ("FWIN") was issued on 8th May 2018, that a further review was held on 13th September 2018, that minutes were recorded on the FWIN on 14th September 2018, that a Stage 2 review was held on 27th November 2018, and that a Stage 3 review was held on 29th January 2019 (and that arrangements were made by the Respondent for each of these things to happen).

c) Did the Respondent subject the Claimant to DARD by these acts and arrangements? As to this:

i) Did they amount to "unfavourable treatment" of the Claimant?

ii) Did the treatment take place because of something arising in consequence of the Claimant's disability, namely the Claimant's disability-related sickness absence?

iii) Was the treatment a proportionate means of achieving a legitimate aim? The Respondent relies on the legitimate aim of upholding the Respondent's requirement for satisfactory attendance from its employees.

d) Further and in the alternative, did the Respondent's formal absence management of the Claimant identified at paras 7(a) and (b) above reflect a Failure to Make RAs? As to this:

i) It is common ground that the Respondent applied a PCP of submitting officers to its Unsatisfactory Performance Procedure ("the Procedure") relating to attendance when they reached a certain level of sickness

absence, leading to formal hearings and warnings that could eventually culminate in the employee's dismissal.

ii) It is common ground that the Respondent applied a PCP of setting action plans at various stages of the Procedure, save the Respondent disputes that these were "formulaic" and claims they took account of the individuals' (including the Claimant's) own circumstances and individual medical evidence.

iii) It is common ground that the Respondent applied a PCP of requiring employees to maintain a certain level of attendance at work in order that they may not be subject to attendance management hearings, FWINs and other warnings or sanctions up to and including dismissal.

iv) Did the PCP at para 7(d)(i) put the Claimant at a substantial disadvantage in comparison with persons who were not disabled in that the Claimant received a FWIN and was required to submit to formal reviews, meetings and sanctions under the Procedure, bringing him closer to dismissal? The Claimant claims that the above outcomes were made more likely by his disability, as it increased the probability of his not being fully fit for his full range of duties and needing to take sickness absence.

v) Did the PCP at para 7(d)(ii) put the Claimant at a substantial disadvantage in comparison with persons who were not disabled in that the Claimant's own input, his GP's input and his particular circumstances were not taken into account, leading to escalation under the Procedure and bringing him closer to dismissal?

vi) Did the PCP at para 7(d)(iii) put the Claimant at a substantial disadvantage in comparison with persons who were not disabled in that his disability meant that he took (or was more likely to need to take) sickness absence, placing him at risk of being called to hearings and being issued with improvement notices and sanctions taking him closer to dismissal?

vii) Did the Respondent fail to take such steps as were reasonable to avoid the disadvantage(s)? The Claimant suggests that reasonable steps would have included: a phased return, part-time working, alternative positions such as administrative work, a secondment including the SV role, an extension (to trigger points or otherwise) before hearings are required to take place and warnings are issued, further extensions of the FWIN, an action plan that met the Claimant's circumstances rather than being generic in nature, and the continuation of the Claimant's service as opposed to his dismissal.

e) Further and in the alternative, did the Respondent's adherence to the Procedure giving rise to warnings and staged absence meetings reflect Indirect Discrimination? As to this:

i) The PCPs are those set out at para 7(d)(i)(ii) and (iii);

ii) It is common ground that the PCPs were applied to both disabled and non-disabled employees.

iii) Did the PCPs put those with the Claimant's disability at a particular disadvantage compared to those who do not share that characteristic?

iv) If so, did they put the Claimant at that disadvantage?

v) If so, was the PCP a proportionate means of achieving a legitimate aim? The legitimate aim relied upon is upholding the Respondent's requirement for satisfactory attendance from its employees.

8) The Stage 3 hearing pack

a) It is the Claimant's case that he received the pack for the Stage 3 hearing on 24th January 2019, which left the Claimant 5 days to absorb this information and prepare for the hearing on 29th January 2019.

b) Did the Respondent's failure to instead provide the pack at least 14 days before the Stage 3 hearing reflect a Failure to Make RAs? As to this:

i) The Claimant relies on the PCP of the Respondent providing hearing packs shortly before attendance management hearings, including up to 5 days before.

ii) Did that PCP put the Claimant at a substantial disadvantage in comparison with persons who were not disabled, namely did it mean that the Claimant had insufficient time to digest the information, to spot and correct any errors, and/or to prepare his representations?

iii) Did the Respondent fail to take such steps as were reasonable to avoid the disadvantage(s)? The Claimant suggests that a reasonable step to have taken would have been for the Respondent to have provided the Claimant with the Stage 3 pack at least 14 days or more before the Stage 3 hearing.

c) Further and in the alternative, did the provision of the pack by the Respondent 5 days before the Stage 3 hearing (rather than 14 days or any longer period of time before the hearing) reflect Indirect Discrimination? As to this:

i) The PCP is that set out at para 8(b)(i);

ii) Was that PCP applied to disabled and non-disabled employees?

iii) Did the PCP put those with the Claimant's disability at a particular disadvantage compared to those who do not share that characteristic?

iv) If so, did they put the Claimant at that disadvantage?

v) If so, was the PCP a proportionate means of achieving a legitimate aim? The legitimate aim relied upon is the need to avoid delay in holding a Stage 3 hearing, once it is determined that such a hearing is required, and the need to ensure that Stage 3 hearing packs contain all relevant documentation at the time they are sent to employees.

9) DCC Terry's approach to the Stage 3 hearing

a) It is common ground that DCC Terry, on behalf of the Respondent, chaired the Stage 3 hearing on 29th January 2019 involving other panel members that led to the Claimant's dismissal that day.

b) At the Stage 3 hearing, was DCC Terry:

i) Largely dismissive of what the Claimant had to say in support of allowing him to continue in his employment with the Respondent?

ii) Rude and abrupt in manner? The Claimant gives the examples of DCC Terry changing the subject when the Claimant got to the end of his points and swiftly moving the conversation on when he sensed that the Claimant was touching upon matters favourable to his case for remaining employed.

iii) Accusatory in terms of his line of questioning? The Claimant claims that DCC Terry attempted to trip him up with his questions.

iv) Conducting the meeting in a way that demonstrated poor body language?

c) Were other panel members at the Stage 3 hearing complicit in the above behaviour in para 9(b)(iii) or did they accept that behaviour without challenging it?

d) Did the acts and omissions as set out at paras 9(b) and 9(c) above constitute Direct Discrimination (to the extent that the Tribunal finds they took place)? In particular:

i) Did they constitute less favourable treatment of the Claimant?

ii) Did they happen because of the Claimant's disability?

e) Further and in the alternative, did those acts and omissions constitute Harassment? As to this:

i) Did they amount to "unwanted conduct"?

ii) Was that conduct related to the Claimant's disability?

iii) Did that conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading humiliating or offensive environment for the Claimant?

10) Dismissal

a) It is common ground that the Claimant was dismissed on 29th January 2019. The Claimant claims his dismissal was direct and/or indirect discrimination, discrimination arising from disability, a failure to make adjustments and an act of disability-related harassment. The Respondent denies these claims.

b) Did the Respondent's act of dismissing the Claimant constitute Direct Discrimination? In particular:

i) Did it constitute less favourable treatment of the Claimant?

ii) Did it happen because of the Claimant's disability?

c) Further and in the alternative, did the Claimant's dismissal amount to DARD? As to this:

i) Did it amount to "unfavourable treatment" of the Claimant?

ii) Did it take place because of any of the following things arising in consequence of the Claimant's disability:

(1) The fact the Claimant was not fully operational, not fit to carry out his full range of duties and/or not able to work his usual hours?

(2) The fact the Claimant was not able to pass fitness and tactics training?

(3) The Claimant's disability-related sickness absence?

(4) The assumption that the Claimant could not use fatal force if required to do so?

iii) If so, was this a proportionate means of achieving a legitimate aim? The Respondent relies on the legitimate aim of upholding the Respondent's requirement for satisfactory attendance from its employees.

d) Further and in the alternative, did the Respondent's dismissal of the Claimant reflect a Failure to Make RAs? As to this:

i) The Claimant relies on the PCPs, substantial disadvantage(s) and reasonable adjustments contended for para 4(g) above regarding the SV Role, with the addition of the substantial disadvantage of his dismissal;

ii) Further and in the alternative the Claimant relies on the PCPs, substantial disadvantage(s) and reasonable adjustments contended for para 5(c) above regarding return to work in some modified capacity, with the addition of the substantial disadvantage of his dismissal;

iii) Further and in the alternative the Claimant relies on the PCPs, substantial disadvantage(s) and reasonable adjustments contended for para 7(d) above regarding the application of the absence management procedure without adjustments, with the addition of the substantial disadvantage of his dismissal;

e) Further and in the alternative, did the Respondent's dismissal of the Claimant reflect Indirect Discrimination? As to this:

i) The PCPs are those set out at paras 4(g), 5(c) and 7(d) as referenced above in para 10(d);

ii) Were those PCPs applied to disabled and non-disabled employees?

iii) Did the PCPs put those with the Claimant's disability at a particular disadvantage compared to those who do not share that characteristic?

iv) If so, did they put the Claimant at that disadvantage?

v) If so, was the PCP a proportionate means of achieving a legitimate aim? The legitimate aim relied upon is upholding the Respondent's requirement for satisfactory attendance from its employees.

f) Further and in the alternative, did the Claimant's dismissal constitute Harassment? As to this:

i) Did it amount to "unwanted conduct"?

ii) Was that conduct related to the Claimant's disability?

iii) Did that conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading humiliating or offensive environment for the Claimant?

11) Time limits

a) It is common ground that the Claimant's claims are in time in so far as they relate to DCC Terry's approach to the Stage 3 hearing and the Claimant's dismissal.

b) Are the Claimant's other claims in time, applying section 123(1)(a) of the Act? In this respect and insofar as relevant, did the conduct in question constitute "conduct extending over a period" for the purposes of section 123(3)(a) of the Act? If so, when was the end of that period?

c) To the extent, in light of (b), that any of the Claimant's claims were not in time, were they brought within such further period of time as the Tribunal considers to be just and equitable (section 123(1)(b) of the Act)?

12) Remedies

a. If the Claimant succeeds on any of his claims, to what compensation is he entitled?

b. Should interest be awarded? If so, in what amount?

c. Should the Tribunal make a declaration as to the rights of the parties?

Should the Tribunal make any recommendations?

The relevant legal framework

5. Complaints of disability discrimination are brought under the Equality Act 2010. Section 39(2)(c) and (d) prohibit discrimination against an employee by dismissing him or subjecting him to a detriment. Section 39(5) applies to an employer the duty to make reasonable adjustments. Section 40(1)(a) prohibits harassment of an employee. Conduct which constitutes harassment cannot also constitute a "detriment" (section 212(1)), meaning that it can only be pursued as a harassment complaint.

Burden of Proof

6. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides:

"(2) if there are facts from which the Court (which includes a Tribunal) 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."

Consequently, it is for a claimant to establish facts from which the tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

7. In Hewage v Grampian Health Board [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provisions should apply. That guidance appears in Igen Limited v Wong [2005] ICR 931 as supplemented in Madarassy v Nomura International Plc [2007] ICR 867. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence. Furthermore, in practice if the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Direct Disability Discrimination

8. Direct discrimination is defined in section 13(1) as follows:

"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."

9. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies:

"On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."

10. Section 23(2) goes on to provide that if the protected characteristic is disability, the circumstances relating to a case include the person's abilities. The effect of section 23 as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparator

can be with a hypothetical person. The Employment Appeal Tribunal and appellate courts have also emphasised in a number of cases including Amnesty International v Ahmed [2009] IRLR 894, that in most cases where the conduct in question is not overtly related to disability, the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator. It may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator.

11. In Aylott v Stockton-on-Tees Borough Council [2010] EWCA Civ 910 the Court of Appeal (when addressing in essence the same provision under the Disability Discrimination Act 1995) was concerned with a decision of an Employment Tribunal that an employer had taken a stereotypical view of the employee's mental illness. The Court of Appeal held that the Tribunal's conclusions on the facts of that case could amount to direct discrimination. It was said:

"*Direct discrimination can occur, for example, when assumptions are made that a claimant, as an individual, has characteristics associated with a group to which the claimant belongs, irrespective of whether the claimant or most members of the group have those characteristics…*

I would accept that an ET can err in law if they conclude that liability for direct discrimination has been established simply by relying on an unproven assertion of stereotyping persons with that particular disability. Direct discrimination claims must be decided in accordance with the evidence, not by making use, without requiring evidence, of a verbal formula such as "institutional discrimination" or "stereotyping" on the basis of assumed characteristics. There must be evidence from which the ET could properly infer that wrong assumptions were being made about that person's characteristics and that those assumptions were operative in the detrimental treatment, such as a decision to dismiss."

Duty to make reasonable adjustments

12. The duty to make reasonable adjustments appears in Section 20 as having three requirements. In this case we are concerned with the first requirement in Section 20(3) –

"(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."

13. Under section 21 a failure to comply with that requirement is a failure to comply with a duty to make reasonable adjustments and will amount to discrimination. Under Schedule 8 to the Equality Act an employer is not subject to the duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the claimant has a disability or that the claimant is likely to be placed at a substantial disadvantage.

14. In Environment Agency v Rowan [2008] ICR 218 it was emphasised that an employment tribunal must first identify the "provision, criterion or practice" applied by the respondent, any non-disabled comparators (where appropriate), and the nature and extent of the substantial disadvantage suffered by the claimant. Only then is the tribunal in a position to know if any proposed adjustment would be reasonable.

15. The words "provision, criterion or practice" ["PCP"] are said to be ordinary English words which are broad and overlapping. They are not to be narrowly construed or unjustifiably limited in application. However, case law has indicated that there are some limits as to what can constitute a PCP. Not all one-off acts will necessarily qualify as a PCP. In particular, there has to be an element of repetition, whether actual or potential. In Ishola v Transport for London [2020] EWCA Civ 112 it was said:

"*all three words carry the commutation of a state of affairs… indicating how similar cases are generally treated or how a similar case would be treated if it occurred again."*

It was also said that the word "practice" connotes some form of continuum in the sense that it is the way in which things are generally or will be done.

16. The purpose of considering how a non-disabled comparator may be treated is to assess whether the disadvantage is linked to the disability.

17. Substantial disadvantage is such disadvantage as is more than minor or trivial; Section 212.

18. In County Durham and Darlington NHS Trust v Dr E Jackson and Health Education England EAT/0068/17/DA the Employment Appeal Tribunal summarised the following additional propositions:

- It is for the disabled person to identify the "provision, criterion or practice" of the respondent on which s/he relies and to demonstrate the substantial disadvantage to which s/he was put by it;
- It is also for the disabled person to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage;

s/he need not necessarily in every case identify the step(s) in detail, but the respondent must be able to understand the broad nature of the adjustment proposed to enable it to engage with the question whether it was reasonable;

- The disabled person does not have to show the proposed step(s) would necessarily have succeeded but the step(s) must have had some prospect of avoiding the disadvantage;
- Once a potential reasonable adjustment is identified the onus is cast on the respondent to show that it would not been reasonable in the circumstances to have to take the step(s)
- The question whether it was reasonable for the respondent to have to take the step(s) depends on all relevant circumstances, which will include:
    - The extent to which taking the step would prevent the effect in relation to which the duty is imposed;
    - The extent to which it is practicable to take the step;
    - The financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of its activities;
    - The extent of its financial and other resources;
    - The availability to it of financial or other assistance with respect to taking the step;
    - The nature of its activities and size of its undertaking;
- If the tribunal finds that there has been a breach of the duty; it should identify clearly the "provision, criterion, or practice" the disadvantage suffered as a consequence of the "provision, criterion or practice" and the step(s) the respondent should have taken.

19. Consulting an employee or arranging for an occupational health or other assessment of his or her needs is not normally in itself a reasonable adjustment. This is because such steps alone do not normally remove any disadvantage; Tarbuck v Sainsbury's Supermarkets Ltd *[*2006] IRLR 663; Project Management Institute v Latif [2007] IRLR 579.

20. What adjustments are reasonable will depend on the individual facts of a particular case. The Tribunal is obliged to take into account, where relevant, the statutory Code of Practice on Employment published by the Equality and Human Rights Commission. Paragraphs 6.23 to 6.29 give guidance on what is meant by reasonable steps. Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicality of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantial disadvantage.

Discrimination arising from disability

21. Section 15 of the Equality Act states:

> *"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."*

22. The approach to determining Section 15 claims was summarised by the Employment Appeal Tribunal in Pnaiser v NHS England and Another [2016] IRLR 170. This includes:

- In determining what caused the treatment complained about or what was the reason for it, the focus is on the reason in the mind of A. This is likely to require an examination of the conscious or unconscious thought process of A;

- The "something" that causes the unfavourable treatment need not be the main or sole reason, but must at least have a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it;

- Motives are not relevant;

- The tribunal must determine whether the reason or the cause is "something arising in consequence of B's disability";

- The expression "arising in consequence of" can describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link;

- Knowledge is only required of the disability. Knowledge is not required that the "something" leading to the unfavourable treatment is a consequence of the disability.

23. The respondent will successful defend the claim if it can prove that the unfavourable treatment was a proportionate means of achieving a legitimate aim. Legitimate aims are not limited to what was in the mind of

the employer at the time it carried out the unfavourable treatment. Considering the justification defence requires an objective assessment which the tribunal must make for itself following a critical evaluation of the position. It is not simply a question of asking whether the employer's actions fell within the band of reasonable responses.

24. The Equality and Human Rights Commission Code of Practice suggests the question should be approached in two stages:

- Is the aim legal and non discriminatory and one that represents a real, objective consideration?

- If so, is the means of achieving it proportionate – that is appropriate and necessary in all the circumstances? The Code goes on to say that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. "Necessary" here does not mean that the treatment is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means (see Hampson v Department of Education and Science [1989 ICR 179 and Hardys & Hansons plc v Lax [2005] ICR 1565.)

25. Justification therefore requires there to be an objective balance between the discriminatory effect and the reasonable needs of the employer (Hensman v Ministry of Defence UKEAT/0067/14). The Tribunal has to take into account the reasonable needs of the employer, but it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the treatment is reasonably necessary.

26. The Equality and Human Rights Commission Code of Practice in paragraph 5.2.1 suggests that if a respondent has failed to make a reasonable adjustment it will be very difficult for it to show that its unfavourable treatment of a claimant is justified.

Indirect disability discrimination

27. Indirect disability discrimination is prohibited by section 19 Equality Act 2020 which says:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic;
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;
(c) it puts or would put, B at that disadvantage; and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

28. There is the same justification defence as in a complaint of discrimination arising from disability save that it is the PCP that requires justification whereas it is the treatment which is to be justified in a section 15 discrimination arising from disability claim.

29. In Heskett v Secretary of State for Justice [2020] EWCA Civ 1487 the Court of Appeal recently addressed the issue of whether "cost" is capable of being a legitimate expectation. The Court held that the saving or avoidance of cost without more cannot amount to achieving a legitimate aim. However, a tribunal needs to look at the whole picture of how the employer's aim should be characterised. In that case an employer's need to reduce its expenditure, specifically its staff costs in order to balance the books, could be a legitimate aim. It was said that an employer having to make choices about how it is best to allocate a limited budget is not just about "costing more." A tribunal can take into account the constraints in which the employer has to operate.

Harassment related to disability

30. Section 26 of the Equality Act defines harassment under the Act as follows:

(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…

(4) In deciding whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account –

(a) the perception of B;

(b) the circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

31. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336 the Employment Appeal Tribunal set out a three-step test for establishing whether harassment has occurred:

(i) was there unwanted conduct;
(ii) did it have the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them; and
(iii) was it related to a protected characteristic.

32. It was also said in the case that the tribunal must consider both whether the complainant considers themselves to have suffered the effect in question (the subjective question) and whether it was reasonable for the conduct to be regarded as having that effect (the objective question). The tribunal must also take into account all the other circumstances. The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for her, then it should not be found to have done so.

33. In Grant v HM Land Registry [2011] IRLR 748 the Court of Appeal reiterated that when assessing the effect of a remark, the context in which it is given is highly material. A tribunal should not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive" as they are an important control to prevent trivial acts causing minor upset being caught up in the concept of harassment.

34. The phrase "related to" a protected characteristic encompasses conduct associated with the protected characteristic even if not caused by it; Equal Opportunities Commission v Secretary of State for Trade and Industry [2007] ICR 1234.

The time limit for disability discrimination complaints.

35. The initial time limit for complaints under the Equality Act 2010 is 3 months starting with the date of the act of discrimination complained about. The effect of the early conciliation procedure is that, if the notification to ACAS is made within the initial time limit period, time is extended, at least, by the period of conciliation.

36. Under Section 123(3) of the Equality Act conduct extending over a period is to be treated as done at the end of the period. A continuing course of conduct might amount to an act extending over a period; Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96.

37. Under Section 123(3) a failure to do something is to be treated as occurring when the person in question decided on it. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on a failure to do something when either P does an act inconsistent with doing it, or if P does not do an inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

38. In relation to complaints about a failure to make a reasonable adjustment, sections 123(3) and 123(4) therefore establish a default rule that time begins to run at the end of the period in which the employer might reasonably have been expected to comply with the relevant duty. The period in which the employer might reasonably have been expected to comply with its duty is assessed from the claimant's point of view, having regard to facts known or which ought reasonably to have been known by the claimant at the relevant time; Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640.

39. A tribunal may consider a complaint out of time if it considers it just and equitable to do so in the relevant circumstances.

Relevant Findings of Fact

40. In order to decide the issues in this case we make the following findings of fact. Where there is a dispute between the parties we applied the balance of probabilities.

41. The claimant commenced his service as a Police Constable AFO on 16 February 2015. The claimant's role is a front line operational one which required him to pass the fitness test and to be trained in, and carry, firearms. His role included providing physical armed security to the Hereford Garrison and the policing of MDP Property.

Initial sickness absence and stage 1 of the Unsatisfactory Attendance Procedure (UAP)

42. In May 2017 the claimant's mental health declined and he commenced sick leave on 15 May 2017. The claimant's GP diagnosed him with depression and recommended that the claimant stay off work and receive treatment. The claimant's GP referred him to the mental health team based in Pentwyn, Cardiff with a view to starting counselling and cognitive behavioural therapy but unfortunately it took until May 2018 for the

claimant to have his first appointment with the NHS community mental health team.

43. In the meantime, in July 2017 the respondent's occupational health service, OH Assist [OHA], prepared a report [116–117]. The report declared the claimant unfit for any aspects of his job due to the severity of his symptoms. The report said that situation was likely to continue until CBT had commenced and treatment was being more effective, which was likely to be at least 6 more weeks. The report said the claimant should be referred again at that point when the practitioner was hopeful of being able to further consider a return to work, a rehabilitation plan and longer-term prognosis. The report said that the claimant did not have an underlying mental health condition and that the claimant's impaired wellbeing was reactive in nature to his personal circumstances. The practitioner was hopeful the claimant would be able to resume his normal functions and work pattern. At that time she advised she did not consider the claimant was likely to be considered disabled because his condition had not lasted longer than 12 months and was expected to resolve with effective treatment.

44. On 5 September 2017 the claimant attended a meeting at Costa Coffee with his two line managers, Sergeant Childs and Inspector Musto. After the meeting he was given a written improvement notice [124-126]. The notice recorded that the claimant was on medication and waiting for CBT through the NHS and that there had been no improvement in his condition as a result of the medication. The claimant was given a specified period of 3 months in which he was to continue to seek medical support from his GP, and to see if, as a member of the Defence Police Federation [DPF], he could access any services via the Police Firearms Officers Association [PFOA] in view of the NHS delays. There was then to be a referral to OHA to review his case. The Written Improvement Notice said that if sufficient improvement was not made within the specified period the claimant may be required to attend a second stage meeting. The claimant accepted in evidence that he was not critical of that Written Improvement Notice being issued and accepted that there were no adjustments that could have been made at that point in time to get him back into the workplace. At that point in time the claimant was not very well. Inspector Musto described him as being "not with it."

45. Inspector Musto said, and we accept, that finding cover for the claimant was difficult at the time due to his team already being under establishment numbers and budget cuts meaning overtime was curtailed. Inspector Musto told us, and we accept, that his understanding was that there had been a directive from the Chief Constable to robustly manage absenteeism and whilst individuals should be dealt with sympathetically it should also be robustly. He said that the 3 months was to reflect the

claimant's change in medication and anticipated CBT treatment. He said that his understanding of the Chief Constable's directive was that this kind of step should be 3 months or 6 months as opposed to 12 months but that he also considered that the 3 month period set was suitable to the claimant's circumstances at that time (albeit the Written Improvement Notice itself was set by Sergeant Childs).

46. Sergeant Childs wrote to the claimant enclosing the Written Improvement Notice [122-123]. He told the claimant he had made contact with Ms Batt the DPF Welfare Officer about PFOA support and that she would be in touch. Ms Batt emailed the claimant on 8 September 2017 [121] with some preliminary details of the DPF Welfare Portfolio and the PFOA.

47. On 27 September 2017 Ms Batt emailed the PFOA [127], noting that the claimant was about to go on to half pay, and asking if they could assist with counselling due to the likelihood it would take 8 or 9 months on the NHS. She also asked for them to place the claimant on their welfare support service and to make contact with him by phone.

48. The claimant started CBT counselling sessions in October 2017 funded by the PFOA. On 20 October 2017 Inspector Musto emailed Ms Batt again expressing concerns about the claimant's wellbeing and asking if there was anything that could be done to support him. Ms Batt in turn asked the PFOA to contact the claimant with a welfare call [128]. Ms Batt also told Inspector Musto that she had spoken to the claimant a few times and had arranged the private counselling for him. She explained the claimant had access to the welfare support line and she had asked them to do a welfare check [130].

49. In November 2017 the claimant's pay was reduced to half pay.

50. On 9 December 2017 the claimant's Written Improvement Notice was extended by 8 weeks because he had only completed 3 sessions of CBT [131 – 134]. The claimant confirmed in evidence that he did not take issue with this extension.

51. In January 2018 Inspector Musto and Sergeant Childs had an informal meet up with the claimant. Sergeant Childs told the claimant he had arranged for 80 hours of accrued annual leave to be paid to the claimant to try to help his financial situation. There was also some discussion around what a potential return to work could look like in due course with the claimant being told that once he was feeling well enough to return to work again it would be on a phased return. We return to this further below.

52. On 20 February 2018 there was stage 1 review meeting between Inspector Musto and Sergeant Childs [135]. It was decided that the stage 1 review would remain in place until a report had been obtained from

OHA. The claimant said in evidence he did not take issue with this second extension to the stage 1 process.

Stage 2 of the UAP

53. On 27 February 2018 OHA produced a report [136-137]. The occupational health advisor noted there had been no improvement in the claimant's symptoms and he was waiting to see a psychiatrist. The report said the claimant was unfit for work, the advisor could not predict a return to work date and there were no adjustments that could be recommended for a return on work. The advisor suggested a re-referral in 6 to 8 weeks after the claimant had seen the psychiatrist and started appropriate treatment. She advised that the claimant should be considered as likely to meet the test of being a disabled person.

54. On 3 April 2018 the PFOA welfare officer contacted Ms Batt expressing concern about the claimant not being really aware of what was going on around him and the consequences. The PFOA welfare officer said the claimant was due to have a stage 2 UAP meeting on 17 April and was confused by that process and stressed about the prospect of nil pay. The welfare officer said he thought the claimant needed advice before the meeting and some support at it. He said the claimant was nearing the end of his 12 funded counselling sessions [139]. Ms Batt authorised 6 more counselling sessions [138]. By this time Ms Batt's role had changed as she had become the Force Welfare Officer. However, she also maintained a role with the DPF as portfolio lead for DPF. Ms Batt is also an authorised officer for the Police Mutual Assurance Society ("PMAS") which is an organisation that offers financial services for police officers. In that role she would distribute information received from PMAS around the force.

55. The stage 2 meeting scheduled for 17 April 2018 was postponed to allow the claimant time to arrange representation from the DPF.

56. In May 2018 the claimant saw a psychiatrist and was prescribed a new anti-depressant. On 8 May 2018 the claimant attended a Stage 2 UAP meeting with Inspector Musto and Ms Batt. Inspector Musto accepted in evidence that moving to stage 2 in the process could be seen as the operation of an automatic process. However, he also said it was decided upon as he had the occupational health report and there was no improvement in attendance.

57. Ms Batt initially met with the claimant and his partner from a welfare perspective. She did so at the request of Ms Hinchey who had contacted Ms Batt expressing concern that the claimant was not good at articulating his position and that the full facts were not coming out. There was a

discussion about the possibility of a respite weekend being funded for the claimant and his family. There is a dispute about how that topic of conversation arose. The claimant says it was raised by Ms Batt. Ms Batt said, and we accept, that when Ms Hinchey had gone to make drinks the claimant explained some of the problems he was facing with his family and also potential homelessness. The claimant commented that a break would really help the family. Ms Batt said that it was a respite break the claimant was looking for, but unfortunately the MDP or the MOD or the Police Federation did not provide that kind of thing. Ms Batt noted that the claimant seemed despondent with this and that she was running out of options for ways to assist him.

58. Ms Batt had attended a PMAS conference and had seen a promotional video where PMAS were talking a new wellbeing arm. The video featured someone getting a respite break for a terminal illness. She therefore asked the claimant if he had any PMAS policies. He said that he did. Ms Batt told the claimant about the video and to leave it with her. She said she would contact PMAS and get some further details. The claimant and Ms Hinchey say that Ms Batt said more than this. They say that Ms Batt said she was going to actively refer them for a respite break, that she would put him forward and get it sorted out and that the referral would have to come from her as a welfare officer. Ms Batt denied saying she would make a referral or that she had to make the referral as a welfare officer.

59. In the Tribunal's judgement, much of this dispute of fact may come down to different nuanced recollections of the same conversation. However, we preferred Ms Batt's account. It fitted with the notion that PMAS is not a welfare organisation but a financial services organisation and that Ms Batt's knowledge of what limited support they may fund for welfare activities was itself limited. We considered it unlikely she would make some kind of express promise that the claimant now recalls in that kind of circumstance.

60. There are no minutes of the welfare meeting or the subsequent stage 2 meeting. Ms Batt took some handwritten notes which are at [141A – 141B]. Ms Batt says that she thinks she did later type up some minutes, but they cannot be found and there is no suggestion any were ever sent to the claimant.

61. The claimant was very shortly about to go on to nil pay which was causing him distress. He had talked to Ms Batt about feeling very down and about a lack of confidence. Ms Batt got the impression that the counselling sessions had not improved the claimant's condition. The claimant could only see the counsellor every two to three weeks. Ms Batt said something to that effect to the claimant, and about how she thought the counselling

was just going round and round. She thought that he may benefit from a new direction of support. She therefore suggested that the claimant have a course with a life coach funded by the PFOA instead. She thought it may help improve the claimant's confidence and help him in getting back to work. The claimant agreed it sounded like a good idea.

62. There was also a discussion about a potential return to work and the forms it might look like. The claimant expressed some desire to work as a dog handler in the future. He was told it was not possible as there was a long list of applicants for the dog handler position. The claimant also said something about wanting to work on a part time basis. He was told that when he was signed back fit it would be on a phased return, which would mean returning on reduced hours to start with. He was told there would be regular reviews and increases in his hours until he got back to his contracted hours of 40 a week. Inspector Musto accepted in evidence that the claimant would have been given the impression there was an expectation to get back to full time hours on a phased return to work relatively quickly. Inspector Musto also accepted that the claimant could have felt pressured by this and the claimant was not told at that time that the phased return to work could be a slow one. The Tribunal accepts that this is the case, and that it was an embodiment of Inspector Musto's understanding of the drive to tackle absenteeism in the Force and of course he was also short staffed. The Tribunal also finds that a similar message about what a phased return to work would look like had been communicated to the claimant in their earlier January meeting.

63. Something was also said to the claimant about him needing to prove he could return to his role on a full-time basis to see how he managed before he could be considered for formal part time working. The claimant referred to this in his subsequent email to Ms Batt [157] and Inspector Musto accepted as much in evidence. There was also a mention of a female AFO who was wanting to move to a part time working arrangement and a potential job share. The claimant was also told words to the effect that he could make a formal application for part time working but that Inspector Musto would not support it. Again, Inspector Musto conceded this in evidence, saying that he needed full time officers. He said he was really short on AFOs at the time due to being under-establishment and being down on numbers for other reasons. He said that the operational needs of the station and how they could be covered was what was driving his thought processes at the time.

64. Inspector Musto said in evidence that at the time in question he did not understand that the claimant was requesting formal part time working for a reason that was connected to his depression. Inspector Musto said at the time he thought the claimant's request was odd, that the claimant did not really say why the request was being made, and he thought the claimant's

health may be affecting the claimant's judgment. By the time of giving evidence at the tribunal hearing Inspector Musto said he could by then understand the claimant's side of things, and that the claimant was saying that if the application to work part time had been supported, it could potentially help get the claimant back to work and be fit. However, Inspector Musto said that at the time in question he just did not see the claimant's application in that way. Inspector Musto also referred in evidence to the difficulties in AFOs reaccrediting when working part time because of the sheer number of reaccreditation courses required.

65. Part of Ms Batt's role as MDP Welfare Officer was to identify potential officers for a scheme run between the UK's Security Vetting Agency ("UKSV") and the MDP. Under the scheme temporarily non-operational officers would attend a training course and then undertake telephone interviews on behalf of UKSV. It was of mutual benefit to both organisations, as it was a way in which to get non-operational officers back into the workplace, and it helped the UKSV with their workload. At that time what was anticipated to be the last UKSV training course was coming up in June 2018. Ms Batt knew this. During this stage 2 meeting she suggested the claimant attend the course and consider doing the role for a while as part of a return to work. She thought it would be good for the claimant in giving him something to focus on, hopefully help him rebuild his confidence and put him back onto pay. The UKSV scheme was run for the MDP by Inspector Carr. Ms Batt told the claimant that she would pass on his details to Inspector Carr. She also said that the UKSV usually allowed some flexibility in terms of hours worked in individual circumstances. It is not clear to the Tribunal whether that was a discussion about part time hours in the UKSV role or reduced hours as part of a phased return to work. But whatever, it left the claimant with the impression that part time working may be possible in the role.

66. During the meeting it was also discussed that the Garrison's personal training instructor would engage with the claimant with a view to providing help and guidance in getting the claimant physical fitness restored so that he could in due course take the job related fitness test.

67. The claimant was told that as he had not returned to work since May of the previous year his attendance during the extended period of his Written Improvement Notice was considered unsatisfactory. He was told that it was necessary to give him a Final Written Improvement Notice with a specified improvement period of 12 weeks. The claimant was told that if there was no improvement in his attendance he may be required to attend a stage 3 meeting. In particular the claimant was told there was an expectation of the claimant returning to work by that 12 week period. Inspector Musto accepted in his evidence that on reflection the 12 week period sounded harsh. He said the driver behind this was the Chief

Constable's directive. What it does also demonstrate, is that Inspector Musto and Ms Batt thought there was a prospect of the claimant being able to return to work in some way in that 12 week period.

68. The claimant was sent the written Final Improvement Notice [144 – 145]. The actions were firstly for the claimant (subject to approval) to attend the UKSV training course with the intention of re-entering the workplace on a phased return to work plan. Secondly, Ms Batt was to contact PFOA about arranging a course to take over from counselling. The actions also included the station PTI to engage with the claimant, there was to be an up to date OHA report to give direction on the phased return to work, and Ms Batt was to engage with PMAS to see if they could provide any respite care to the family. The claimant was also to work with all medical professionals with the aim of improving his medical condition with the intention of a return to work within 12 weeks of the meeting.

Ms Batt's actions after the stage 2 meeting

69. The evening of the stage 2 meeting Ms Batt emailed Inspector Carr [149] explaining that the claimant had been absent from the workplace for 12 months with generalised anxiety and that he was about to go on nil pay which was causing more stress. She said "*we need to break the cycle that he has got into and the first step is back into the workplace and a routine. We spoke at length about UKVA attachment and I think that attending the training course would be a good goal to work towards and hopefully will provide the mental stimulation he needs to achieve*." She asked if Inspector Carr could contact the claimant and potentially arrange his attendance on the last course. She explained she was going to be on leave until 21 May.

70. On 22 May Ms Batt also contacted PFOA about arranging a coach for the claimant [148]. The PFOA welfare officer said that the claimant was about to finish his last session of counselling and that he a coach in mind for the claimant. Ms Batt also emailed the claimant to update him about having contacted both the PFOA about a coach and Inspector Carr. On 23 May Ms Batt and Inspector Carr spoke about the claimant and Inspector Carr agreed to contact the claimant. Inspector Carr telephoned the claimant on 24 May 2018 and left a message [153].

The claimant's discussion with Inspector Carr

71. On 29 May 2018 the claimant and Inspector Carr spoke by telephone. There is a dispute of fact as to what was said during that call.

72. The claimant states that he was put off applying for the UKSV role by Inspector Carr. The claimant says that Inspector Carr told the claimant

that he was going to be frank and that the MDP had been paying the claimant for doing nothing. The claimant says Inspector Carr stated the claimant needed to pull himself together and that it was time to get back to work for the sake of the claimant's family and child. The claimant says that Inspector Carr said words to the effect that he had himself "worn the T shirt and put it back on the shelf" and that the claimant should do the same. The claimant says that Inspector Carr told him that the role was very full on, was very intense, stressful and demanding and that the claimant would be personally responsible for vetting. He states Inspector Carr told him "on your head be it" if he made a mistake that jeopardised security and that "I'm a very impatient man and I'll be ringing you back if I don't hear from you in the next few days." The claimant says Inspector Carr also told him that part time working was not an option and that the role was full time only. The claimant's account is supported by his partner as they say they were in the car at the time and the claimant's Bluetooth automatically put the call onto loudspeaker.

73. The claimant says that given what Inspector Carr said about the role, he was fearful of the level of responsibility he would be given, and he was afraid the stress and the demands of the role would be too much for him. He says that the fact it could not be part time also concerned him as he had wanted to do the role and then return to his main role as an AFO. He said for his own mental wellbeing he wanted the opportunity to go part time and build his confidence and look to return full time later on. The claimant also said in evidence that the way Inspector Carr spoke to him reinforced what the claimant had himself been feeling since going on sick leave that he was letting his son and his partner down. He said he felt humiliated and thought that it may reflect other people's opinions about having depression. He also said that the personal comments made were not the main reason why he did not take the role. He said it was how the role itself was described as being full on, with no room for error and full time only. The claimant did, however, also say that if that was how he was made to feel then he did not really want to do the job anyway and so he focused instead on making the request for part time hours when the vetting role fell through. He said in evidence that about this time whilst he did not feel 100%, he felt well enough for part time working.

74. Inspector Carr denies speaking to the claimant in the way alleged. Inspector Carr told us that he himself has suffered from depression with three significant periods of mental health illness. He told the Tribunal that he did not and would not make such a comment about the "T-shirt" and "putting it back on the shelf" because that is simply not how he views depression. He explained he did not consider it was something that could be taken off and put on the shelf, and that he did not think depression was something that just went away, but something you carried with you and learned to cope with. He likewise denied telling the claimant to "pull

himself together". Inspector Carr again says that as someone with depression himself he just would not say that kind of thing as he knows the impact that those kind of comments can have.

75. Inspector Carr says that he spoke to the claimant with empathy and respect and that he did not approach the conversation from the perspective of not wanting someone with depression to take up the UKSV role. He observes that would run contrary to the whole point of having the conversation with the claimant which was to present the UKSV opportunity and benefits to the claimant.

76. Inspector Carr says that he explained what the role entailed, that it was office based, required access to a secure telephone line and Modnet computer, and could be undertaken from different MOD establishments, including reserve centres near where the claimant lives in Cardiff. He says he explained the role involved cold calling referees to ask questions provided by UKSV, record the answers and then produce a report with those answers. He explained there was an expectation of a seconded officer completing 13 processes a week. Inspector Carr says that the report then forms part of several pieces of information which are gathered together ahead of a Developed Vetting interview taking place with the applicant. A final decision is then made as to whether the applicant can be offered Developed Vetting security clearance to a secret level. Inspector Carr says that the UKSV role for MDP seconded officers does not involve making a decision as to whether the applicant should be granted Developed Vetting clearance or not. It is just part of the wider information gathering exercise. Inspector Carr accepted it was an important role and that he would have talked through the importance of the role as being part of obtaining that clearance at a secret level. He says that as there are pre-set questions to which answers are recorded for a report, it would be difficult for a seconded officer to make a mistake. Inspector Carr denies saying that the claimant would have decision making responsibility for security clearance, or that decisions would be all down to the claimant, or that if the claimant made a mistake on his own head be it. He accepted he could have said the role could be stressful and demanding. He disputes that he would say very stressful or very demanding. He said to the tribunal his experience was that some officers find it easy and some find it more difficult; with an attrition rate of about 30 to 40%.

77. Inspector Carr said that if the claimant had expressed worries about finding the role difficult or stressful or intense then he would have suggested to the claimant to give the training course a go, as there would be no harm caused in doing so, and then deciding the role was not for him. Inspector Carr says that other officers have attended the training and have then withdrawn saying that the role was not for them.

78. Inspector Carr agreed that he would have identified to the claimant the benefits of taking up the role, in particular, helping the claimant back into the workplace, getting back on to pay in circumstances in which the claimant was shortly to be on nil pay and the benefits that could have on family life. He denies saying "we're not paying you for doing nothing".

79. Inspector Carr said that he could not remember saying that part time hours would not be an option. He said that making part time hours arrangements would not be part of his role as he would not have line management responsibility for the claimant. He said that if the claimant were employed on a part time contract, he would come to the role with a part time working arrangement already in place, and then conduct the UKSV role on a part time basis. He said any application to work part time hours would have to go through line management and not him. But otherwise if the claimant was employed on a full time contract the role would be a full time one.

80. Inspector Carr said he could not recall anyone else doing the role on adjusted hours as part of a phased return to work. However, he said the claimant was unusual in the sense that he was potentially being signed up to the role when he was absent on sick leave whereas most AFOs who take up the role are non-operational but already in the workplace. He said it would be possible for an individual to have a phased return to work in the role with reduced hours and he would have arranged for UKSV to adjust the workload. He said that would be an easier arrangement than going through a formal internal part time working application process.

81. Inspector Carr said that he ended the call thinking it was a positive one, and he earmarked the claimant to attend the course due to start on 12 June. He said he explained to the claimant that the claimant would need to confirm in the next few days whether the claimant was interested as the course was due to start on 12 June and at the time it was thought to be the last training course. He denies saying that he was an "impatient man" or that he would be on the claimant's case if the claimant did not get back to him.

82. As against those competing accounts, in the Tribunal's judgement we consider it likely that Inspector Carr said something to the claimant about how the secondment would offer the opportunity to get back into work and get back onto pay, and that that would be a good thing for the claimant and his family. We find that was intended to be a comment in a constructive, supportive way, and not to demean or humiliate the claimant. It would reflect what Ms Batt had put in her email to Inspector Carr and reflect Inspector Carr's own experiences both of his own health challenges

and the advantages that the role could bring to temporary non-operational officers.

83. We consider it is likely that Inspector Carr said words similar to having worn the T shirt (i.e., having suffered depression himself) but not that he told the claimant that he had put it back on the shelf and it was time for the claimant to do so too. We accept that does not fit with Inspector Carr's own candid, personal account to the Tribunal of his own experiences with depression. Again, it was a comment intended to show empathy with the claimant and not to pressurise him or humiliate him or make him feel guilty.

84. We also do not find that Inspector Carr was seeking to dissuade the claimant from going for the role (whether because of the claimant's depression or otherwise). To the contrary we find Inspector Carr was trying to encourage the claimant to give the role a try and indeed Inspector Carr came out of the conversation thinking it had been a positive one. The point of Inspector Carr's role was to find non-operational officers to put forward for the secondment. We accept it would not have been in his interest to act contrary to that.

85. We accept that Inspector Carr would have spent some time explaining what the role involved. It is likely that he talked about the usual UKSV expectations as to the number of reports that would be generated and that it is likely that Inspector Carr made some comment to the effect that some officers could find that demanding and stressful. We do not find, however, that was an attempt to put the claimant off, but rather to just explain his understanding of what the role was like, and others experiences of it. We do not find that Inspector Carr told the claimant he was personally responsible for vetting, and it was on the claimant's head if be made a mistake that jeopardised security. Inspector Carr knew what the role entailed and that the seconded officers prepared one report that was part of the whole vetting decision making process. He therefore would not have described the claimant as being personally responsible. We find it likely that he instead spoke about the role having some responsibilities and being important, as part of that overall vetting decision making process which was an important and serious one given it was giving vetting clearance at secret level.

86. We accept that the claimant said something to Inspector Carr about hoping to do the role part time. It is likely that Inspector Carr did say to the claimant that to do the role as a part time officer would involve already being on a part time hours contract, which the claimant was not. That reflected the position as Inspector Carr understood it. It was not part of Inspector Carr's role to get involved in the finer details of line management, so we find it is likely he did not say much more beyond that.

He did not say to the claimant that he may be able to do the role on reduced hours as part of a phased return to work. It is likely the claimant did not directly ask that question as the claimant's focus was on part time working. It would not have immediately occurred to Inspector Carr because, as already stated, the claimant was the first potential candidate he had who would have been starting the role coming back from sick leave.

87. We accept that the call ended with Inspector Carr saying something about needing an answer from the claimant within the next few days. That would be natural given the limited time available before the start of what was understood to be the last training course. We do not accept that Inspector Carr used words to unnecessarily, deliberately pressurise or upset the claimant or that he said he was an impatient man.

End of May and Early June 2018

88. Following the stage 2 meeting, Ms Batt had done various things, such as taking forward the potential for the claimant to go on the UKSV course and contacting the PFOA about a change to a life coach. She forgot initially about making contact with PMAS about the potential for a respite break.

89. On 30 May 2018 the claimant emailed Ms Batt [157] saying:

"… as discussed, I do not feel that having to return to my role on a full time basis to see how I manage before being considered for part time work would be beneficial to my health and could certainly have a detrimental effect on my wellbeing and self esteem. I therefore respectfully request that full consideration be given to my formal request that upon my return to work it will be on a part time basis. I have spoken to the Inspector regarding the vetting course and have been advised that part time work would not be an option. I have received a letter from Inspector Musto which only refers to a few items discussed at the meeting. I appreciate you are very busy so could you please forward full minutes of the meeting at your earlier convenience. Could you also please advise if the referral has been made to PMAS? Please note I am still waiting for a doctor at OH assist to get in touch as the nurse that contacted me said she was unable to make that decision (pensionable pay).

90. On 3 June Inspector Carr confirmed he had earmarked a space for the claimant on the UKSV course [154]. On 4 June Inspector Carr asked Ms Batt if she had any thoughts for other potential candidates other than the claimant, and identified that the claimant had yet to express an interest [155]. On 5 June Inspector Carr spoke with Ms Carr and asked if she could give the claimant a "nudge."

91. At some point Ms Batt also spoke with a PMAS representative who gave her contact details to be passed to the claimant. Ms Batt says that the PMAS representative had said the claimant should contact them. She said she did not know that the claimant could not self-refer as she did not know the process. We accept her evidence in that regard.

92. On 5 June 2018 Ms Batt sent the claimant an email [156]. She said:

"I have just had a visit from Inspector Jimmy Carr who needs a definitive on if you will be attending the UKSV. I would encourage that you have a go at the training, it will get you back into the workplace and is the first step forward to breaking the circle and improving your work life balance.

I believe that the paperwork that you were sent through from Graham was the F/win which is not the minutes of the meeting. I will send through them separately.

You will need to attempt a phase return to work with an expectation of achieving 40 hours before part time working can be considered as an adjustment. I would encourage that you re-enter the workplace on a phase return to work increasing your hours weekly, that way we know what you feel comfortable with and what amount of hours is too much.

We would also need a letter from your GP and OH Assist to confirm you are permanently incapacitated in doing 40 hours a week. You are significantly reducing your chances of part time working if you are non-operational, the officer who I spoke of at Hereford is fully operational. If you can achieve full operational capacity in the future then a part time working contract may be a consideration.

Tom PMAS have provided the following contact details for you to make representations to them for help

https://www/policemutual.co.uk/wellbeing/care-line/

To arrange for a referral, please call 01543 305266 or email careline@pmas.co.uk"

93. Ms Batt said in evidence that she spoke about the claimant achieving full operational capability before making a part time working application, because she thought a chief officer responsible for deciding an application would be confused to receive a part time working application from an officer off sick and non-operational with his qualifications expired. She said her advice to the claimant was to get back and then apply as she thought it would increase the claimant's chances. She saw that as something separate to, and different from, a reasonable adjustment. She

said that she had checked this with Ms Plaskitt in HR before responding to the claimant, who had said the claimant was unlikely to get support for a formal application because he was currently non capable.

94. Ms Batt said in evidence that she saw a different route of requesting a reasonable adjustment. She thought that reasonable adjustments would be captured as part of the phased return to work process if there was medical evidence to say the claimant needed to work reduced hours. But she did also say that if the claimant was permanently incapable of doing 40 hours a week he would need to get some medical evidence and that was talking about a different thing again and would be an application for a tailored reasonable adjustment.

95. She said, in essence, the point she was trying to make to the claimant was to try a phased return, see the GP and OHA and then put forward a part time application as a reasonable adjustment. However, if the claimant wanted to job share with a fully operational officer then he had to be full time operational too. She also said that requalification as a part time AFO would take a very long period of time to be fully capable again.

96. The claimant says that he was upset by what he saw as a lack of action of Ms Batt's part about a request he be considered for a respite break. He says he felt disappointed that she did not get back to him to start with and with her response when he chased her. The claimant said in oral evidence that his partner had contacted PMAS and they had stated they referral needed to be made by a line manager or Force welfare officer and that Ms Batt had known this all along. He said in cross examination that he believed there may have been a further voice message left for Ms Batt saying that he could not self-refer but that he could not be definite about it. Ms Batt said she could not recall a telephone call or message from the claimant saying that PMAS said she needed to make the referral. She said if she had been asked to help further she would have done so. We do not find it established that the claimant at this time made contact with Ms Batt asking her to make the referral.

97. On 7 June the claimant sent a text message to Inspector Carr [158] saying:

"As Claire has probably explained, due to my health issues, I have formally requested that upon returning to my job role, my hours of work be reduced to part time/job share.

Regarding the temporary vetting role, which you explained could be demanding and stressful, and as there was no provision for part time working hours, I feel that this would not be beneficial to my health, however, I appreciate you taking the time to explore this option with me.

98. The claimant therefore withdrew from the UKSV second opportunity. In the Tribunal's judgement, the claimant did so for two main reasons. Firstly, because he thought the role sounded too stressful at a point in time where his self-confidence and self-esteem were very low. Secondly, he also wanted to work part time and did not think that was an option in that role. We do not find that the claimant understood, from his conversation with Inspector Carr, that potentially he could work reduced hours in the role as part of a phased return to work.

99. Inspector Carr could not recall receiving the claimant's text message but did not dispute that it had been sent or that he had not replied. He accepted in evidence with the benefit of hindsight he could see a benefit in replying to encourage the claimant to have a rethink and give it a go. However, on his understanding of the conversation at the time and based on what the claimant said in his own text message he considered he would have seen it at the time as the claimant asking about part time/ a job share and also that he would not have wanted to affect the claimant's health. Inspector Carr said in evidence that he did not contact the claimant's line manager and tell him that the claimant would find part time working easier because the course was due to start 5 days later and it was due to be the last course. He said it was unlikely a part time working application would be processed in time for the course starting. Inspector Carr said in evidence that a phased return to work was different and could be agreed quickly, normally with an OH report.

100. In fact, there was no UKSV course on 12 June in the end as no one signed up. We also pause here to add that ultimately the arrangement with UKSV did go on until March 2020 when it was cancelled due to the impact of the Covid pandemic as the UKSV then used their own staff as homeworkers to undertake the work. It is an arrangement that may return in the future but has been complicated by the move of UKSV from the MOD to the Commonwealth Office. Inspector Carr also told us that in the civil service there can be reciprocal agreements in place where staff can transfer, known as "broader banding." He said there was no such agreement in place to allow such a transfer over to UKSV, including when they were both part of the MOD. He said the longest he had known an individual to do the role on secondment was about 6 months until that particular officer took ill health retirement. Inspector Carr also confirmed that no one ever came back to him to suggest that the claimant be considered afresh for the role.

101. By this point in time the claimant was feeling down. He was on nil pay which was a big source of stress. The claimant did receive pension rate sick pay of £50 a month but after deductions he was left with only around £10 a month. The claimant did not challenge his reduction in pay at the

time. Whilst we have not found that Ms Batt actually made the claimant the kind of promises about a respite break that the claimant suggests, we accept that subjectively he felt that he had been let down about this and he thought Ms Batt was withdrawing offers of help from him. He was in stage 2 of the UAP which was requiring a return to work in 12 weeks. He thought that the UKSV role would be too much for him, including a need to do the role on full time hours. The impression he had got from Inspector Musto was that if he returned to work on a phased return in his normal place of work he would face pressure to quickly build up his hours which he did not think he could do. Inspector Musto had also said he would not support part time working at Hereford. The claimant was also in a place whereby he was fearful of trying things and failing because his self-confidence was so low, and he was fearful of knocking it further and making himself more unwell. The concept of working part time was important to the claimant as it represented a way to exercise some control over the pressures he felt he was under. It strikes the Tribunal that Ms Batt's email would be unlikely to assuage the claimant's concerns about working hours, not least because it has the potential to be a bit confusing in what it was trying to say.

Rest of June and July 2018

102. The claimant therefore decided that the best way to protect his health and return to the workplace would be to get an agreement for part time hours. He was hopeful that he would return to full time hours at some point in the future. The claimant did not think that a phased return to work would achieve the same protection for his health because his understanding was that he would be under pressure to keep on increasing his hours. The claimant got a letter from the Community Mental Health Team dated 11 June 2018 addressed to Sergeant Childs [160] saying:

"During the two appointments in which we have seen Mr Thomas he still has significant symptoms of anxiety and depression. We are currently trying alternative second line anti-depressant medication.

I am writing this letter, therefore, in support of Mr Thomas wanting to return on a part-time basis initially. Mr Thomas feels that returning to full time work will cause him significantly increased stressed and we feel, a possible deterioration in mental state secondary to this."

103. The claimant also emailed Sergeant Childs saying that the advice of his GP and mental health team was, for the sake of his mental health wellbeing, that a return to his job role should be on a part time basis for the foreseeable future. He asked for the application form that was needed [164].

104. On 13 June 2018 the claimant and Inspector Musto spoke by telephone. Inspector Musto followed it up with an email [161-162]. The email sets out Inspector Musto's perspective on what they would look to do to get the claimant back to operational duties. He said the claimant would firstly have to be signed fit to work by his GP. He said that they would then look to get the claimant back on a phased return, normally 2 x 4 hour duties a week minimum on non-operational tasks. Inspector Musto told the claimant he would not be exposed to frontline policing until he was ready. Inspector Musto said that the claimant would be doing basic admin tasks, mandatory e-learning computer courses and the main requirements would be a Station Security Brief, restoring the claimant's computer access, and physical training for the force fitness test. He said "*following on from this we would look to regularly review your hours of duty – I suggest every two weeks. Once you have settled back to work we would look to increase your duty hours until you reach 40 hours per week.*"

105. The email also said:

"*Part time hours/ Job Share. As I mentioned, you have a statutory right to apply for part-time working. You would have to state your reasons; you cannot just want to work less hours. As I also stated I can support a personal need, but I would not currently support it from a business perspective as I have a shortfall of officers due to sickness, capability and 3 down on station numbers. However, the final decision would be made by a senior police manager in Frontline Operations…*"

106. The email went on to talk about other mandatory training that would be necessary to get the claimant operational including the fitness test, personal safety training, annual firearms medical and then firearms related training. He said that a "gap analysis" would be needed to capture the training required to get the claimant back to being a full AFO. Inspector Musto said he projected the whole process of getting the claimant back fully operational would take about 6 months.

107. The claimant decided he still wanted to make a formal request for part time working. He sent a further message to Sergeant Childs asking for the form and for an occupational health referral [163]. On 16 June Sergeant Childs provided the application form and the policy guidance [164].

108. On 2 July 2018 the claimant's GP produced a report [164A] saying:

"He is keen to try and return to work at some point but on a part time basis only. As you know, he works in a very stressful role and as such it is best that he doesn't do anything more than part time work as anything more is likely to have an effect on his mental health."

109. OHA produced a report dated 10 July 2018. It said:

> "***Current Capacity for Work***
>
> *Thomas remains unfit for work in any capacity, and I cannot say exactly how long it may be before he is well enough again, so there is no planned return date. It is unlikely that any workplace adjustments would help at present. For the foreseeable future. Depression and anxiety.*
>
> ***Current Outlook***
>
> *Most episodes of depression like this will eventually settle down within 12 – 18 months, so I hope that Thomas will be able to resume work within the next two months or so, and we would be happy to review his progress again in about six weeks time."*

Formal part time working application

110. The claimant says that he submitted a formal application to work part time either on 31 August 2018 or earlier on 31 July 2018. He says that he submitted it to Inspector Musto with the letters from his GP and mental health team. The evidence before the Tribunal on the submission of this formal application was unsatisfactory from both parties' perspective. The claimant dated the form 31 08 2018 but says it may have been July. It is difficult to see how that mistake could happen. The respondent in their ET3 accept that the claimant applied to work part time on 31 August 2018 [70]. However, in evidence both of the claimant's second line managers denied having seen the application or receiving it at the time. Inspector Musto said he had retired and that his last day in work before retirement was 27 July. He accepted he had seen the letter from the mental health team but not the GP report or the formal application to work part time. Inspector McIlwraith says that he never received the written formal application or the two medical reports. We did not hear any evidence from the claimant's first line manager, Sergeant Childs. Nor did the claimant assert he had given it to Sergeant Childs.

111. Given the date on the form, we find that it was submitted on 31 August 2018 but that it was not submitted directly to Inspector McIlwraith. We do not have the evidence before us to determine who it was submitted to. The application itself said "*I feel ready to return to work on a part time basis with a view to resuming full time hours at some point in the future. I feel that this would assist my recovery."* The claimant said in the form that there would be no detrimental affect on his colleagues or employer if his application was granted.

Review of the Final Written Improvement Notice

112. The Final Written Improvement Notice issued by Inspector Musto expired on 31 July 2018. Inspector McIlwraith took over at the end of July or early August and so there was a period of time before he had a meeting with the claimant.

113. They met on 13 September 2018. Inspector McIlwraith's record is set out in an amended Final Written Improvement Notice at [171] – [174]. The claimant said that his medication had been increased and it would take up to 6 weeks to identify if this was successful. Inspector McIlwraith recorded "He has not engaged with the station PTI to plan for the JRFT as this was not viable due to distance and no plan for a phased return to work." The claimant by that time had had one session with the life coach which he felt was of more benefit than the counselling. They talked about the UKSV work and why the claimant had not pursued it. Sergeant Childs said there would be another occupational health referral which would include the option to be assessed for ill health retirement. The claimant said he did not want to consider this as he was only in his mid 30s. Inspector McIlwraith raised the possibility of a transfer to another MOD department and committed to identifying the possibilities of the option in the Cardiff area.

114. The notes say in relation to part time working and a return to work:

"*Tom has applied to return to work on a part time basis. Inspector McIlwraith informed him that this could not be considered at this time as he was not fit to conduct the role in a full-time capacity. A phased return to work plan was discussed and it was explained how this would be implemented. It would be up to Tom and his care team when he felt he was ready to implement this phased return to work. Tom identified that he wished to return to work but did not give any timescale. Insp McIlwraith explained the Prep process and that a further review would be conducted in 3 months which would allow Tom to consider his health and the options available to him with regard to IHR and a move within the MOD. Insp McIlwraith explained the process in moving to stage 3 of Prep and the options available in stage 3."*

115. Inspector McIlwraith also said that he would contact Ms Batt to identify the PMAS respite options identified in the Final Witten Improvement Notice. The Final Written Improvement Notice was extended until 17 November 2018.

116. Inspector McIlwraith said in evidence that he had not actually seen the claimant's formal part time working application. He said that his view was that the claimant had to come back as a full time AFO to make a request

for part time hours. His view was the claimant's contract was as a full time AFO to work 40 hours a week and the claimant needed to be an AFO to then go to part time. He also said that for the claimant to be an AFO he needed to do the training requirements as the claimant was not qualified anymore.

117. Inspector McIlwraith also said in evidence that there was no part time role at Hereford that was not an AFO. He said the best option for the claimant was to have a phased return to work, which would still have a flexible work pattern. He said whilst the phased return may say 3 months it could be extended and the clamant could have time to get settled, do his requalification to be an AFO and then look at part time hours. In terms of requalification, he said the claimant would need an 8 week AFO course and other elements of the student officer portfolio. He also said he was also aware the claimant could only apply to work part time once a year and he thought the claimant had already done that with Inspector Musto, so that it was also not an option for that reason. He said a phased return to work would also be the better option as the claimant would be back on full pay rather than part time pay. He said he discussed how the phased return to work would be quite in depth with the claimant. He said he set the extension to the Final Written Improvement Notice as this would allow the claimant time to see how his change in medication took effect.

118. The claimant says that the discussion about a phased return to work was again about getting back to full time hours as quickly as he could and that he could not give a timescale for returning to work as it was based on that. The claimant says Inspector McIlwraith also said he was sitting on the claimant's flexible working application until the claimant had done the fitness test and firearms training instead of sending it to frontline operations. The claimant says that Inspector McIlwraith told him that part time working was still an option in the future. The claimant also accepted in evidence that he was content at time with the extension as he had only recently changed his dose of medication and it needed 6 weeks to settle down.

119. There is a dispute of fact between the claimant and Inspector McIlwraith about what the claimant was told about a phased return to work. We find that the claimant was not expressly clearly told that a phased return to work would be at his own pace and he would not be under any pressure to increase his hours if he did not feel able to do so. That is not what is written in the notes of the meeting. Moreover, at the subsequent later meeting of 27 November (see below) the notes record Inspector McIlwraith saying that a phased return to work would be 3 months with the expectation of being back to full time after 3 months. It would be incongruous for Inspector McIlwraith to have said something different at this earlier meeting. We accept that Inspector McIlwraith had not seen the

claimant's actual flexible working application. Why that was and what happened to it we are simply unable to make findings about. But in any event, Inspector McIlwraith accepted in evidence that he had told the claimant that a part time working application was not the best option. Inspector McIlwraith's focus was in steering the claimant down the phased return to work route.

120. Inspector McIlwraith emailed [177-178] Ms Plaskitt in HR copied to Ms Batt and Ms Foster, the Attendance Capability Manager. He asked for some guidance on how the claimant could transfer to another department. He said he would contact Ms Batt about the PMAS action as he said that the claimant had contacted them, and they had said it required welfare officer referral. Ms Foster [177] recommended an OH referral and that the occupational health referral should cover "- *Is there an anticipated return to work date – Is IHR appropriate – Would a transfer to MGS be more appropriate for future employment?"* She also said, "*PC Williams has now been absent from the workplace for 16 months and, whilst the validity period for his FWIN runs until 8 May 2019, the extensions are there where there is clear evidence on a return to work or a clear prognosis; we don't have that in this case."*

121. Inspector McIlwraith responded to Ms Foster to say that the OH referral had been done by Sergeant Childs. He said he had asked the claimant to think about his future and had provided the options of IHR and transfer within MOD [176]. He said in evidence that the OHA referral form had been written by Sergeant Childs so he did not know what it said. The actual referral (or indeed any of them) was not before us in the bundle.

122. Ms Batt [176] responded to *say, "With regard to the PMAS I am unsure what Tom requires?"* She said that they offer respite care for officers suffering with terminal illness of themselves or a dependent. She said "*PMAS do not offer financial support. What is it that Tom is requiring from Police Mutual, I can't make a recommendation without a detailed requirement from Tom."* Inspector McIlwraith said [175] "*I'm not sure where the idea of PMAS assistance came from and whether respite care for a mental health illness fits the criteria. The FWIN identified PMAS as an option for respite care, but as you mentioned it is generally for terminal illness assistance. I think this option is no longer worth pursuing. "*

123. Ms Batt said in evidence that she had forgotten about the matter in the meantime as she had not heard again from the claimant. She said her email was just responding to the fact that it was said the claimant needed welfare officer referral and so she was asking for the detail of the requirement that she was being asked to recommend as a welfare officer. She thought that Inspector McIlwraith also telephoned her and initially she had thought that the claimant had been unsuccessful in an application and

that Inspector McIlwraith had then said the claimant needed her to make the referral as a welfare officer. We have already found above that Ms Batt had not at the outset promised to make a referral but to look into the matter and that she thought she had done so. We accept that she was seeking to understand the exact details of the referral that the claimant was asking her to make to PMAS.

Occupational Health Report of 15 October 2018

124. On 15 October 2018 a further occupational health report was provided [179]. The report said that there had been little improvement in the claimant's psychological health and the advisor she was unable to provide a prognosis for a return to work. The advisor said she was obtaining a GP report. The tribunal does not know if that GP report was ever obtained or, if so, what it said.

Stage 2 review – 27 November 2018

125. In November 2018 the claimant was given a fit note dated until 18 March 2019 [180A]. On 22 November 2018 there was a further stage 2 review meeting. Mr McIlwraith said that the notes [181-182] were sent to the claimant by email to comment upon. The claimant disagrees. Also at the meeting were the claimant's partner, Sergeant Childs, and Ms Plaskitt from HR.

126. At the meeting Inspector McIlwraith asked the claimant if he had considered the broader banding option, the move of job option and had he looked at other civil service job options. The notes record Ms Plaskitt saying that "*it was the individual's responsibility to identify another job and that the MDP pay scale was not transferable".* The notes record the claimant saying that he had briefly looked at some jobs on the civil service website and was receiving emails, but he had not given the jobs that much consideration as he wanted to return to MDP Hereford. He also said that he did not want to consider ill health retirement.

127. The notes also record the claimant explaining his frustrations with the Mental Health Team and that he did not think they were managing his illness very well. The notes say "*TW said he was now on his 5th set of medication and his current dosage is the second highest he can be on. He explained he was constantly tired and felt blank minded very often. He had asked his Psychiatrist for some help and he was given an appointment with the Mental Health team for May 2019. He reiterated his frustration regarding the timescale and went back to his GP for help. TW also explained that he was conserving [presumably considering] going back to private healthcare but will have to identify some funds to assist with the excesses required."* The notes also show the claimant saying he

was still attending a life coach as opposed to counselling and was feeling some benefit from this. He said he was keeping fit through walking the dog and attending the gym to try to provide some motivation to get fit. He said (as he said to the Tribunal) that attending the gym building was the first step in the process and he started out just by attending and not using the equipment as he did not want to start something he could not complete and feel a failure.

128. The notes also record, in relation to a return to work:

"DM explained the process for a phased return to work and how this would be managed identifying the timescale as 3 months but the expectation that after 3 months TW would be back full time. TW felt he was not ready to return even on a phased return and DM agreed. DM also explained the part time working process and that MDP Hereford would not at this time be able to accommodate part time officers. Any part time work would require to be at a station that could accommodate requiring TW to move. TW understood this."

129. The notes also record the claimant saying he had a further occupational health appointment on the 10 December and that he still wanted to return to MDP Hereford. The claimant's partner asked some questions about what would happen if the claimant resigned in relation to things like references and reapplying in the future. There was a discussion about where they were in the unsatisfactory attendance procedures and the notes record the claimant saying, "*he understood a process had to be put in place and that this situation could not go on forever, but he wanted to get back to work."* They say record Inspector McIlwraith saying:

"he could not see any significant progress to full capability which would allow a further extension to the specified period of the FWIN and would have to consider the options before moving the process forward to stage 3. DM explained that the stage 3 process was managed and facilitated by MDP attendance and capability manager at MDP HQ where they will review all the circumstances of the case to ensure achievable measures have been considered."

130. The claimant says that at this meeting Inspector McIlwraith did not mention a phased return to work at all. He says that no timeframe was given, and 3 months was not discussed. The claimant says that Inspector McIlwraith also told him that part time working was not an option and that it was either full time work or look for another job. The claimant says this was a change of mind compared to the earlier meeting and left him feeling speechless and let down. He says that it was repeatedly said to him he would have to come back to work full time and that he was left feeling he was expected to go from "zero to hero" in a very short space of time.

131. Inspector McIlwraith told us in evidence that whilst the claimant was told the expectation of a return to full time hours on a phased return was 3 months there was flexibility there. He said that whilst there was also flexibility in part time working it was not flexible enough to bring the claimant back to the workplace and it was not viable at the time to do part time working to come back to the workplace. He said again that if the claimant was part time, he was not a qualified AFO and there were no tasks at Hereford to give the claimant. Inspector McIlwraith said he told the claimant he could not consider part time working at the time at Hereford because he was "6 to 8 officers on the bone and up to 14 on the bone." He said that he could not grant it for anybody at Hereford at that time. He denies saying that part time working was not an option or that he was not going to consider it as an option or that it was "either work full time or look for another job. "

132. We do not accept that there was no mention of a phased return to work to the claimant. However, we also do not accept that the claimant was told the phased return to work would be flexible and at the claimant's pace. We find it is likely he was told what is set out in the written record, that there was an expectation the claimant would be back to full time hours in 3 months. That fits with the claimant's expression of feeling like (from his perspective) he had to go from "zero to hero" in a short space of time. We also accept that Inspector McIlwraith said he could not support part time working as a AFO at Hereford at that time. The claimant was told that he would need to transfer to another station to accommodate any part time working request. We also accept that by that time the claimant's increased medication was making him feel worse, with, as he described it, his head feeling empty of thought.

133. Inspector McIlwraith told us in evidence that in terms of potential redeployment he did put the option of the Ministry of Defence Guard Service ("MGS") to the claimant and did point him in the direction of the civil service website. The MGS is an unarmed guard service for the defence estates. Inspector McIlwraith said he did not consider there was any more he could sensibly do in relation to redeployment in the civil service as he did not know the claimant's wider skill set and interests. He said the claimant later made contact by telephone to say that he was no longer interested in the MGS and wanted to return to Hereford as an AFO. Ms Foster told us that she raised the prospect of a transfer to MGS because she knew of another case where a transfer to MGS had been managed in the South Wales area for a student officer who could not meet all the requirements of the firearms role, so she thought it was a possible route for the claimant. She explained that in general it was possible for an AFO to transfer within the civil service but that it was not a straight forward option because the job is not broader banded. Some civil servants are in

a banding that means they can potentially transfer within the civil service keeping things like their pay point, accrued annual leave and pension. However, an AFO is such a unique role it does not have other banded equivalents within the civil service (including the MGS). Exploring a transfer to a vacancy is possible, but it would take work between departments in the civil service, and generally would involve a move to less pay.

134. After the meeting Inspector McIlwraith contacted Ms Foster and asked her advice as to next steps as his view was there had not been significant progress. A decision was made to await the OH referral before there was a decision whether to progress to stage 3. Inspector McIlwraith then did not have further involvement.

Occupational health report – 19 December 2018

135. On 19 December 2018, Dr Scott, Consultant Occupational Physician provided a further OHA report [183 – 185]. He noted the claimant's history and said "*He is still struggling with fluctuations in mood and with persistent fatigue, which may be related to the depression, but he had recently undergone some tests to exclude any physical cause. He has no results yet.*

136. The report went on to say:

*"**Current Capacity for Work***
Mr Thomas WILLIAMS is unlikely to return to work.

Thomas is much the same as when we last met on 10th July, and is still not well enough to be returned to work in any capacity.
I cannot say exactly how long it may be before he is well enough again.
For the foreseeable future.
Chronic depression and anxiety.

Current Outlook
We expect that most cases of depression will resolve within three to eighteen months, but successful therapy is an important aid to recovery. In cases like this, however, where the cause isn't known, counselling is less beneficial because the counsellor has nothing to work on.
The anticipation is still for Thomas to recover but it is still impossible to say exactly when. He goes back to see his doctor in the New Year and it is possible that he will then be changed from his single drug to several at once, to see if that helps. However, the process takes several months to initiate.
We would be happy to speak to him again should there be any significant change in his health or treatment, if that would help you…

Manager Question(s)

Expectation for a return to work has passed, can OH confirm likeliness of return to work within the next 6 to 8 weeks?

I think that it is unlikely but not impossible that he will recover sufficiently to resume work in that time-scale.

Please advise on any decline in attendance or performance which is wholly or partially due to an underlying health problem.

There is no other obvious physical or mental illness to account for the decline.

How are is Medical treatments progressing; is he taking medication and how long is this going to be for?

He has been fully compliant with all his treatment. Please see my report.

Would he meet the IHR Criteria with his underlying medical conditions?

Not at present, because we can't say he is likely to be permanently incapable of working, or that all possible treatment has been exhausted yet."

Requirement to attend a Stage 3 meeting

137. The claimant says that he was not happy with Dr Scott's report. He says his spoke to his own GP who said that he was making some progress and could not see a return to work being a problem provided the claimant's severe tiredness could be kept under control. The claimant says his GP said that may have been a result of the claimant's medication or a lack of vitamin D. The contemporaneous GP notes were not before us. The claimant did not himself obtain a report from his GP at the time.

138. Ms Foster took the claimant's file received from Inspector McIlwraith to DCC Terry to decide how to proceed. DCC Terry decided to progress to a stage 3 hearing. DCC Terry said based on the evidence before him he wanted to sit down with the claimant and see where the land lay with a return to work.

139. On 21 December 2018 the claimant was sent an official notice signed by DCC Terry [186 – 187] requiring him to attend a stage 3 meeting on 29 January 2019. The stated reason was "*There has been insufficient improvement during the specified period Reg 26(2)*." The form also said

that the claimant's attendance/medical capability was considered unsatisfactory because:

"You have been absent from the workplace since 15th May 2017 and have been unable to return during that time and there is currently no expectation of a return to the workplace. It is therefore deemed appropriate to conduct a Stage 3 meeting of which I will be the Chair."

140. The claimant was told who the panel would be, his right to be accompanied by a Federation Representative and was sent "*WIN notice from First Stage Meeting, FWIN Notice & notes from Second Stage Meeting, Notes of reviews carried out within the process."* The claimant was also told he had 14 working days to provide a written notice stating whether he accepted that his attendance/ medical capability had been unsatisfactory and, if accepted, a written submission setting out any grounds for mitigation. If it was not accepted the claimant was to set out which parts of the reasons for notice were disputed and an account of relevant events. The notice said that the outcome could be deployment to other activities, dismissal with notice, issue of a Final Written Improvement Notice or Extension to the Final Written Improvement Notice (in exceptional circumstances.)

141. At some point the claimant made contact with someone about the possibility of moving the meeting nearer to the claimant's home in Cardiff and it was moved to St Athan. On 18 January 2019 the claimant emailed Ms Foster saying he had mislaid the sheet that came with his Stage Three paperwork which had set out the 14 working day requirement for a response (which expired on 15 January 2019). He said that he was going to attend. The claimant said in evidence that he had learned about the stage 3 meeting for the first time on a date in the New Year when he received a text message from the DPF. On 21 January 2019 Mr Barrett from the Police Federation emailed Ms Batt with a copy of the claimant's statement for the Stage 3 hearing which Ms Batt forwarded on to Ms Foster [195]. No issue was taken as to its lateness. The statement itself is at [197 – 199]. The claimant in it set out his dissatisfaction with the delays with the community mental health team. He said that the GP had arranged blood tests for the claimant's complaints about fatigue which had just shown the claimant's vitamin D levels were slightly low. The claimant said his GP had said he did not feel this would account for the extreme tiredness. The claimant said that the GP agreed it would be beneficial to see a private health specialist so that he could be seen by a consultant at the Spire Hospital.

142. The claimant said in his stage 3 written statement that it was still and always had been his intention to return to his role and full duties as an AFO. He said that he did not hear anything further after Inspector Musto

had said that he would see if the station PTI could offer any help with the fitness test. The claimant also complained that he had been told he may be able to do the UKSV course on a part time basis but that when he spoke to Inspector Carr he was told:

"*it would be full time work (part time was not an option) and that the role was in his words very intense and full on and required a huge amount of concentration and attention to detail as if not a small mistake could have huge dire consequences with potentially someone obtaining security clearance who should not be entitled to it. After a lot of thought I sent Inspector Carr a message telling him that I thoroughly appreciated him taking the time to explain and go through the job role with me but where my mental state and well-being was at that time I did not feel that was the role for me as I obviously would not want to make any mistakes in that important role as my clarity was not at a suitable level. Also I felt that if I was well enough to do that role on a full-time basis then I would be able to go back to my normal role as an AFO which is what I have always intended to do since first going off work. I would also like to clarify that the phased return which was discussed was looking to be implemented after successfully completing the Vetting role for a few months."*

143. The claimant also said "*since the stage two meeting my mental health has improved but the obstacle holding me back at the moment is getting to the bottom of this extreme and intense fatigue. As I have said to all parties since I commenced sick leave in May 2017 it is and always was my intention to return to full duties."*

144. Ms Foster says that she then chased the claimant's line management for any correspondence needed including in the Stage 3 pack. She says she was also waiting for a summary from Inspector Carr about discussions with the claimant over the UKSV role.

145. On 22 January 2019 Inspector McIlwraith sent Ms Foster some text messages with the claimant and Sergeant Childs sent his contact log, some other documents relating to contact with the claimant and a letter from the community mental health team. Inspector Carr sent a timeline had had prepared of his discussions.

146. Ms Foster then completed the stage 3 pack and posted it to the claimant by recorded delivery that same day. She also posted a copy to the claimants' Federation Representative and the other individuals involved in the stage 3 meeting. The claimant received the pack on 24 January 2019.

147. The pack contained a line management report from Sergeant Childs. It contained a sentence saying [264] "*A return to duty date cannot be anticipated and he has stated returning to work is not an option for him*

and that nothing can be done to achieve his return to duty." At the stage 3 hearing itself Sergeant Childs clarified that this was an error, which had been copied across by mistake from a precedent document.

Stage 3 meeting – 29 January 2019

148. Prior to the stage 3 meeting DCC Terry spoke with Inspector Carr. There is no contemporaneous note of what they spoke about.

149. The stage 3 panel was made up of DCC Terry, Superintendent Pawley (based at a naval base in Portsmouth) and Superintendent Yates (based at Aldermaston). Also present at the hearing were two DPF Representatives Mr Barrett and Mr Tuplin. Mr Tuplin was the Southern Area Secretary for the DPF and would therefore appear to be an experienced DPF representative. Sergeant Childs was also present as was Ms Plaskitt and Sergeant Hamilton (who took a transcript).

150. There is a full transcript of the stage 3 hearing at [206 - 257] and we therefore do not set out a full summary here. The claimant alleges that DCC Terry's manner was rude and abrupt and that DCC Terry changed the subject when the claimant got to the end of his points and swiftly moved the conversation on when DCC Terry allegedly sensed that the claimant was touching on matters favourable to his case for remaining employed. The claimant alleges that DCC Terry was largely dismissive of what the claimant had to say in support of being allowed to stay in employment. The claimant says that DCC Terry's body language was poor and that his line of questioning was accusatory in nature. The claimant says that DCC Terry tried to trip him up by, for example, revealing that he had spoken to Inspector Carr about the SV role. He says that DCC Terry accused him, in effect, of changing his story about treatment for his condition and tried to trip the claimant up about using private medical cover. The claimant says that DCC Terry's language showed that he was preferring Inspector Carr's account. The claimant says DCC Terry was also dismissive about the potential for vitamin D deficiency to be the cause of his fatigue. The claimant also complains about DCC Terry's questions to him about use of lethal force. DCC Terry denies the claimant's allegations. We set out our findings in respect of these particular allegations in our discussion and conclusions section below, as to otherwise attempt to set out what is in the transcript will make this Judgment unnecessarily long.

151. The claimant received a decision on the day of the hearing. The oral decision is again within the transcript. In short form DCC Terry said that the information before them suggested that there was no prospect of a return to work within a timeframe that could be determined on the claimant's admission or within a reasonable period of time if the Final

Written Improvement Notice were extended. The panel decided that on the balance of probabilities, attendance was unsatisfactory in that the claimant was unable to perform the duties of the role or rank he was currently undertaking to a satisfactory standard or level. The panel decided that redeployment to alternative duties would not be successful and extension to the Final Witten Improvement Notice would not have an effect as previous Written Improvement Notices had not been met and there was no anticipated return to work date. The claimant was dismissed with 5 weeks' notice. Within his closing words to the claimant DCC Terry made some additional comments that the claimant also complains about. Again, we return to these in our specific findings below.

152. The claimant was also sent a written statement of the panel finding [266-267]. One of the comments in the panel findings (also said in the oral decision) is "*PC Williams has been given the opportunity to work in an office-based environment but did not wish to take on the responsibility for the decisions he would be required to make."*

153. Acas early conciliation took place between 28 April 2019 and 27 May 2019. The claimant presented his claim form on 27 June 2019.

Events after the claimant's dismissal

154. We deal with this in short form as these are events which post date the allegations of discrimination that we have to decide. We therefore do not here make findings of fact but simply summarise the broad narrative for completeness. The claimant appealed against his dismissal to the Police Appeals Tribunal. The appeal was to take place on 31 July 2019. By the time of the appeal the claimant had a report from his GP [333]. At that time the GP reported that the claimant was *"a great deal better now. I last saw him today (19th July 2019) and his mood was much better than I have seen in at least the last two years.*" The GP said he felt that "he certainly could return to work for the Ministry of Defence Police Force in *some form of capacity – this maybe a slightly different role to the one he was previously doing and he will highly likely need to have some kind of reduced hours/ phased return to go back to work"*.

155. A decision was made to reinstate the claimant. The respondent's position was that the GP report was new evidence that there had been a material change in the claimant's medical condition. The respondent's position was that this new evidence could not have been considered at the original hearing but could possibly have materially affected the decision or outcome. Agreement was reached between the parties and the Police Appeals Tribunal chair was asked to allow the appeal by agreement and remit the case back to a third stage panel [355]. The claimant was also given a letter [356] confirming his reinstatement and that the Final Written

Improvement Notice was extended for a period to consider a phased return to work and reasonable adjustments.

156. The claimant and his partner in their written witness statements give evidence about what has happened since the claimant's reinstatement and his complaints about his treatment in that regard. That is not something that we need, however, to make findings about for the purpose of the liability proceedings before us.

Discussion and Conclusions

157. Applying our findings of fact and the relevant legal principles to the issues in the case our findings are as follows. As best as we can, we try to follow the chronological sequence of events in the presentation of our decision, albeit it is necessary at times to separate out particular themes. At times, again for ease of presentation and analysis, we have grouped together the indirect disability discrimination complaints.

Knowledge of disability

158. The Tribunal finds that the respondent knew and only reasonably could have been expected to know that the claimant was a disabled person by reason of depression from 27 February 2018 onwards; once it had received the occupational health report of that date.

159. It was then that OHA advised for the first time that the claimant's mental health condition was likely to be considered a disability because his depression was likely to last longer than 12 months, was likely to recur and would have a significant impact on his normal day to day activities without the benefit of treatment.

160. The claimant argues that OH advice is not conclusive as to whether an employer can be fixed with actual or constructive knowledge of disability. The claimant argues that the respondent knew or reasonably should have known that the claimant was disabled by the stage 1 review meeting on 5 September 2017. The claimant points out that the claimant's line managers knew the claimant's depression was bad enough to have stopped him from working for 4 months, had not improved, and was obviously liable to continue to affect him severely for months to come.

161. The Tribunal does not accept that Inspector Musto or Sergeant Childs knew or reasonably ought to have known as at 5 September 2017 that any substantial adverse impact on the claimant's day to day activities was at that point likely to last at least 12 months (a further 8 months). Only some 5 or 6 weeks before, on 26 July 2017, OHA had advised that the claimant's condition was unlikely to be considered to be at disability as it

had not lasted 12 months and was expected to resolve with effective treatment. The advice had been that for treatment to be effective it was likely to be at least 6 weeks, and they would then be hopeful of being able to advise on a return to work date, rehabilitation plan and longer-term prognosis. The Written Improvement Notice only mentions an understanding that the claimant was not likely to return in the "very near future". We find that Inspector Musto and Sergeant Childs expectation at that time was that with an anticipated course of treatment, it was likely the claimant would become well enough to return to work. We accept Inspector Musto's oral evidence that at that time he did not anticipate at that the claimant's health difficulties were likely to be longer term and that his aim was to get the claimant back to work. There was no evidence, for example medical evidence, to the contrary before Inspector Musto.

162. We accept that knowledge of disability was gained, and ought reasonably to have been gained, from 27 February 2018 onwards, on receipt of the updated OHA advice given its express content. By that point in time the claimant had been absent from work for approximately 9 months and it would likewise have been reasonable for Inspector Musto or Sergeant Childs to suppose that the substantial adverse effects of the claimant's impairment on his day-to-day activities was likely to last at least a further 3 months.

163. It follows that the claimant's complaint that reducing his pay to half pay in November 2017 was discrimination arising from disability or a failure to make reasonable adjustments cannot succeed and as individual complaints are dismissed. Likewise, the claimant's complaint that the arrangements requiring the claimant to attend a Stage 1 review meeting on 20 February 2018 and the stage 1 review meeting itself was discrimination arising from disability or a failure to make reasonable adjustments cannot succeed. These individual complaints are dismissed. The indirect disability discrimination claims (which are not dependent on knowledge of disability) are considered separately below.

The decision to move to Stage 2 and hold a Stage 2 meeting (see paragraph 53.3 of the claimant's closing submissions)

164. The decision to move to stage 2 and hold a stage 2 meeting was made on or around 2 April 2018 [191]. It is not in dispute that the respondent knew the claimant was a disabled person by this time.

165. The attendance management process being applied by the respondent is governed by The Ministry of Defence Police (Performance) Regulations 2020 ("the Regulations"). They set out a detailed statutory attendance and performance management framework which in very short form take an officer through 3 stages of meetings (with a written improvement notice,

and a final written improvement notice in between the stages) before dismissal can be considered at the third stage. There are potential internal appeal stages throughout (although the claimant here did not appeal at stage 1 or 2). After stage 3 there is a statutory external right of appeal to the Police Appeals Tribunal. Unsatisfactory attendance is defined in regulation 4(2)(a) as "*an inability or failure of a police officer to perform the duties of the role or rank the officer is currently undertaking to a satisfactory standard or level."*

166. A very similar set of regulations came before the Employment Appeal Tribunal in Buchanan v Met Police Commissioner [2016] IRLR 918. The Employment Appeal Tribunal observed that whilst those regulations did not mention disability (as likewise the Regulations here do not) there are many places where allowances or adjustments may be made for disability for example, when deciding whether to begin a stage, when deciding whether to adjourn or postpone at each stage, when deciding on the length of any written improvement notice, and when deciding what to do at the third stage. It was also said that although the procedure in the regulations can be made to work in the case of a disabled officer, "*it is obvious that if the question of disability is not carefully addressed by management with disability training the UPP may operate harshly without the allowances and adjustments which are required by the Equality Act 2010."*

167. In relation to progressing to stage 2 the relevant regulation says:

"19(1) Where a police officer has received a written improvement notice, as soon as reasonably practicable after the date on which the period specified in accordance with regulation 14(6)(c) ends-

(a) the line manager must assess the performance or attendance of the officer concerned during that period, in consultation with the second line manager or a human resources professional (or both); and
(b) the line manager must notify the officer concerned in writing whether the line manager considers that there has been a sufficient improvement in performance or attendance during that period.

(2) If the line manager considers that there has not been a sufficient improvement, the manager must, at the same time as notification is given under paragraph (1)(b), also notify the officer concerned in writing that the officer is required to attend a meeting (in these Regulations referred to as a second stage meeting) to consider their performance or attendance…"

168. The date being referred to in Regulation 19(1) (by reference to Regulation 14(6)(c)) is the date for improvement given at stage 1 of the process. At stage 1 the officer has to have been informed that "*if a sufficient*

improvement is not made within such reasonable period as the line manager specifies (being a period not greater than 12 months), the officer may be required to attend a second stage meeting in accordance with regulation 19 and the line manager must specify the date on which this ends." In the claimant's case the stage 1 written improvement notice had originally been set at 3 months and subsequently extended by 8 weeks.

169. Regulation 20 then governs what the officer must be told in a written notice when the second stage meeting is being arranged and Regulation 21 governs the procedure at the second stage meeting.

Section 15 – discrimination arising from disability

170. For the purposes of the section 15 claim, the tribunal finds that convening the stage 2 meeting was unfavourable treatment. The claimant was being progressed along an attendance process that could potentially result in his dismissal. The treatment was because of something arising in consequence of the claimant's disability as it was due to the claimant's sickness absence from work which was in consequence of his disability.

171. The respondent relies on a claimed legitimate aim of "upholding the respondent's requirement for satisfactory attendance from its employees." The Tribunal accepts (and the claimant concedes) that having and maintaining attendance standards is a legitimate aim. The key area of dispute here is whether convening the stage 2 meeting was a proportionate means of achieving that legitimate aim.

172. The claimant says that the decision to progress to stage 2 did not need to be made or made at that point in time. The claimant says that the relevant manager only had to progress the claimant to stage 2 of there had not been "sufficient improvement" in attendance which gave the respondent a measure of discretion. The claimant says that the claimant's case was being progressed more quickly than was necessary under the Regulations as the Regulations allow for 12 months for each stage and potentially longer in exceptional circumstances. The claimant says it was not reasonably necessary to progress the absence management process at the speed at which it did, and it was inappropriate for steps in the claimant's case to be taken by reference to a generic Force directive requiring "efficiency" in the handling of long-term absence. It is said the respondent should have waited longer to see if the claimant's health improved, especially having regard to OH advice that similar episodes of depression tended to last between 12 and 18 months and bearing in mind the claimant's positive attitude and desire to return to work.

173. In the Tribunal's view, what the Regulations require, when dovetailed with the requirements of the Equality Act, (and as set out in Buchanan) is that

each stage in the process is tailored to the individual's particular circumstances and balances the competing needs of the officer and the respondent. Just because potentially under the Regulations a specified improvement period could be set at 12 months, does not mean that it should or should reasonably be set at that maximum, in just the same way that it does not mean a period should be set at the opposite end of the available range.

174. It is also important to set the requirement to attend the stage 2 meeting in the context of what had gone before. The stage 1 written improvement notice's timescale of 12 weeks and requirements it contained were all focused upon the claimant's change in medication and anticipated CBT. It was built around him. It was then extended by 8 weeks because the claimant had only had 3 sessions of CBT. On 20 February 2018 the decision was again made to leave the stage 1 in place whilst further OH advice was obtained. The original stage 2 meeting was then postponed to allow the claimant time to get advice from the DPF.

175. Whilst Inspector Musto's understanding was that it was the Chief Constable's policy to drive forward attendance cases, we do not accept that it was this that was driving his decision to call the claimant to a stage 2 meeting at that point in time. Inspector Musto's evidence, which we accept, was that he decided to progress to stage 2 because he had the updated occupational health advice and there had been no improvement in the claimant's attendance. The claimant himself in evidence did not take issue with the decision to call him to a stage 2 meeting.

176. It was a decision to call the claimant in to a stage 2 meeting to review his attendance. The tribunal does not consider this unreasonable on the part of Inspector Musto, nor Inspector Musto's decision, when deciding to call the claimant in, that there had not been sufficient improvement in his attendance. As against the background we have set out, the claimant had been off work for some 11 months with no indication of an imminent return to work. He had had two previous extensions to stage 1. The claimant's absence was having an impact on the respondent. Their numbers of AFO were already under establishment; they were reliant on other officers working overtime, which has an impact on those officers, was an expense, and caused concerns about breaching working time limits under the Working Time Regulations. That the respondent was able ultimately to cover the claimant's absence does not mean that it did not cause operational difficulties. The AFO role is a safety critical role in keeping safe the Hereford Garrison and its sister site, and was a high level terrorist risk site.

177. Whilst the impact on the claimant is obvious; it moves him along the attendance management process and closer towards potential dismissal,

it was also just a decision to require him to attend that meeting so that there could be a discussion and then a decision about the claimant's attendance. There was discretion to come at that meeting as to what would happen to the claimant next. The claimant was facing nil pay, and that was another reason to have a meeting with him to discuss potential options for a return to work.

178. In this context, viewed objectively, and as against the impact on the claimant, we are satisfied that the respondent reasonably needed to discuss the claimant's attendance with him and convening a stage 2 meeting was an appropriate and proportionate means of achieving the legitimate aim. We do not consider that waiting, an undefined period, would have been a more proportionate means of achieving that aim.

Reasonable adjustments

179. It is not in dispute that the respondent applied a PCP of submitting officers to its Unsatisfactory Performance Procedure relating to attendance when they reached a certain level of sickness absence, leading to formal hearings and warnings that could eventually culminate in the employee's dismissal. It is also not in dispute that the respondent applied a PCP of requiring employees to maintain a certain level of attendance in work in order that they may not be subject to attendance management hearings, Final Written Improvement Notices and other warnings or sanctions up to and including dismissal.

180. In Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265 the Court of Appeal preferred the latter phrasing of the PCP in an attendance management policy case, saying it better encapsulates why a sickness absence policy may in certain circumstances adversely affect disabled workers where their disability leads to absences from work.

181. The Tribunal is satisfied that such a PCP in the claimant's case placed him at a substantial disadvantage because, on account of his disability, the claimant was more likely to face long term sickness absence and be required to attend the attendance management hearing and have steps taken against him (again as was the case in Griffiths). A non-disabled officer would not be absent and would not be subject to the procedures. The respondent knew or reasonably should have known of that substantial disadvantage.

182. The Tribunal does not, however, find that the respondent failed to take reasonable steps to reduce or remove that disadvantage. For the reasons already given in respect of the section 15 claim, we do not find it was unreasonable not to have waited longer before convening the stage 2 meeting or keeping the stage 1 under review for longer. The claimant

also refers to options such as a phased return to work, part time working or alternative positions, but it was not unreasonable to convene a stage 2 meeting with the claimant at which such things could be discussed.

The issuing of Final Witten Improvement Notice with an improvement period of 12 weeks (see paragraph 53.4 of the claimant's closing submissions)

183. The claimant was given a Final Written Improvement Notice on 8 May 2018. It stated, amongst other things, that the claimant should continue to work with all medical professionals and occupational health practitioners with the aim of improving the medical condition with the intention of a return to the workplace within a reasonable timescale (12 weeks from the date of the meeting).

Discrimination arising from disability

184. The Tribunal is satisfied that the Final Written Improvement Notice was unfavourable treatment; breach of it placed the claimant at risk of being taken to a stage 3 meeting and potentially dismissed. It was because of something arising in consequence of the claimant's disability, namely his sickness absence.

185. The same legitimate aim is relied upon by the respondent and is not disputed by the claimant.

186. In terms of proportionality, the issuing of a Final Written Improvement Notice goes hand in hand with both its requirements and the timescale for those requirements to be met as they are all interlinked. The Final Written Improvement Notice was all predicated upon a potential return to work by the claimant and in particular attendance on the vetting course and a phased return to work. On the claimant's own account, it was something that he saw as a potential way back into the workplace. It was designed to have the support and direction of the claimant's GP and OH. At the time it was thought that the final UKSV training course was coming up in June. The claimant's absence from work, as already set out above, was impacting on the respondent's operational resilience. The impact on the claimant was that if he was unable to meet the terms, he ended up at risk of being progressed along the UAP to a stage 3 with the potential for dismissal. However, the claimant's own case is also that there was a potential for him to be able to return to work at that time, and he was involved the discussions and potential planning for such a return at that stage 2 meeting.

187. As things stood at the point of issuing it, viewed objectively the Tribunal does not consider the Final Written Improvement Notice's actions to

secure a return to work or the time scale of 12 weeks was unreasonable. We took account of Inspector Musto's candid admission that with the benefit of hindsight the timescale seemed harsh, and that it was probably driven by his understanding of the Chief Constable's directive. However, hindsight involves factoring into what happened to the claimant next and not what was perceived at the actual time. Viewed objectively we consider the terms of the Final Written Improvement Notice were reasonably necessary and proportionate to the aim of improving attendance by facilitating the claimant's return to work, when balanced against the impact on the claimant. It was proportionate to have issued a Final Written Improvement Notice rather than taking some lesser step such as not issuing a Final Written Improvement Notice or setting a longer timescale. It contained within it an action plan to facilitate the claimant's return to work that was tailored to the claimant's needs as understood at that point in time.

Reasonable adjustments

188. The claimant relies on three PCPs said to be "Submitting officers to the UPP relating to attendance when they reach a certain level of sickness absence leading to formal hearings/ requiring employees to maintain a certain level of attendance at work in order not to be subject to attendance management hearings, FWINs and other warnings or sanctions up to and including dismissal", "setting action plans at various stages of the Procedure, save the Respondent disputes these were "formulaic" and claims they took account of the individual's (including the Claimant's) own circumstances and individual medical evidence", and "requiring employees to maintain a certain level of attendance at work in order that they may not be subject to attendance management hearings, FWINs, and other warnings or sanctions up to and including dismissal."

189. Applying the principles in Griffiths, the true PCP here was the imposition of the Final Written Improvement Notice with its terms, as this is what caused the claimant the disadvantage. The Tribunal does not find that the claimant was subject to a "formulaic" action plan. It was tailored to his individual circumstances. Nonetheless the imposition of the Final Written Improvement Notice was to the claimant's substantial disadvantage as he was at risk of further steps being taken against him if its terms were not met. He was vulnerable to not meeting its terms if his disabled related absence did not improve in the way the action plan was predicated upon. A non-disabled officer would not have been absence and therefore would not have been in this situation.

190. We do not, however, find that there was a failure to make reasonable adjustments to ameliorate that disadvantage. As already set out above, we consider that the timescale at 12 weeks was reasonable as at the time

it was set and taking into account what the proposals were for a return to work at that time and the actions set in that regard to support the return to work were reasonable.

The Security Vetting Role – the discussion with Inspector Carr

Harassment related to disability

191. The claimant alleges that the comments set out in paragraph 13 of the Further Particulars of Claim amounted to unwanted conduct related to his disability and had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

192. The Tribunal has not found as a matter of fact that Inspector Carr said the role was "*very* demanding" and "*very* stressful" (our emphasis on very). We have not found that Inspector Carr told that the claimant he would have responsibility for security clearance, decisions would all be down to him and if he made a mistake "on your head be it". We have found that Inspector Carr gave the claimant what Inspector Carr believed to be a factual summary of what the role was about and said that some people could find it demanding and stressful. It was reasonable for Inspector Carr to explain what the role was about and to give some sense of what others felt about the role. We have also found that Inspector Carr said that the role was part of security vetting at secret level, and so it played a part in what was an important overall decision by UKSV but not that it was the claimant making the decision or it was on his head if he made a mistake. This summary and appraisal of the role was not unwanted conducted related to disability. It did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Inspector Carr was trying to sell the role to the claimant and indeed thought he had probably done so.

193. The Tribunal considers it likely that at some point the claimant placed a nuance on what Inspector Carr had said which created an impression in the claimant's mind that the role might be too much for him, linked to the claimant's low self-esteem, fear of failure and how that might compound his mental health difficulties. But that is not a finding that this is what Inspector Carr actually said to the claimant so that it could be said to have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Moreover, when viewed objectively, it would not be reasonable for the words Inspector Carr actually did say to be taken to have that proscribed effect.

194. The Tribunal has also found as a matter of fact that Inspector Carr did not say "we're not paying you for doing nothing" and "pull yourself together." Inspector Carr was attempting to be empathetic in his conversation with the claimant. He spoke about the benefits of getting the claimant back to work and back on to full pay for himself and his family. What we have found was actually said was not unwanted conduct related to the claimant's disability. Even if it could be said that the claimant subjectively perceived those words as violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, when viewed objectively it cannot be reasonably said that the actual words would have the proscribed purpose or effect.

195. Inspector Carr did say that the claimant would not be able to do the job part time, as he was not coming to the role as a part time officer. However, that by itself cannot sensibly be said to be conduct that had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

196. Inspector Carr did not say "I'm an impatient man. If you don't get back to me with a decision, I'll be on your case." He did not tell the claimant not to keep him waiting for a decision. Inspector Carr let the claimant have time to think about it. However, he did also say words to the effect that he would need the claimant to get back to him relatively promptly. That was simply because what Inspector Carr understood to be the last course was coming up fairly quickly. It was not conduct related to the claimant's disability. Even if the claimant subjectively felt he was under some kind of inappropriate pressure, viewed objectively it was not reasonable to perceive the words Inspector Carr actually said as having the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

197. The claimant also alleges that overall Inspector Carr pressured the claimant against putting himself forward for the role. The Tribunal has not made this finding. To the contrary the Tribunal has found that Inspector Carr was trying to sell the role to the claimant and thought he had done so. These individual complaints of harassment related to disability are not well founded and are dismissed.

Direct disability discrimination

198. The claimant relies on the same allegations as being acts of direct disability discrimination. The Tribunal does not find that Inspector Carr treated the claimant less favourably than he would treat a non-disabled person in not materially different relevant circumstances because of disability. On the facts as found Inspector Carr would have had the same

conversation with a non-disabled person in not materially different relevant circumstances, such as trying to get a non-disabled person who had been absent from work (including someone on reduced pay) back into the workplace. The Tribunal has not found that Inspector Carr was trying to pressurise the claimant against putting himself forward for the role. Inspector Carr would also have said to a non-disabled officer who was contracted to be full time but asking about part time working the same as what was said to the claimant. Inspector Carr was not motivated by an assumption that as a person with depression the claimant needed to pull himself together; to the contrary as a person with his own life experience of depression, he was seeking to be empathetic.

Discrimination arising from disability

199. The Tribunal does not consider that Inspector Carr's conduct as actually found amounted to unfavourable treatment of the claimant. It was a factual conversation about the role and about the need for the claimant to get back to Inspector Carr once he had thought about it. The comments about getting the claimant back into work and back onto pay in the context as found could not sensibly be described as unfavourable treatment. The claimant was not spoken to harshly. It was also not treatment that took place because of (in the sense of looking at Inspector Carr's mindset) the claimant's sickness absence or the claimant's tendency to experience stress/and or self-doubt. Inspector Carr did not hold a degree of hostility or frustration with the claimant based on the fact the claimant had been off sick for an extended period and was assumed to have a bad attitude to work. Inspector Carr thought he was (and had) sold the role to the claimant. The Tribunal would also consider Inspector Carr's conduct to be justified. There was a legitimate aim of managing the claimant's expectations as to what the role was about and what Inspector Carr said was proportionate to that.

Reasonable adjustments

200. In paragraph 16 of the claimant's Further Particulars of Claim, it is said that Inspector Carr had a practice of communicating set requirements for job roles and a set way of working or carrying out those requirements without deviation, and that this amounted to a PCP. At paragraph 71 of the Amended Grounds of Resistance the respondent accepts the Respondent would do this, if deviation was not possible, and that it is capable of amounting to a PCP.

201. The Tribunal accepts that Inspector Carr had a conversation with the claimant about the role that was along the same lines that he had had or would have with multiple other officers. That was part of Inspector Carr's job of coordinating the UKSV secondment scheme. Based on the

evidence actually heard by the Tribunal and the findings of fact made, describing that as "a practice of communicating set requirements for job roles and a set way of working or carrying out those requirements without deviation (if deviation was not possible)" seems a somewhat unnatural and artificial fit or descriptor for what was actually going on. But as a matter of substance, the Tribunal accepts that what Inspector Carr said about the role could amount to a "practice", albeit some of what he said to the claimant about the benefits of returning to work were more tailored to the claimant's situation. We do not accept the claimant's counsel's submission that Inspector Carr said what he did about the role in a "take it or leave it way" or in a way that would not encourage the claimant to take it. It was simply a factual representation of what he understood the position to be.

202. It is said that PCP put the claimant at a substantial disadvantage in comparison with persons who were not disabled, because he became demoralised and upset and missed out on a secondment to the UKSV role that would have afforded the claimant the chance to return to paid work.

203. In the Tribunal's judgement, after the stage 2 meeting on 8 May 2018 the claimant's mindset became very much fixated on the notion of moving to part time hours. He wanted to be an AFO and he saw working part time hours as being a good way to balance the job against his health and other matters going on in his personal life. He decided not to pursue the UKSV role because he wanted to work as a part time AFO. A key component of why the claimant did not want to try the UKSV role because Inspector Carr had said he could not do it part time. Further, the claimant also saw the UKSV as being a role that was very different from being an AFO. In the claimant's own mind, and bearing in mind his low self-esteem and fear of failure, the claimant projected the role as having too much responsibility. He was worried about doing the course and worried about doing the role, making a mistake and being in his own mind a failure. But that was the claimant's analysis in his own mind about the role, as opposed to what Inspector Carr actually said or intended.

204. In the Tribunal's judgement even if this could be said to amount to a substantial disadvantage, it is not a substantial disadvantage that Inspector Carr or the respondent knew or reasonably could have known about at that point in time. Why would they anticipate that the claimant would analyse the demands of the role in that way? The respondent was approaching it on the basis that it was role that could help non-operational officers back into the workplace.

205. Furthermore, it would not be reasonable to expect Inspector Carr to paint the role in a way that oversold it to the claimant if that did not reflect Inspector Carr's understanding of the realities. To require Inspector Carr

to tell the claimant that he did not need to stick with it if he found the role too difficult, seems to be a counsel of perfection, and presupposes that Inspector Carr knew or reasonably should have known what the claimant's worries were. Moreover, the claimant had never been told that if he did the course, he was then obliged to take on the role.

206. We therefore do not find in relation to the description given of the role that there was a failure to make reasonable adjustments. We address separately below the issue relating to what was said about part time working and the issue of picking up with the claimant in feedback his decision to reject the course and the role in our section on modified working arrangements as there is substantial overlap in these issues.

Respite break

207. The claimant says that the respondent applied a PCP of "not progressing discussions with employees about benefits tailored to wellness to the point of submitting a formal request." We have not found as a matter of fact that Ms Batt initially said that she would make a formal referral or formal request on the claimant's behalf as opposed to investigating the matter and getting back to the claimant (which we found she did, albeit once reminded by the claimant). The decision not to make a formal request was ultimately made by Inspector McIlwraith sometime later after a discussion with Ms Batt about it being unlikely to be effective as it was not a case involving terminal illness. The Tribunal does not consider that this amounted to the application of a PCP. We have no evidence before us of what has happened or would happen in relation to other cases. The Tribunal considers that this treatment of this respite break request was a one-off act specific to the claimant and which does not have a sufficient element of repetition, whether actual or potential.

208. In his closing submissions the claimant's counsel submits that the PCP should alternatively be viewed as "suggestions about wellness benefits of this kind via PMAS (or any other external body) were left to the employee to follow up." It is said that this placed the claimant at a substantial disadvantage as he found that kind of follow up particularly stressful. That all said, he did actually follow it up. In any event, we do not find it established on the evidence before us that there was the application of any such PCP. There is nothing before us to show that Ms Batt on behalf of the respondent exercised some kind of practice of leaving referrals for welfare benefits to employees to follow up. The fact that she passed details back to the claimant in this particular instance does not mean there is a sufficient element of actual or potential repetition to constitute a PCP. There are other instances, for example, where Ms Batt did actively seek referrals for the claimant, for example in relation not PFOA counselling and the life coach. This was a one-off act, not a PCP.

209. It is accepted by the respondent that they applied a PCP of not providing funding and funding benefits tailored to wellness to those on sick leave (either for mental health reasons or otherwise) and/or disallowing or not funding benefits tailored to wellness (or more specifically respite/weekend breaks) to those on sick leave. Basically, it is said the respondent would not themselves fund a respite break to employees on sick leave.

210. In terms of substantial disadvantage, there is no medical evidence before the Tribunal to show that the claimant had or was liable to suffer a flare up of his symptoms of depression, and increased sickness absence without pay because of a failure to fund a respite break or that a failure to fund respite breaks would increase the likelihood of disabled people suffering such flare ups. There is no evidence to say that if the respondent funded a respite weekend break for the claimant and his family, the claimant would be able to return to work. There is also no evidence that the respondent knew or reasonably should have known that the claimant would suffer such a flare up or be unable to return to work if the respondent failed to fund a respite break.

211. The Tribunal further finds that the adjustments sought are not reasonable. In Griffiths, the Court of Appeal made the observation that:

"whilst a disabled employee may suffer disadvantages not directly related to the ability to integrate him or her into employment, the steps required to avoid or alleviate such disadvantages are not likely to be steps which a reasonable employer can be expected to take."

212. The Court of Appeal in Griffiths referred to the sick pay case of O'Hanlon v Revenue and Customs Commissioners [2007] ICR 1359 and the observation that extending sick pay was not a reasonable adjustment not least because it would mean the employer would have the invidious tasks of having to assess the financial means of disabled employees and the stress suffered as a result of any hardship. It noted the approval in O'Hanlon of an observation by the EAT that:

"*The Act is designed to recognise the dignity of the disabled and to require modifications which enable them to play a full part in the world of work, important laudable aims. It is not to treat them as objects of charity which, as the tribunal pointed out, may in fact sometimes and for some people tend to act as a positive disincentive to return to work."*

213. The Tribunal considers that these principles are very relevant here. Reasonable adjustments are about integrating an employee back into the workplace. To step in and fund, in effect, social care for the claimant in the form of a respite break would not on the available evidence in this case

have reasonably served that reintegration. It is not a case like, for example, Croft Vets Limited v Butcher [2013] UKEAT 0430 12 0210 where there was focused medical evidence to show that funding a specific form of private medical treatment would enable the claimant to return to work. The claimant's scenario falls more within the wider principle in Croft Vets that it would not generally be a reasonable adjustment for an employer to pay for private medical treatment for an employee. The claimant's case here indeed takes that point even wider to seek funding for a social or welfare respite break as opposed to being medical treatment.

214. Whilst Ms Batt did state in evidence that the respondent's policy was not about the expense, that observation seemed to be focussed upon an individual level. The Tribunal heard evidence from Inspector Musto, Inspector McIlwraith and DCC Terry about the budgetary pressures upon the respondent. To fund such a proposed adjustment would in the Tribunal's room leave the respondent wide open to similar requests from many other employees, and an unmanageable budgetary situation and again would not be a reasonable adjustment.

Nil pay from 12 May 2018

215. The claimant was placed on half pay in November 2017 and nil pay from May 2018. There is a dispute of law in this case as to the extent of the respondent's discretion to extend pay.

216. The claimant submits that the Chief Constable of the MDP has an express direction to extend pay under paragraph 3 of Annex K of the Home Secretary's determination made pursuant to Regulation 28 of the Police Regulations 2003. It is said that Regulation 28 exists for the benefit of "members of police forces" and that the MDP is a police force under section 1 of the Ministry of Defence Police Act 1987.

217. The Tribunal agrees with the respondent's submission that this is not legally correct. The Home Secretary's determination at Annex K of the Police Regulations 2003 is made pursuant to those empowering Regulations which in turn are made pursuant to section 50 of the Police Act 1996. The Secretary of State is empowered to make regulations about the "conditions of service of police forces." In turn "police force" is defined in section 101 of the Police Act 1996 as a force maintained by a local policing body. A local policing body is in turn defined as a Police and Crime Commissioner for the police areas listed in Schedule 1 to the Act, the Mayor's Office for Police and Crime (in relation to the MPS), and the Common Council (in relation to the City of London Police). In effect, they apply to the 43 territorial Police Forces in England and Wales. The MDP Police are not a local policing body and therefore not a police force within the meaning of the Police Act 1996 and its ensuing Regulations and

Determinations. That the MDP is a police force constituted under section of the Ministry of Defence Police Act 1987 does not make it a police force under the Police Act 1996. They are two separate pieces of legislation. Why, during the Police Appeals Tribunal an appeal response prepared by counsel on behalf of the Chief Constable referred to Annex K is unknown to this Tribunal [591]. It may have been an error. But in any event, it cannot change the legal analysis.

Reasonable adjustments

218. It is not in dispute that the respondent applied a PCP to the claimant that "NSOG (non-standard occupation group) staff on sickness absence were not entitled to more than six months in all on full pay during any period of 12 months; thereafter half pay for no more than six months (subject to a maximum of 12 months paid or unpaid absence in any period of four years or less)". It is also not in dispute that the respondent applied a PCP "by which it did not maintain full pay/half pay for more than 6 months at a time for those employees on sickness absence."

219. Whilst not referred to by the parties we should add that under NSOG terms there is no general discretion to extend pay but there are 3 ways in which pay can be extended:

- where an individual has exhausted sick pay, returns to work, but gets sick again with a minor ailment unrelated to the original long-term illness or injury;
- Where there is an injury on duty;
- Where there is an assault on duty.

It is also possible to receive ongoing sick pay at the ill health retirement pension rate in certain circumstances. The claimant actually qualified for this, but he received a very small sum because his service was so short in length.

220. The respondent denies that the PCPs put the claimant at a substantial disadvantage compared with persons who are not disabled. The respondent argues that the sick pay entitlements are generous compared with the wider employment market and wider MOD employees and that they favour disabled workers as they are likely to have longer periods of sickness absence.

221. The Tribunal accepts that the PCPs placed the claimant at a substantial disadvantage. A non-disabled officer would not be on sick leave and therefore liable to have his sick pay reduced. As the claimant says, as a sufferer of a depressive illness the claimant was naturally more likely to be

on sickness absence and have his pay reduced. The disadvantage was clearly known to the respondent.

222. We do not consider, however, that extending the claimant's pay (or to do that indirectly by discounting his disability related absence) would be a reasonable step for the respondent to take.

223. The Tribunal is aware of the observations in O'Hanlon (which had a sick pay policy remarkably similar to that engaged here) where the Court of Appeal said there was much force in the observations of the Employment Appeal Tribunal that:

"In our view, it will be a very rare case indeed where the adjustment said to be applicable here, that is merely giving higher sick pay than would be payable to a non-disabled person who in general does not suffer the same disability related absences, would be considered necessary as a reasonable adjustment. We do not believe that the legislation has perceived this as an appropriate adjustment, although we do not rule out the possibility that it could be in exceptional circumstances. We say this for two reasons in particular.

68. First, the implications of this argument are that Tribunals would have to usurp the management function of the employer, deciding whether employers were financially able to meet the costs of modifying their policies by making these enhanced payments. Of course we recognise that Tribunals will often have to have regard to financial factors and the financial standing of the employer, and indeed section 18B(1) requires that they should. But there is a very significant difference between doing that with regard to a single claim, turning on its own facts, where the cost is perforce relatively limited, and a claim which if successful will inevitably apply to many others and will have very significant financial as well as policy implications for the employer. On what basis can the Tribunal decide whether the claims of the disabled to receive more generous sick pay should override other demands on the business which are difficult to compare and which perforce the Tribunal will know precious little about? The Tribunals would be entering into a form of wage fixing for the disabled sick.

69. Second, as the Tribunal pointed out, the purpose of this legislation is to assist the disabled to obtain employment and to integrate them into the workforce. All the examples given in section 18B(3) are of this nature. True, they are stated to be examples of reasonable adjustments only and are not taken to be exhaustive of what might be reasonable in any particular case, but none of them suggests that it will ever be necessary simply to put more money into the wage packet of the disabled. The Act is designed to recognise the dignity of the disabled and to require

modifications which will enable them to apply a full part in the world of work, important and laudable aims. It is not to treat them as objects of charity which, as the Tribunal pointed out, may in fact sometimes and for some people tend to act as a positive disincentive to return to work."

224. These observations were quoted again with approval in Griffiths. O'Hanlon was referring to the precursor of the Equality Act, the Disability Discrimination Act. However, its central point remains good and the Tribunal considers apt to apply here. We would be inappropriately usurping the management function of the MDP to decide that they would, in effect be able to financially afford to meet the cost of modifying their policies by making further enhanced sick payments to the claimant and to potentially all disabled employees. We would be unilaterally disrupting the exceptions they have already set in place for the limited circumstances in which sick pay can be extended. Ms Kemp also said in evidence the decision would affect at least the NSOG. It is also not an adjustment that would have served to integrate the claimant back into the workplace. We also do not consider that the claimant's case would be one of the rare exceptions that O'Hanlon identified.

225. The claimant in oral closing submissions relied on the case of G4S Cash Solutions v Powell UKEAT/0243/15/RN. That decision was, however, a fact sensitive one. It was held on the particular facts of the case it could be a reasonable adjustment to extend pay protection to a disabled employee who was in work but who had been moved to carry out a role with lesser responsibilities, whilst initially having been maintained on his old, higher pay. It was a case about pay protection for an employee who was in work, in circumstances in which the arrangement had already continued for a year. It was not about sick pay. The Employment Appeal Tribunal also made clear it was a single claim based on its own facts and very different from the O'Hanlon type scenario where a decision for one individual could have a significant knock effect on others. It does not change the Tribunal's analysis in this claimant's case.

Discrimination arising from disability

226. It is not in dispute that the reducing the claimant's pay or stopping the claimant's pay was unfavourable treatment that was because of something arising in consequence of the claimant's disability (his sickness absence).

227. On justification the respondent says it has a legitimate aim of upholding its limits on sick pay and ensuring consistency across all NSOG staff. It is said the aim is legitimate as the respondent has a limited budget of public funds out of which sick pay is distributed and there is obviously a real need to preserve those funds. It is said that the limits set in respect of sick

pay are generous and are proportionate to achieve the aim of upholding the sick pay limits set.

228. It is the treatment that has to be justified in a discrimination arising from disability claim, rather that the policy itself. That said, this is an example of the point made in Griffiths that in some scenarios there is little difference between the two as the treatment complained about is the bare application of the policy.

229. The Tribunal accepts that the respondent had legitimate aims of living within its budgetary means (a better expression of "upholding its limits on sick pay") and treating staff consistently.

230. The Tribunal finds that moving the claimant to nil pay in accordance with the respondent's sick pay rules was a proportionate means of achieving those legitimate aims. Whilst the Tribunal appreciates the serious impact reduced pay or nil pay had upon the claimant, that has to be balanced against the impact on the respondent. The O'Hanlon case demonstrates the potential importance of acting with consistency when dealing with employees' wholesale access to sick pay benefits and where the budgetary impact, if a discretion was potentially accessible to a whole group of employees, would be significant. Whilst the Tribunal was not given a specific figure by the respondent on cost, it accepts on the evidence provided by DCC Terry that the MDP, like many Governmental departments has budgetary pressures and a need to live within its means (see Heskett for example). It is a matter of inherent logic that if an adjustment potentially affected at least the NSOG group the potential cost could be substantial and would be unbudgeted. We also accept that the existing sick pay regime, of 6 months full pay and 6 months half pay (within a rolling period) with the limited exceptions identified for things such as an injury on duty, is also relatively generous scheme with some potential discretions already built within it, albeit understandably so in a frontline policing occupation with the consequent risks of injury and ill health. Overall, we are satisfied that the claimant's sick pay reduction to nil pay under the sick pay rules was a proportionate means of achieving a legitimate aim.

Indirect discrimination

231. Again, the PCPs already set out above in relation to the reasonable adjustment claim are not in dispute.

232. Particular disadvantage is in dispute. It was said in Griffiths that:

"..., if the PCP, breach of which gives rise to the dismissal, also adversely impacts on a class of disabled people including the claimant, the conditions for establishing indirect discrimination will also be met."

233. The Tribunal agrees with the respondent that the claimant has not demonstrated particular disadvantage. The claimant has not shown that the PCPs put persons who share the claimant's disability, namely depression, (the class of disabled people) at a particular disadvantage when compared with persons who do not share the disability (namely people who are not disabled and people who are disabled by virtue of a different disability to depression). There is nothing before us to show that there is disparate disadvantage to those employees who have the disability of depression when compared with those suffering from a different type of disability of which there are many, and in respect of whom are also likely to have to take extended periods of sick leave and face reductions in pay.

234. The claimant relies upon the European Court of Justice case of Ruiz Conejero v Ferroser Servicios [2018] IRLR 372 at paragraph [39]. That case was concerned with a Spanish national law that permitted the dismissal of workers in certain circumstances where they hit a threshold for intermittent absences. It was said a worker with a disability has a greater risk of accumulating days of absence because of absence because of illness. The Tribunal did not find this authority of assistance in establishing on the facts of this specific case involving this specific employer that the PCPs would put those who share the claimant's class of disabled people at a particular disadvantage compared with others who are not disabled or who have a different disability.

235. In any event, we would find the PCPs justified for the rationale already provided in respect of the section 15 claim (bearing in mind our previous observation that on this particular issue there is little difference between justifying the PCP and justifying the treatment).

236. The same analysis would apply to the reduction of the claimant's sick pay to half pay in November 2017. We similarly find that indirect disability discrimination claim is not well founded and is dismissed.

Modified Working and the UKSV role – June 2018

237. At the heart of this case is a dispute about whether there were steps the respondent could reasonably have taken, and if so when, which could have got the claimant back into the workplace or a chance of doing so.

238. The Tribunal considers that the first meaningful potential opportunity was following the stage 2 meeting of 8th May when the claimant was put forward for, and he agreed to consider, the UKSV role.

239. We have set out already above our finding that after the 8th May 2018 stage 2 meeting the claimant became focussed on a return to work being about a move to a part time working arrangement. He thought it would give him some balance. We have also already set out our finding that the claimant withdrew from the potential UKSV role because Inspector Carr told him that it would be a full-time post and because the claimant reached the view, on his own analysis, that the UKSV role would be too demanding for him.

240. The respondent's position is that the claimant would not have been fit for any work. But also, that even if the claimant was fit then a phased return to work, whether in the UKSV or in the claimant's substantive post (with adjustments) would have offered the claimant the same protection he was looking for, with the added advantage of remaining on full pay.

241. The claimant's counter position is that he did not understand a phased return to work would offer him the same protections as a part time working arrangement as the impression he had always been given was that a phased return to work would have a short timescale, with pressure to keep on increasing his hours to get back to full time. He did not want that pressure. Part of his condition was a fear of failure, and so he saw the answer as securing a formal part time working arrangement.

242. The Tribunal considers that the claimant's understanding of the limits of a phased return to work was justified. Inspector Musto accepted in evidence that he would, initially at least (and at the time we are looking at), have given the claimant the impression that once he was back in the workplace there was an expectation he would start increasing his hours quite quickly. The respondent's witnesses all told the tribunal that in reality there was flexibility in a phased return to work and it could go at an individual's pace. We are not satisfied, however, that that message was adequately communicated to the claimant at the time.

243. The Tribunal can understand why Inspector Carr did not revert to the claimant when the claimant withdrew from the UKSV role. It was a role that was very different to being a AFO and would not be for everyone. It had a relatively high attrition rate. We accept at the time it would not have occurred to Inspector Carr, or he would not have considered it appropriate, to go back to the claimant to ask him to think about it again or to contact the claimant and make it clear that whilst he could not grant a formal change to part time working, it would be possible to arrange a

phased return to work. Inspector Carr was not the claimant's line manager and we accept this kind of discussion was not really in his ambit.

244. However, once the claimant had decided to withdraw from the UKSV role we do consider that the claimant's line management team should have had a discussion with him. That the claimant was under a live stage 2 Final Written Improvement Notice did not stop his managers having other discussions with him about a potential return to work or barriers to that return. Indeed, it gave every reason for them to do so.

245. The Tribunal considers that the claimant's line managers should have had a discussion with him about why he did not consider the UKSV role was suitable. It did not need to be a pressured conversation. We consider that it is a real possibility that such an open discussion would have led to the claimant being given some reassurance about the demands of the role or reassured that he would not be criticised if he tried the course or tried the role and decided it was not for him. We also consider that it is likely that such an open conversation would have led to the claimant being asked why part time working was so central to him in terms of a return to work. Inspector Musto accepted in evidence that he did not understand why the claimant was seeking a part time contract. But he did not openly explore that with the claimant. Instead, the claimant just seems to have been shut down on the point with comments such as Hereford could not accommodate part time working AFOs at the time, or that the claimant would have to get back to work as a full time AFO before he could move to part time work. What that did not achieve was an understanding on the respondent's part as to what was going on in the claimant's mind, and how he saw a part time working arrangement as a way of minimising and controlling the pressures upon him and his own fear of becoming overwhelmed and failing.

246. We accept that Ms Batt attempted to cover some of this in her email exchange with the claimant. However, her email was confusing. Moreover, she was not the claimant's line manager and it really needed, in the Tribunal's view, an actual discussion with the claimant's line management team. We do consider it possible that such an open discussion could have led to the respondent clearly telling the claimant that if he did try the UKSV role then he could do it on a phased return to work, and that the phased return to work could be done at a slow pace that suited the claimant and that he would not be pressurised to increase his hours quickly to get back to full time hours or to increase them if he was not ready. We accept and find that this had not already made obvious to the claimant.

247. Alternatively, it is possible that it could have led to a discussion about whether, as a specific adjustment, the claimant could do the UKSV role

only on a temporary part time basis on the understanding that it did *not* mean the claimant would then automatically be able to return to the AFO role part time when the UKSV role ended. It would not have been in Inspector Carr's gift, and no doubt it would be an unusual arrangement in the MDP, but it does not strike the Tribunal that there was anything barring the claimant's line management team together with HR exploring it as a specific temporary arrangement for the claimant. It would get the claimant back in the workplace, it would help him build up some resilience in the protected way he was seeking, it would not compromise the potential need for the claimant to be full time as an AFO and the respondent would only be paying him part time pay whilst temporarily in the role. Further, Inspector Carr accepted that if he had a part time officer, then he could tell UKSV that that was what the part time arrangement was and UKSV would adjust the workload accordingly. Much of that would of course also apply to a properly structured and communicated phased return to work plan which would have been the primary sensible way forward.

248. Inspector Musto's email to the claimant of 13 June 2018 [161] did not achieve the necessary level of engagement and explanation that we have identified. It did not address the UKSV role or how any phased return to work in that role would not be pressured etc.

Direct discrimination and harassment related to disability

249. In terms of the claimant's pleaded claim we accept that the Respondent (other than Ms Batt's email) did not question, ask to discuss or give or seek to give feedback about the claimant's reasons for withdrawing from the UKSV role. However, we do not accept that amounted to direct discrimination. We accept that the topic would equally have been left alone in the comparative situation of an officer seeking to return from sick leave, who was not disabled. The Tribunal considers that the reason for it not being actively picked up with the claimant was partly due to the particular scenario falling between Inspector Carr, Ms Batt, and the claimant's line management team with no one (i.e., the claimant's line management team) picking up overall responsibility for it. We consider it was also partly because the claimant was unwell on sick leave and there was a (we would say misplaced) sense that the claimant should not be overly pressured. This is not "because of" disability. Similarly, we do not consider that it amounted to harassment. We do not consider it can be said that any subjective perspective of the claimant that a failure to have such a discussion with him violated his dignity or creating an intimidating hostile, degrading, humiliating or offensive environment for him would be an objectively reasonable perspective. It is simply not conduct that meets the threshold to amount to harassment.

Reasonable adjustments

250. As we have said above, we do not consider that a described PCP of "communicating set requirements for job roles and a set way of working or carrying out those requirements without deviation" sensibly represents what was going on here. But we do accept that Inspector Carr applied a PCP to the claimant that to work part time in the UKSV role required a pre-existing part time working arrangement and that a full-time contracted officer would have to do the role full time. The respondent also applied a PCP of "not accepting a person's decision not to put themselves forward or to withdraw from a job application process without giving or seeking feedback."

251. We find that these PCPs placed the claimant at substantial disadvantage compared to persons who are not disabled. A non-disabled person would not have the ill health and sickness absence that led to the claimant seeking part time working to further protect his health. The respondent would reasonably have understood this disadvantage if they had made proper enquiries they ought to have made of the claimant. We also accept that the nature of the claimant's disability meant that he was unlikely to have proactively chased up work opportunities for himself or have led a feedback process and his disability left him with low confidence and self-doubt about whether he could do the UKSV role. The respondent knew this because they had noted themselves in the past that sometimes the claimant seemed not with it or on occasion had temporary difficulties in being able to speak to him. Ms Batt had to prompt the claimant, for example, to revert to Inspector Carr. The respondent also knew about the claimant's lack of self-confidence, as Ms Batt referred to it. They would have known more about how this affected the claimant's views on the UKSV role and also why he wanted part time working/ was concerned about how a phased return to work was presented, if they had engaged with him in the way outlined. The claimant then withdrew from the UKSV role. He then remained on sick leave, under the UAP and at ongoing risk of dismissal. A non-disabled officer would not have been in that situation at all.

252. We are also satisfied that there were steps the respondent could reasonably have taken to ameliorate that disadvantage. As above, the respondent could have engaged with the claimant about what the actual barriers were with the UKSV role and have had the open discussions with the claimant referred to above about that role and about what lay behind the claimant's request for part time working. The respondent could reasonable have reassured the claimant about the role and suggest that he give the course a try. As already stated, the respondent could reasonably have explained to the claimant (and then potentially implemented) that a phased return to work in the UKSV role was possible

and that it would be slow, at the claimant's place and not pressured. Alternatively, the respondent could have discussed (and then potentially implemented) a temporary part time working arrangement in the UKSV role.

253. The respondent says these kinds of adjustments would not have alleviated any disadvantage that the claimant was suffering because he was simply not well enough to return to work.

254. In Birmingham City Council v Lawrence [2017] UKEAT/0182/16 it was held that, given the duty was to take steps that were reasonable to avoid the disadvantage, the question of whether, and to what extent, the step would be effective to avoid the disadvantage would always be an important one:

"18… given the language of section 20(3) – where the steps required are those that are reasonable to avoid the disadvantage – the question whether, and to what extent, the step would be effective to avoid the disadvantage, will inevitably always be an important one (see per HHJ Richardson at paragraph 59 of Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins [2014] ICR 341 EAT). Thus if there was no prospect of the proposed step succeeding in avoiding the disadvantage, it would not be reasonable to have to take it, conversely if there was a prospect – even if considerably less than 50 per cent – it could be (see per HHJ Peter Clark at paragraph 39 of Romec Ltd v Rudham UKEAT/0069/07). The reasonableness of a potential adjustment need not require that it would wholly remove the disadvantage in question: an adjustment may be reasonable if it is likely to ameliorate the damage (Noor v Foreign & Commonwealth Office [2011] ICR 695 EAT per HHJ Richardson at paragraph 33); a, or some, prospect of avoiding the disadvantage can be sufficient (see per HHJ McMullen QC at paragraph 50 in Cumbria Probation Board v Collingwood UKEAT/0079/08 and Keith J at paragraph 17 in Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10). All that said, the uncertainty of a prospect of success will be one of the factors to weigh in the balance when considering reasonableness (see per Elias LJ in Griffiths [v Secretary of State for Work and Pensions [2017] ICR 680 CA] at paragraph 29 and per Mitting J at paragraph 18 in South Staffordshire & Shropshire Healthcare NHS Foundation Trust v Billingsley UKEAT/0341/15)."

255. The respondent relies upon the claimant's continuous fit notes and the OH reports to say there was no prospect of the claimant being well enough to return to work. It is also said that the claimant's reports from his GP and community mental health team do not actually say he was fit to return on part time hours.

256. The Tribunal is, however, satisfied that there was a sufficient prospect of the adjustments alleviating the disadvantage faced such that they were reasonable steps to have taken. The respondent set the claimant a 12 week Final Written Improvement Notice to return to work together with a series of actions as to how the claimant would be supported to achieve this, such as considering the UKSV role amongst other things. We have made a finding of fact that a potential return to work was therefore within the respondent's expectation as being achievable and stemmed from the stage 2 meeting where it had been discussed with the claimant. The available most contemporaneous medical evidence is also that from the claimant's community mental health team of 11 June 2018 which whilst acknowledging the claimant still had significant symptoms of anxiety and depression said the letter was "*in support of Mr Thomas wanting to return on a part-time basis initially."* The letter does not say the claimant was not fit for that part time work as at the point of it being written. It speaks in the current tense. We also accept the claimant's evidence that whilst he did not feel 100% at the time he felt well enough to try some part time working.

257. We acknowledge that OHA did not sign the claimant off as fit and by 10 July were saying the claimant was unfit for work in any capacity. However, the Tribunal does consider that there is a prospect that if the kind of discussions we have outlined had happened with the claimant with a positive result, and a positive proposal had then been taken forward to OHA and the claimant's GP that there is an ensuing prospect they would have endorsed it, particularly if faced with the claimant expressing a wish to give it a go. Whilst the Tribunal has not seen any of the letters of instruction sent to OHA, there is no suggestion that the UKSV role was a specific proposal put before Dr Scott that he was asked to comment upon in his report of 2 July 2018. It is not something that the claimant would have put forward, absent the kind of line management engagement with him that we are talking about, as he thought at that point it was not workable. Furthermore, we are satisfied that if this positive engagement process had happened there is a prospect that the claimant would have then given that kind of return to work a go. We are therefore satisfied that there was sufficient prospect of the steps being effective to avoid the disadvantage, that they were reasonable steps for the respondent to have taken in the circumstances. The evaluation of the size of that overall prospect then becomes a remedy question.

Discrimination arising from disability

258. The respondent similarly argues that the treatment complained about cannot amount to unfavourable treatment because the claimant was not medically fit to return. In Aston v The Martlet Group Limited UKEAT/0274/18/BA it was said:

"A*s to the law, in Williams v The Trustees of Swansea University Pension and Assurance Scheme [2018] UKSC 65, [2019] IRLR 316 the Supreme Court was referred to passages in the Equality and Human Rights Commission's Code of Practice on Employment (2011), which suggest that unfavourable treatment involves putting the disabled person at a disadvantage, which would include "denial of an opportunity or choice". Lord Carnwarth (at paragraph 27, the other Justices concurring) agreed with a submission*

> *"…that in most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a "subjective/objective" approach. While the passages in the Code of Practice to which she [counsel] draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section."*

259. In our judgement, the treatment of the claimant in not having those discussions with the claimant, and not explaining/ offering an adjusted phased return to work or a part time working arrangement in the UKSV ultimately amounted to a denial of an opportunity to the claimant which was to his potential detriment and can fairly be described as unfavourable treatment. It deprived the claimant of a possibility that was not fanciful.

260. The treatment was because of something arising in consequence of the claimant's disability. One of the reasons for not having the conversation with the claimant was because of his absence on sick leave and the sense he should not be overly pressured. It was a material influence in terms of the decision-making process.

261. The respondent says the treatment can be objectively justified, relying on the legitimate aims of reasonably managing the claimant's expectations as to the requirements of the SV role and respecting the claimant's decision in order to avoid placing undue pressure on the claimant to change his mind. The respondent says that this allows an employee freedom of choice without being placed under pressure to do a role which they may not feel comfortable undertaking. It is said this is particularly poignant when dealing with disabled employees who are not yet deemed fit in any capacity to return to the workplace.

262. We accept that managing an individual's expectations, and not placing undue pressure on an employee, particularly an employee absent with a

mental health condition, are legitimate aims. We do not, however, consider that the respondent's actions were a proportionate means of achieving that aim. As already set out above, we consider that the respondent could reasonably have had the kind of conversations outlined above without putting undue or unreasonable pressure on the claimant. Moreover, we consider the respondent had a responsibility to do so. The claimant was under a 12 week action plan to return to work, a failure to comply with left him at risk of ultimately being called to a stage 3 meeting. Given the claimant had withdrawn from the UKSV role, what was happening with a potential return to work needed to be reviewed with him or he would be left in an even more pressured situation than that which the respondent says they were seeking to avoid. Subject to limitation considerations we would therefore uphold this complaint of discrimination arising from disability.

Other modified working considerations – pre dismissal

263. The claimant told Ms Batt, Sergeant Childs, Inspector Musto and later on Inspector McIlwraith that he wanted to return to work as a part time AFO. The possibility of part time working was discussed at the meeting on 8 May 2018 and the claimant was told words to the effect that he would have to return to his role as AFO on a full-time basis to see how he managed before being considered for part time working.

264. On 30 May 2018 the claimant emailed Ms Batt requesting that full consideration be given to a formal request for part time working. Ms Batt sent her response on 5 June 2018 saying, "*you will need to attempt a phase return to work with an expectation of achieving 40 hours before part time working can be considered as an adjustment*." She also said, "*You will need a letter from your GP and OH Assist to confirm that you are permanently incapacitated in doing 40 hours per week"* and "*If you can achieve full operational capacity in the future then a part time working contract may be a consideration."*

265. On 11 June 2018 the claimant told Sergeant Childs that the advice of his treating practitioners was that a return to his job role should be on a part time basis for the foreseeable future and he asked for the paperwork to make a formal part time working application. On 13 June 2018 there was a telephone conversation between the claimant and Inspector Musto, for which there are no records available. However, it was followed up in an email from Inspector Musto in which he said "*As I mentioned, you have a statutory right to apply for part-time working. You would have to state your reasons; you cannot just want to work less hours. As I also stated I can support a personal need, but I would not currently support it from a business perspective as I have a shortfall of officers due to sickness,*

capability and 3 down on station numbers. However, the final decision would be made by a senior police manager in Frontline Operations."

266. On 13 September 2018 Inspector McIlwraith told the claimant that his application "*could not be considered at this time as he was not fit to conduct the role in a full time capacity*." On 27 November he told the claimant that MDP Hereford would not be able to accommodate part time officers at that time.

267. During the same timescales the respondent was offering the claimant a phased return to work. The respondent's position was and remains that was the optimal solution for the claimant. However, we have already found that the impression that the claimant was given about this at the time was that it would require a relatively swift progression in hours to get back to full time hours. The claimant felt pressured by this and that he would not be able to cope; hence his intense focus on achieving a formal part time arrangement.

268. In the Tribunal's judgement there were several things going on here. Firstly, the respondent was communicating the message to the claimant that a phased return to work would be a relatively short return to full time hours. Secondly, the respondent did not understand why the claimant did not think a phased return to work would be suitable for him health wise and therefore why he was pushing for a part time contract. Thirdly, the claimant needed to requalify and reaccredit as an AFO. He needed to get fit and pass the fitness test. There was a lot to be done to get him back fully operational which included attending courses. We find it likely that the respondent did not consider it was practical for that kind of requalification to be done on a part time basis because it would take a long time to achieve. Ms Batt, Inspector Musto and Inspector McIlwraith said as much in their oral evidence. Fourthly, the respondent considered that even if the claimant completed his reaccreditation and requalification, they did not have the operational resilience that would allow them to grant a part time working application or job share to the claimant as an AFO at Hereford at that time in any event. Moreover, part of the respondent's difficulties in granting a part time working or job share arrangement lay in the uncertainty of when the claimant would be operationally fit. Fifthly, the respondent did not consider that they had other non-operational duties that they could give to the claimant at Hereford as a viable, substantive long-term role. Hence why the claimant was being directed by the respondent down the route of a phased return to work with light duties and starting work on his requalification as an AFO.

269. In terms of analysis this breaks down into two central complaints. First, not offering or giving the claimant a reduced hours arrangement for non-operational rehabilitative duties before he returned to being an AFO.

Second, not giving the claimant part time working or job share as an operational AFO at Hereford for a future date when he was well enough to return as such, or another substantive posting.

Reduced hours arrangement for non-operational rehabilitative duties

Reasonable adjustments

270. The claimant sets out his proposed PCPs at paragraph 5 (c)(i) of the List of Issues. Bearing in mind our findings on the evidence in the case we would cast them in a slightly different way. First, a PCP that a phased return to work plan would require relatively swift progression through to a return to full time hours. Inspector Musto thought that was what the Chief Constable's drive on attendance management required and it would amount to a PCP. It was a practice or a policy that was repeated by Inspector McIlwraith when he took over from Inspector Musto. Second, a PCP that requalification and reaccreditation as part of rehabilitative duties to return to being a fully operational AFO would not be done on the basis of a formal part time working arrangement.

271. The communicated restrictions around a phased return to work disadvantaged the claimant because he felt unable to return because of a lack of control over working hours and the pressure he thought he would not be able to cope with. He remained on sick leave, subject to the UAP and at risk of dismissal. A non-disabled officer would not be in that situation. The respondent ought reasonably to have known of that disadvantage.

272. The Tribunal is satisfied that the were steps the respondent could have reasonably taken to alleviate the disadvantage caused by the first PCP. Our findings mirror those already made above in relation to the UKSV role. The respondent could have better communicated with the claimant to understand what his perceived difficulties were with a phased return to work, and why the claimant was therefore pressing for part time working and then offered or made clear to the claimant that he could have a flexible or longer-term phased return to work as an AFO. For the reasons already given in relation to our analysis for the UKSV role we are satisfied that there is sufficient prospect of this alleviating the disadvantage such that that there was a prospect of the claimant then trialling a phased return to work programme. He said again in his formal flexible working application that he felt well enough to return to work on part time hours. It therefore would have been a reasonable adjustments to take these steps. As before, an assessment of the size of that prospect is a matter for remedy.

273. The second PCP that requalification and reaccreditation to become a full operational AFO would not be done on the basis of a formal part time working arrangement disadvantaged the claimant as he did not feel well enough to return full time and had not been told that a phased return to work could be longer and more flexible. He therefore lost a potential opportunity of a return to work. A non-disabled officer would not have been in that position.

274. The Tribunal considers that an adjustment that could reasonably have a prospect of alleviating that disadvantage is closely linked to the above. If there had been better communication about the flexibility of a phased return to work, then the claimant's reaccreditation and requalification process could have happened as part of that phased return. There would not have been a need for formal part time working arrangements. The claimant's needs would have been met. The claimant himself never said he wanted to permanently work part time, including within his part time working application form. It was part of what reasonably could have been done that had a prospect of the claimant trialling a return to work in his substantive role.

Discrimination arising from disability

275. The respondent did not communicate and offer the claimant a sufficiently flexible phased return to work in May 2018 and thereafter. The claimant was instead told that he would have to progress in a phased return to work relatively quickly, and that he could not have a part time arrangement. The respondent disputes that this was unfavourable treatment on the basis that the claimant was not medically fit to return to work at any stage. It is said that if the claimant had been placed back in the workplace the respondent would have breached their own health and safety duties to the claimant, which is a heightened concern given his role as an AFO. It is said that to have done anything other than to wait and see through medical reviews would have been to treat the claimant unfavourably.

276. The tribunal finds that was unfavourable treatment. For reasons already given, being clear with the claimant about how flexible a phased return to work could be, was the first step in a process that had a prospect of returning the claimant to the workplace. It was a sufficient loss of an opportunity such as to amount to unfavourable treatment. The claimant would not have been returning as an operational AFO on rehabilitative duties and therefore it would not give rise to the health and safety concerns identified.

277. The unfavourable treatment happened because of a lack of communication and understanding of the claimant's condition and his needs. Communication difficulty was part and parcel of the claimant's

depression. It needed the respondent to make more of an effort to engage with him and understand his concerns as the claimant was less likely to lead the discussion because of his mental health condition. The reason for the treatment was, in part, therefore something arising in consequence of the claimant's disability.

278. The respondent relies on the legitimate aims of having regard to OH advice/ medical advice and requiring OH advice/ medical advice to set out that an employee is at least fit for work in some capacity in order to consider and/or make any offer of an alternative working arrangement as a reasonable adjustment. The respondent also says there was a legitimate aim of the need for an employee in an AFO role to be medically fit for work at least in some capacity.

279. The Tribunal, leaning on its own industrial experience, accepts that it can be difficult for an employer to set out the finer detail of a complete phased return to work plan without knowing a likely return to work date and without having occupational health advice on likely hours of work, type of work etc. However, that is not what was needed here. The respondent was able to set out the broad framework of what a return to work would potentially look like. Inspector Musto did that in his email of 13 June. What was needed was open dialogue with the claimant about what was, in his mind, the difference between a phased return to work and part time working. This would have been likely to have led to an understanding on the part of the respondent as to what the claimant's perceived barriers to a phased return to work were. In turn that would have given the respondent an opportunity to be clear to the claimant that the phased return to work could be flexible or longer term and would not be pressured to the detriment of his health. There was no need to have occupational health advice to have that conversation.

280. As already said, the Tribunal is satisfied that there was a prospect that some common ground could have been reached which may have led to a proposal being put to occupational health about the broad framework of what that phased return to work could be. Ultimately the OH advisor would have to give his view (as would the claimant's GP), however it is the Tribunal's industrial experience that there is a better prospect of that potentially happening when the employee and the employer have the bare bones of a proposal in mind. It would also not have jeopardised the claimant's health and safety or the health and safety of other AFOs and the public. The claimant was not, as part of a phased return to work, about to have access to his firearms. It was clear from the respondent's own evidence he would be returning initially in a non-operational capacity to start with whilst his retraining needs were assessed and then implemented. We therefore do not find that the respondent's actions or inactions were a proportionate means of achieving a legitimate aim.

Subject to limitation (addressed below) we would find in this context that there was a failure to make reasonable adjustments and discrimination arising from disability.

Refusing the claimant part time working as an operational AFO at Hereford for a future date when he was well enough to return as such or an alternative substantive posting.

Reasonable adjustments

281. We find that the respondent applied PCPs that at that time part time working or a job share arrangement as an operational AFO (once the claimant was fit to be one) at Hereford would not be accommodated and that to return to work substantively at Hereford, after a phased return to work and requalification process, had to be in a role as AFO.

282. We do not find that the respondent applied a PCP of "only submitting requests to front line operations where officers were fully operational and/or had passed fitness and tactics training." There was not sufficient evidence before us that there was such a practice in place. We were not able to make positive findings as to what happened with the claimant's formal application form, however, there is also nothing to demonstrate a level of actual or anticipated repetition.

283. In relation to the first PCP, the substantial disadvantage suffered by the claimant was that the claimant considered he needed to work part time and the lack of that opportunity risked keeping him on sick leave and under the UAP. The reasonable adjustment that would have alleviated this disadvantage again is the same we have already set out; namely clear communication and opportunity of a flexible longer term phased return to work. A part time working or job share arrangement as an AFO was not reasonably needed to alleviate the disadvantage. The claimant was not saying, even in his formal application form, that he had a permanent need to work part time or in a job share arrangement because of his health condition. The letter from Dr O'Toole in the community mental health team supported "wanting to return on a part-time basis initially."

284. The second PCP that the long-term role that the claimant had to return to was as an operational AFO was not what was causing the claimant the substantial disadvantage at the relevant point in time. He wanted to get back to being an operational AFO. The respondent could accommodate lighter duties as part of a phased return to work and whilst the claimant was rehabilitating and requalifying. What was causing the claimant substantial disadvantage was again the lack of communication and flexibility about the phased return to work.

285. We would not, in any event, have found it to be a reasonable adjustment to have offered the claimant a part time working or job share arrangement as an AFO at Hereford, or an alternative substantive post that was not as an AFO. We accept that the respondent did not have any alternative substantive posts at Hereford that were not as an AFO. We do not consider that it would be reasonable to require the respondent to create one. We accept there are temporary light rehabilitative duties that the claimant could be given to do such as administrative tasks, property management, operating the control room and assisting manning entrances (supporting AFOs). We accept, however, that there is a difference between allocating such duties on a temporary rehabilitative basis and creating from scratch a whole new role made up of those different things. The respondent's need was for AFOs.

286. We also do not find that it would have been a reasonable adjustment, based on the respondent's needs at that time, to have granted the claimant a part time working or job share arrangement as an AFO. At the Hereford Garrison they were already working below establishment numbers and facing budgetary cuts. They were carrying high levels of overtime and had concerns about working hours breaching the Working Time Regulations. The respondent had requirements as to numbers of AFOs to be supplied to meet the needs of their clients at the Hereford Garrison and its sister site under the General Statement of Operational Requirement. For that site the paid requirement was for all AFOs because it was a high level terrorist risk site.

287. The claimant argues that because the respondent ultimately coped with his complete absence, then they could accommodate part time working, and that it would be better to have him in work than not at all. However, the Tribunal considers that oversimplifies matters. To be requiring other officers to work long hours to provide cover, particularly in a highly security critical role, we accept would be a serious matter and one of increasing seriousness as time goes on. Further, to say that a part time working application should be granted, as otherwise the officer will not return at all, also seems on the face of it to be a means to potentially force through something that could be overall detrimental to the employer at that time. It would hold an employer over a barrel. The respondent's other option would be further recruitment of AFOs, but given the specialist nature of the work and the qualifications, that was not something that could be used as a quick fix.

288. In terms of wider redeployment, we did not have sufficient evidence before us as to any dog handler vacancies. We accept that the claimant at the time told Inspector McIlwraith that he did not want to pursue a transfer to the MGS or other civil service vacancy and that he wanted to return to and remain as an AFO.

Discrimination arising from disability

289. In terms of not offering the claimant part time working or a job share in his substantive AFO role or requiring the claimant to return, after rehabilitation to his role as AFO full time, the respondent argues that it cannot constitute unfavourable treatment because the claimant was not medically fit to return to work at that point.

290. The loss of an opportunity can potentially amount to unfavourable treatment. In our judgement, it is reasonable to view the rejection of an application to work part time or in a job share as being unfavourable treatment to someone who is interested in it and has an expectation that it may be a potential option, even if it relates to a future date. Historically there had been AFOs working part time hours at Hereford and it was something that Ms Batt had couched with the claimant.

291. Outside of that, we do not consider that it has been established there were other substantive jobs that were available at Hereford and we do not consider it can be said to be unfavourable treatment to not offer an opportunity that did not in any event exist. We have also found that the claimant ultimately did not want to explore wider job opportunities.

292. The rejection of the part time working or job share request (or saying that the claimant had to work substantively as a full time AFO) was largely for operational reasons; the respondent was under establishment numbers and short staffed. Other officers were being refused at the time, for example the female AFO Ms Batt talked about. In addition, and linked to this, it was difficult to grant in circumstances where the respondent did not know when the claimant would be fit and deployable for full AFO duties. The claimant's unfitness and uncertainty about his future deployability was in consequence of his disability. To that extent the decision to reject the request was therefore because of something arising in consequence of the claimant's disability. It was a material influence.

293. Turning to justification, the Tribunal does not consider that the respondent did a good job of explaining to the claimant what was really going on behind the refusal of part time working. The true position was that the claimant's substantive role was as an operational AFO. He was not fit for that role. He would have to go through a period of reaccreditation, requalification and assessment before he could return to full operational AFO duties. The respondent was short on operational AFOs. To grant a formal part time working request involved agreeing that the claimant, after his requalification process, would continue on a part time basis. It was not

felt that operationally they had such a role for the claimant at that time. Further, it was unknown exactly when the claimant would be fully operationally deployable again as an AFO even if he did return to work. So the respondent, if it granted the request, would be committing to something that would impact operationally on an unknown point in time in the future in what was already an operationally difficult environment.

294. The respondent says their legitimate aim was the need for OH/medical advice saying that an employee is fit for work in some capacity in order to be able to consider or make an offer of alternative working as a reasonable adjustment. The Tribunal accepts that was a legitimate aim in the sense of being part of a wider legitimate aim relating to the need to be able to plan for the operational deployment and operational resilience of AFOs to meet the respondent's contractual commitments to their clients. It is difficult to do that workforce operational planning, including considering, part time working and job share arrangements for substantive AFOs if as an employer you do not know what point in time it is being sought for. In turn that requires medical advice/ OH advice as to the likely fitness of the individual.

295. We therefore find that the refusal of the claimant's part time working application was proportionate to that aim. As already stated, we accept that the respondent was facing serious deployment issues. They were already working below anticipated numbers and facing budget cuts. They were carrying high levels of over time and had concerns about working hours breaching the Working Time Regulations. To be requiring other officers to work long hours to provide cover, particularly in a high security critical role we accept would be a serious matter and one of increasing seriousness as time goes on. The respondent had contractual requirements of AFO numbers to meet at sites involving national security requirements.

296. The impact on the claimant meant that he was deprived of something that he saw as a potential opportunity, that would facilitate his return to the workplace (albeit we have found that better communication and a more flexible phased return to work plan would have addressed the same need). Balanced against the needs of the respondent, we are satisfied that the operational requirements of the respondent at that time were serious and real and it was reasonably necessary to the workforce planning aim to refuse part time working applications for AFOs at that time including those looking to return to work as substantive operational AFOs at a future date. We do not consider that there were lesser measures that would have met the workforce planning aim.

Modified working - Indirect disability discrimination

297. We have set out our findings above in relation to PCPs. The claimant has not led any evidence in respect of particular disadvantage of his class of disabled people (those with depression) as against persons who are not disabled or disabled but not with depression. We therefore do not find the complaint of indirect disability discrimination well founded and it is not upheld.

The decision of Sergeant Childs and Inspector McIlwraith only to extend the claimant's Final Written Improvement Notice period by 8 weeks following a review meeting with the claimant on 13 September 2018 (paragraph 53.5 of claimant's closing submissions)

298. For the reasons discussed at length above, discussions in May 2018 about a potential return to work as set out in the Final Written Improvement Plan did not come to fruition. The claimant did not pursue the UKSV role. The confusion or miscommunication about phased return to work versus part time working was ongoing. The claimant did not return to work. Inspector Musto retired and Inspector McIlwraith took over as the claimant's second line manager. On 10 July 2018 OHA advised the claimant remained unfit for work in any capacity and it was unlikely workplace adjustments would help at that time. But Dr Scott was hopeful that the claimant would be able to resume work within the next two months or so. The claimant put in his formal part time working application.

299. At the review meeting on 13 September 2018 the claimant was reporting that his medication had been increased, it was making him tired, and it would take up to 6 weeks to take effect. He had only just started with the life coach. The claimant was told he could not work part time and there was a discussion about a phased return to work. The claimant said he wanted to return but could not give any timescale. Sergeant Childs told the claimant there would be another OH referral including consideration of ill health retirement. The claimant said he did not want that. The potential of a transfer to another MOD department was raised and Inspector McIlwraith said he would look at possibilities in the Cardiff area. The claimant was told another review would be conducted in 3 months to allow the claimant to consider his health and the options available in relation to ill health retirement and a transfer within the MOD. The Final Written Improvement Notice was extended to 17 November 2018 to "ascertain development" (which was 8 weeks rather than 3 months). Inspector McIlwraith said in his emails to Ms Foster that he was gauging development for any phased return to work and so that the claimant could think about other options such as ill health retirement, and transfer within the MOD. There was also to be another OH review.

Discrimination arising from disability

300. Extending the Final Written Improvement Notice by 8 weeks as opposed to a longer period was unfavourable treatment as the claimant was at risk of being called to a stage 3 meeting at which he could be dismissed. It was because of something arising in consequence of his disability, namely the claimant's ongoing sickness absence.

301. It is not in dispute that upholding the respondent's requirement for satisfactory attendance is a legitimate aim. Was extending the Final Written Improvement Notice by 8 weeks a proportionate means of achieving that aim? We have dealt with separately above the position in relation to phased return to work and part time working. This was another instance where that opportunity was missed. However, in terms of the Final Written Improvement Notice extension itself and the reasonable needs of the respondent, Inspector McIlwraith was facing the position of the claimant having been absent from work for some 16 months, there was no indication of when the claimant would be likely to be able to return to work (other than the OH suggestion of 2 months which had by then passed), and he had, we accept, long term difficulties with covering operational capacity at the site. The steps that Inspector McIlwraith had in mind (time for the claimant's medication change to bed down, further OH advice, exploring redeployment opportunities) were sensible ones. The discriminatory impact on the claimant was the continuation of the attendance procedures against him and the fact he would edge closer to being called to a stage 3 meeting. The claimant said in evidence that he was content with the extension as it would give time for his medication change to settle down. Taking all this into account the Tribunal considers the period of extension of 8 weeks was a reasonable one. We consider it was a proportionate means of achieving a legitimate aim. The claimant says that to give him longer would have been a lesser measure and would achieve the same aim. But it is not said what that period would be, other than each stage could be up to 12 months (which we have already addressed above). In the position that Inspector McIlwraith faced at the time it was proportionate step.

Reasonable adjustments

302. In terms of the PCPs, it is not in dispute that the respondent applied a PCP of "*submitting officers to the UPP relating to attendance when they reach a certain level of sickness absence leading to formal hearings and warnings that could eventually culminate in the employee's dismissal"* and *"requiring employees to maintain a certain level of attendance at work in order not to be subject to attendance management hearings, FWINs and other warnings or sanctions up to and including dismissal."* The claimant also relies on a proposed PCP of "*setting formulaic action plans at the*

various stages of the process." The respondent disputes that there was any practice of setting formulaic action plans. As above, we agree the claimant's action plans were not formulaic.

303. The continued application of the UAP and under that the extension of the FWIN by 8 weeks did place the claimant at a substantial disadvantage as he remained under the pressure of the process that was ultimately moving towards his potential dismissal. A non-disabled officer would not be in that situation. The respondent knew of this disadvantage. We do not consider it would have been reasonable to give a longer extension to the Final Written Improvement Notice for the reasons already given above. We do consider that it would have been reasonable to engage with the claimant about the issue of flexibility in a phased return to work and the issue of why the claimant was pursuing part time working, for the reasons already given above that we have already found was a failure to make a reasonable adjustment.

The decision of Sergeant Childs and Inspector McIlwraith to move the claimant to stage 3 (paragraph 53.6 of the claimant's closing submissions)

304. The next OH report of 15 October 2018 advised that there had been little improvement and that a report was being obtained from the claimant's GP. There was a stage 2 review meeting on 27 November 2018. The claimant by that time was expressing some frustration with his medical treatment. He was on his fifth set of medication and was feeling constantly tired and often blank minded. He was trying to see a psychiatrist again but did not have an appointment until May 2019 and was seeing if he could find the funds to go private. The claimant said he had looked at some other jobs on the civil service website but had not given them much consideration as he wanted to return to MDP Hereford. He did not want to consider ill health retirement. Inspector McIlwraith said again that there could be a phased return to work with an expectation of being back full time after 3 months. The claimant said he was not ready to return on a phased return basis. Inspector McIlwraith said that part time working at MDP Hereford could not be accommodated.

305. Inspector McIlwraith said that he could not see any significant progress to full capability to allow a further extension to the FWIN and he would have to consider the options before moving the process forward to stage 3. A further OH report was outstanding so, in fact, Inspector McIlwraith waited for that to be received. Dr Scott advised that it was unlikely but not impossible the claimant would recover sufficient to return to work in 6 to 8 weeks. He still expected the claimant to recover but could not say when. He noted that the claimant was due to see his GP again in the new year and there may be a further change in medication, which could take several months to initiate. Inspector McIlwraith considered that the medical

evidence did not materially change matters and he then passed the papers to the Performance Assessment Unit and Ms Foster liaised with DCC Terry about deciding to call the claimant to a stage 3 meeting.

Discrimination arising from disability

306. The decision to progress the claimant to stage 3 was unfavourable treatment and it was because of something arising in consequence of the claimant's disability (his sickness absence). The legitimate aim of upholding satisfactory attendance is not in dispute.

307. We have already made a separate finding above that it was unfavourable treatment not to have fully explored a flexible phased return to work with the claimant. That had a prospect of stopping this eventuality even occurring.

308. However, aside from that and looking things as they then were, we do find that the respondent's actions in calling the claimant to a stage 3 meeting was a proportionate means of achieving that legitimate aim. The claimant had been absent from work for 18 months. The occupational health advice was uncertain of when the claimant would be fit for a return. The claimant did not want to explore other redeployment options. The respondent was facing operational pressures to staff Hereford. The impact on the claimant is clear; he would face a stage 3 meeting which included potential dismissal. However, this was a decision to call the claimant to that meeting. It was not actually the decision to dismiss him. The claimant would still have the opportunity to put forward whatever evidence he would wish as to why he would say he should not be dismissed. We do not consider that extending the claimant's Final Written Improvement Notice by a further period would have been reasonable on the position as it was understood at the time. There was nothing to say as to what that would achieve other than simply waiting to see whether the claimant's health would improve. There is no particular period that the claimant has said would have made a difference and still have achieved the respondent's legitimate aim.

Reasonable adjustments

309. The same suggested PCPs are relied upon as above. The application of the UAP and, in particular, the requirement to attend a stage 3 meeting, was the application of a PCP and it was to the claimant's substantial disadvantage as he was being called to a meeting where he would face dismissal. A non-disabled officer would not be in that situation.

310. As above, dealing with the possibility of a flexible phased return to work, had a prospect of removing that disadvantage and to that extent there was

a failure to make a reasonable adjustment that we have already found. Otherwise, as things stood at that point in time, we do not consider that it would have been a reasonable adjustment to have further extended the Final Written Improvement Notice or delayed the calling of the stage 3 meeting. This is for the reasons given in respect of the discrimination arising from disability claim.

Application of the absence management process - Indirect disability discrimination

311. The claimant asserts that the respondent's adherence to the UAP giving rise to warnings and staged absence meetings was indirect discrimination. The claimant relies on the same PCPs as put forward for the reasonable adjustments claims relating to the application of the absence management procedure. Again, there is no evidence before us in support of particular group disadvantage and this complaint is not well founded and is dismissed.

Stage 3 Hearing Pack

312. The claimant received his hearing pack on 24 January 2019, 5 days before his hearing. The claimant says that this amounted to a failure to make reasonable adjustments or indirect discrimination. The claimant says the respondent applied a PCP of "providing hearing packs shortly before attendance management hearings, including up to 5 days before."

313. The Tribunal is not satisfied that it has sufficient evidence before us to find that there was such a PCP. That it happened to the claimant, does not of itself indicate that it had happened or would happen in other cases. There is no evidence before us, for example, from the DPF saying that this was regularly happening. It was not said, for example, by them in the transcript of the stage 3 hearing when protesting about the lateness of the claimant's pack. It is reasonable to suppose the DPF would have identified that it was a routine problem, if they saw it as such, so as to bring it to DCC Terry's attention. The lateness in the claimant's case appears to relate both to the claimant's lateness in submitting his own personal statement, and with Ms Foster receiving some papers from the claimant's line management late. There is no doubt that is regrettable (although the claimant did not seek a postponement of the hearing on the basis) but it does not mean that it amounted to the application of a PCP, as opposed to being something that happened in the claimant's particular circumstances. These individual complaints of a failure to make reasonable adjustments and indirect discrimination are not well founded and are dismissed.

DCC Terry's approach to the stage 3 hearing

314. The Tribunal have read the whole transcript of the stage 3 hearing. It is simply not practical to summarise it in detail. But it is important to be clear when setting out our findings in respect of the allegations relating to the stage 3 meeting that in our deliberations, we took particular care to assess each individual allegation within the context of the entire stage 3 meeting transcript.

315. At the start of the meeting Sergeant Childs read out his written management report. The claimant then had the opportunity to speak, as did his DPF representatives. DCC Terry then said there were a couple of things he wanted to unpick with the claimant. It is alleged by the claimant that DCC Terry did not have any queries to raise with the management side but that he "embarked on a long, robust and at times aggressive line of questioning of the claimant."

316. In particular, it is alleged that DCC Terry aggressively confronted the claimant with the fact that DCC Terry had spoken to Inspector Carr about the UKSV role in advance of the stage 3 meeting. DCC Terry said that he was concerned about what the claimant had written about the way the role was sold to him, and therefore he had questioned Inspector Carr. DCC Terry said that Inspector Carr "*has a completely different recollection of that conversation", "completely different."* DCC Terry said that Inspector Carr did not recall saying anything about the role being on the claimant's head and "*ruining people's careers."* DCC Terry said he had questioned Inspector Carr as the claimant's report had caused him a lot concern. DCC Terry said again "*Inspector Carr has a completely different recollection of that conversation."*

317. The claimant gave his account of the conversation with Inspector Carr. The DPF also drew attention to the text message the claimant had sent to Inspector Carr (which had not been supplied in advance of the hearing) and DCC Terry looked at it on the claimant's phone and read it into the hearing record. The claimant alleges that DCC Terry was confrontational and seemingly disbelieving of the claimant in repeatedly emphasising that Inspector Carr's recollection was "*completely different*."

318. DCC Terry then asked the claimant how much he was paying for his health insurance each month and asked the claimant "*why didn't you refer to private medical insurance immediately.*" The claimant said that he did, and DCC Terry repeated the question again. The claimant again said that he did go straight to private treatment and that he had seen a consultant, Roger Thomas at the outset in June. It is alleged that this question made an incorrect and unfavourable assumption about the claimant.

319. The claimant also complains that DCC Terry implied that the claimant had changed his story. DCC Terry stated "it *may be me reading too much into the station but your language has changed somewhat".* DCC Terry put it to the claimant that, in his statement, he had said he had a consultant's appointment coming up, but now seemed to be saying that his GP had somebody who the GP could refer the claimant to. DCC Terry asked the claimant if he had a firm appointment date. The claimant said it would be within the next week or so. The claimant explained there had been a delay with getting blood tests which were needed before the GP could do the referral. The claimant said that he had the name of the consultant but was waiting for the GP to make the formal appointment, with the GP being tied up on house calls. DCC Terry then said "*But at the moment, anyway, you said your doctors got somebody who he might be referring, he's got someone in mind. Now you're saying you've actually got a fixed name of a consultant."* It is said that these comments by DCC Terry were unwarranted.

320. The claimant's DPF representative explained, as the claimant had, that the claimant's mood was feeling better but his current problem was fatigue. The DPF representative explained that the claimant had been referred for blood tests to see whether there was anything abnormal or to do with the medication and the result came back with a vitamin D deficiency. DCC Terry said "*probably 50% of the population has got because of the sunshine this time of year."* It is said that this comment was dismissive of the claimant and seemed to imply scepticism that the claimant's symptoms were not as serious as he was suggesting.

321. DCC Terry also referred to the fact that the stage 2 written improvement notice had asked the claimant to engage with the PTI about the fitness test. He said "*then within the review on the 14th of September it says you hadn't engaged with anybody in relation to fitness and the guidance through… I would imagine, and correct me if I'm wrong, but I would imagine your GP would've said that exercise is good for your mental wellbeing. And I just wonder why you didn't take the opportunity to engage with the PTI.*" It is said that this question again made a wrong and unfavourable assumption. The claimant's DPF representative went on to say that the claimant had tried to engage about the PTI but had been "*fobbed off."*

322. DCC Terry then said that his final question was, if the claimant came back to work "*You may be called upon to apply lethal force, either in defence of yourself or in defence of another. Do you have a view as to how that would affect your mental wellbeing bearing in mind the scrutiny you will come under if you do pull that trigger? Because you explained that there was a reluctance to take a decision that might affect somebody's career in relation to vetting. It's a far harder decision to take a decision to kill*

somebody in defence of you or your colleagues, or members of the public." The claimant said that his mental health had vastly improved and was completely different from last year. He said it was just tiredness he currently had. He said there would be no hesitation in acting appropriately and his condition would not have a negative impact upon him.

323. DCC Terry said "*Just, just for the record and to reassure you. I've always been a great believer and I'm sure my colleagues are exactly the same there is a parity of esteem between physical and mental illness. There's nothing, it is no more to feel embarrassed about than it is breaking a leg, they're both illnesses. Please do not feel embarrassed about the fact that you've had a mental illness because its not different from breaking a leg, breaking your arm or any other type of illness…"*

324. Superintendent Pawley then asked the claimant about the UKSV role, asking the claimant if he had tried to talk to anyone who had actually done the role. Superintendent Pawley said "*'Cause I was just talking to a colleague who's working next door at the moment, he's been doing it for 12 months and I thought that, you know, she would be a really good person to talk to."* The claimant agreed and said he had spoken to the same individual that morning and that her take on the role was different to what he had thought at the time.

325. After some further questions from Superintendent Pawley and Superintendent Yates, DCC Terry asked "*Give me a timescale as to when you think you'll be better. If you were, if you had to try and pinpoint when would you anticipate being back at work and ready to carry a gun."* The claimant said he would like to say ASAP and that he just wanted to speak to the consultant and clear his tiredness. He said he would like to think certainly it would be within the next month or two.

326. After a break for deliberations the stage 3 panel returned to give the findings. DCC Terry referred to the claimant's treatment history. He said, "*PC Williams has been given the opportunity to work in an office-based environment but did not wish to take the responsibility for decisions he would be required to make."* DCC Terry summarised the OH report from December 2018, and in particular, that the OH advisor had said that the claimant was much the same as when they had last met in July and "I *cant say exactly how long it may be before he is well enough again."* DCC Terry said that this OH statement had been made following the claimant being sick for 19 months and that it was indicative of the slow rate of progress being made. DCC Terry said the claimant had failed to complete the conditions of his Final Written Improvement Notice. DCC Terry said that the claimant had stated that his intention was to return to work but that the claimant was unable to state when he would be ready to work, and the best he could offer was to say it would be as soon as possible.

327. DCC Terry concluded "*The information before us suggests there is now no prospect of a return to work within a timeframe that can be determined on the officer's admission or within a reasonable period of time if the Written Improvement Notice was extended…*" DCC Terry said that the panel did not consider redeployment to alternative duties in the Force would be successful. He therefore said that the claimant would be dismissed with 5 weeks' notice.

328. After confirming the finding DCC Terry went on to say that he was sorry it had come to that outcome and that "*one of the reasons you may not be getting well is that you may not be progressing towards the career that you actually want or could actually perform and I really do have those concerns about what we would be doing to you putting you in a position where you might have to kill somebody and it, it may be time now for you to now to actually look towards something, a career that you could find yourself happier in that doesn't place the demands upon your mental wellbeing that we've obviously placed upon you."* He also said "*at this moment in time we have you as being in this career for 47 months and you spent 20 months of that off sick, and we have to have a clear timescale of when you can get back to work and get you back on the guns and at this moment in time none of the panel can actually foresee the time you get back."*

Was DCC Terry largely dismissive of what the claimant had to say in support of allowing him to continue in his employment with the respondent? Was DCC Terry rude and abrupt? Was DCC Terry accusatory in terms of his line of questioning? Did DCC Terry conduct the meeting in a way that demonstrated poor body language? Were the other panel members complicit in this behaviour?

329. The Tribunal considers it likely that DCC Terry attended the stage 3 meeting in a frame of mind where he did not think it likely there were duties the respondent could give the claimant to do that would get the claimant back to work. We consider it likely that DCC Terry had formed the view that the claimant had turned down the opportunity of doing some office-based work as a way back into the workplace (the UKSV role) and that he also could not see a prospect of getting the claimant back as an AFO, or "*on the guns*" as he put it.

330. We consider that DCC Terry's questioning of the claimant reflected that mindset. DCC Terry was seeking to both get the claimant's comments on some matters that were unclear him but more importantly he was seeking to challenge the claimant on issues he thought were potentially relevant as to whether, in reality, the claimant was likely to return to work and the claimant's commitment or motivation to that end. DCC Terry was seeing

whether the claimant could persuade him to change his provisional mindset.

331. The occupational health report did not give a firm indication of when the claimant would be likely to return. The claimant had been absent for 20 months. The claimant had not produced alternative medical evidence saying when he was likely to be fit. The claimant did not have a set date that he was due to see a consultant and get a consultant's report about returning to work, although he explained he was urgently getting those steps in place. The claimant was not himself giving a precise date when he thought he would be likely to return. It was inevitable that DCC Terry would therefore ask the claimant some of the types of questions that he did about returning and why the questions were focussed on the claimant rather than management.

332. To that end, the Tribunal considers it is understandable that DCC Terry was trying to understand what was happening with the consultant's referral and whether the claimant was saying he had an actual appointment, and if so when, or whether it was something less than that. The claimant then had the opportunity to explain what the situation was.

333. Asking the question about not referring to private medical insurance immediately, was, in the Tribunal's judgment, simply a question from DCC Terry. The claimant was expressing frustration with the slowness of the NHS and was saying that he was trying to use his BUPA policy to get a consultant's appointment more quickly, if he could fund the excess. The Tribunal cannot see how DCC Terry would have know the claimant had in fact seen a private consultant early on in his sickness absence. There is no reference to Mr Thomas or a report from Mr Thomas in the documents that we have seen. It was just a question from DCC Terry and nothing more sinister than that.

334. Similarly asking the claimant about not taking the opportunity to engage with the PTI was, in the Tribunal's judgment, simply a question that DCC Terry asked because that was how the stage 2 paperwork talked about it. The claimant was given time to, explain in position in response to these questions. DCC Terry's comment about a vitamin D deficiency was, in the Tribunal's view, an innocuous comment made as part of their conversation. The claimant himself said later on in the meeting that even his GP "*said well that's nothing*", that the GP had been looking for other potentially serious causes, and that it was simple to address.

335. The Tribunal was somewhat troubled about DCC Terry's questioning of Inspector Carr and how he then presented that to the claimant, several times, as Inspector Carr having a completely different recollection. As we have already said DCC Terry entered the meeting with a perception that

the claimant had turned down the opportunity that Inspector Carr had offered. We consider it likely that DCC Terry's statements to the claimant about Inspector Carr's version of events, reflected somewhat of a belief going into the meeting that DCC Terry believed Inspector Carr's version of events.

336. The Tribunal was particularly troubled about DCC Terry's questioning of the claimant about whether he would be mentally resilient enough to deal with having to use lethal force. DCC Terry spoke, in evidence, about, with his responsibilities under health and safety legislation, the concerns that may arise about officers with a history of depression carrying out the role of AFO because of his responsibility, and the potential risk to, the individual, their colleagues and members of the public. The Tribunal does not at all underestimate the heavy responsibilities for the respondent surrounding armed officers and their fitness for armed duties. We heard evidence from the witnesses about the fact that returning an AFO to full operational duties after sickness absence, particularly with a mental health related sickness absence, can sometimes be a long and considered process. Ms Foster told us how OHA would be involved and that they are experienced in assessing and guiding how and when an AFO can be returned to operational duties. We heard about the important role of the Chief Firearms Instructor in assessing what retraining and reaccreditation AFOs will need and how the ultimate decision lies with the Chief Firearms Instructor about returning an AFO to operational duties. It was clear to us that there is a detailed and considered process that the respondent follows. DCC Terry spoke about this himself.

337. The Tribunal can understand the respondent wanting to take its responsibilities seriously in relation to the claimant and the potential to return him to full AFO duties. That was the claimant's substantive role and clearly it was important for DCC Terry and his colleagues to scope that out. However, we remained troubled about the questioning of the claimant about his ability to use lethal force or deal with the implications of that.

338. We do not consider that, for example, faced with an officer who had taken similar sick leave and was non operational for a physical condition (for example chronic migraines or Crohn's disease) that led to associated mental health symptoms such as difficulties with concentration, tiredness, focus, concern about making a mistake and mental wellbeing that DCC Terry would have asked such an individual the same questions. We accept that for such a comparator it is likely there would be questions to be asked as to their fitness or readiness to return to full AFO duties, including their mental wellbeing and resilience including the potential use of lethal force. However, we consider, on the evidence we heard, that for such a comparator the process we have just referred to above would be followed. Advice and guidance would be taken from OHA. Assessments

would be done including by the Chief Firearms Instructor, before there was a decision to dismiss. We consider there was a short cutting of that process in the claimant's case, that was linked to his history of depression, that would not have happened in the type of comparator scenario we have identified.

339. We find what was operative in DCC Terry's mind when asking the claimant about use of lethal force, was the fact that the claimant had depression in particular, and had been absent from work for some 20 months with that depression. We do not think that DCC Terry would have asked the same question of the comparator we have talked about if similarly before DCC Terry at a stage 3 meeting. We note that DCC Terry attempted to reassure the claimant that there was no difference between having his mental health condition and, for example, breaking his leg. He also said in his evidence that the line of questioning had nothing to do with the actual decision to dismiss. However, that seems highly unlikely to the Tribunal given the nature of the questions asked of the claimant before the decision was made, and the comments made to the claimant once the decision was communicated. We do consider that it was something that was in fact ultimately operating in DCC Terry's mind, even if subconsciously.

340. DCC Terry did also say he asked the question because the claimant had said he did not want the responsibility of the UKSV role and that the responsibility of that was nothing compared to that of being an AFO. They were not the form of words actually used by the claimant, as opposed to talking about the amount of concentration and attention to detail required, his clarity of thought and fear of making mistakes and further knocking his confidence. But to be clear, we do not consider that DCC Terry would have asked the questions, and said what he did, in the type of comparative situation we have set out above, where the comparator had made similar comments about an earlier opportunity such as UKSV. We consider in terms of capacity to return to AFO duties, such an individual would have simply been put through the OHA and Chief Firearms Instructor assessment processes and would not have been asked, or be spoken to, as the claimant was.

341. The claimant alleges that DCC Terry was "*largely dismissive of what the Claimant had to say in support of allowing him to continue in his employment with the Respondent"* and was *"accusatory in his line of questioning."* The claimant further says that DCC Terry was rude and abrupt in manner by changing the subject when the claimant got to the end of points and swiftly moving the conversation on when he sensed that the claimant was touching upon matters favourable to his case for remaining employed. It is also alleged that DCC Terry was trying to trip the claimant up with questions.

342. We agree that DCC Terry was somewhat dismissive and somewhat accusatory in tone in respect of what had happened with the UKSV role. His language suggested a disinclination towards believing the claimant's version of events. We agree that DCC Terry was somewhat dismissive of the claimant being able to return to a role that could involve the use of lethal force, although we would not label that as being accusatory. DCC Terry did at times move the conversation on to topics he wanted to ask the claimant about, and as we have said already, there were issues he wanted to cover with the claimant to scope out whether the claimant was going to persuade him, contrary to his original mindset, that the claimant was unlikely to return. But to an extent that was understandable from the information DCC Terry had before him. We would not agree with the claimant's complaints here or find that DCC Terry was rude and abrupt or that he was trying to trip the claimant up.

343. We did not find there was sufficient evidence before us to conclude on the balance of probabilities that DCC Terry's body language towards the claimant was poor in failing to make eye contact with the claimant, looking around the room when the claimant was speaking or yawning. People's personal styles are all different. A stage 3 meeting must be an inherently intense and awkward situation for those involved. The Tribunal considers that it would not be unusual for stage 3 panel members, for example, to not make constant eye contact with an unwell officer before them, out of concern for appearing too intense. Further, if DCC Terry's body language were that inappropriate, we would have expected the DPF officers present to intervene. DCC Terry described Mr Tuplin as "*not backwards in coming forwards."*

344. In terms of the alleged complicity of the other panel members, we would only find that they were to the extent that the ultimate decision was a unanimous one. But we have not in general found that the whole style and conduct of the meeting was as the claimant alleges. There were no challenges as to how DCC Terry was allegedly behaving from the DPF representatives and they have not given evidence in support of the claimant's complaints in that regard.

Direct discrimination and disability related harassment

345. We do not consider that DCC Terry's handling and comments about Inspector Carr's account of the UKSV conversation was less favourable treatment of the claimant because of the claimant's disability. The Tribunal considers DCC Terry spoke that way because he believed Inspector Carr's account. We consider that DCC Terry would have treated a non-disabled comparator in the same situation as the claimant in the same way. How DCC Terry presented the discrepancy with Inspector

Carr's account was unwanted conduct and it may have created an intimidating environment for the claimant. However, we do not consider that the conduct was related to the claimant's disability. DCC Terry believed Inspector Carr's account, but we do not consider that was in some way related to the claimant's disability.

346. We do consider that DCC Terry was dismissive in his comments about the claimant potentially returning to work on the guns and the potential impact of use of lethal force. We have said already that we consider the claimant was treated less favourably in that regard than an individual with a different condition would be treated in not materially different relevant circumstances and that we consider this was because of the claimant's specific diagnosis of depression. We do not consider that DCC Terry was seeking to be hostile or dismissive to the claimant. He expressed his doubts from a place of concern given his responsibilities as a senior officer. However, that assessment was not for DCC Terry to make. The process was being short cut. None of the medical evidence before him said that the claimant's depression was related to the claimant's work as an AFO or that the claimant was long term unsuitable to be an AFO because of risks to the claimant, or other officers, or the public, associated with the claimant's depression. Any such assessment of the claimant's ability to be an AFO and risk assessments lay with following the process with OHA and the Chief Firearms Instructor. Furthermore, acting with a benign but discriminatory motivation is still, at law, a discriminatory motivation.

347. We therefore would find that DCC Terry's comments about use of lethal force were in that context dismissive about the claimant continuing in his employment was unwanted conducted related to disability which had the effect of creating an intimidating and humiliating environment for the claimant. We therefore find it did amount to harassment related to disability. We would also find that it met the threshold for direct discrimination, however, applying section 212(1), as the complaint is one of detriment, it can only be upheld as a harassment claim alone.

The decision to dismiss

348. We did not hear from the other two members of the stage 3 panel and the findings were presented as being unanimous. We therefore treat the panel as acting unanimously in respect of the whole rationale behind the decision to dismiss. It is something in any event that DCC Terry, as the most senior officer and chairing the panel, would have had a material influence over.

349. We find that the reason why the stage 3 panel dismissed the claimant was multifactorial. They considered that the claimant had been off work for 20

months and did not consider that he was likely to return to work as an AFO. Part of what was influencing that viewpoint were DCC Terry's concerns, which we attribute to the whole panel, that the claimant would not be able to cope with the specific demands of an AFO role and use of lethal force as someone with the history that the claimant had of depression. The stage 3 panel also thought they would not have a non-operational role to offer the claimant, because he had previously turned down the UKSV role and there were no substantive non AFO roles available at Hereford. As the claimant had previously said he was not interested in ill health retirement, they therefore decided they had run out of options, and they dismissed him.

350. The views about the claimant's ability to cope with the specific demands of an AFO role were a material influence on the decision to dismiss the claimant. We therefore find that the decision to dismiss the claimant was an act of direct disability discrimination. It was also unwanted conduct related to disability which had the effect of creating a humiliating environment for the claimant.

351. We have in any event gone on to consider the discrimination arising from disability and the reasonable adjustments complaints. The claimant's sickness absence was a material influence on the decision to dismiss, and the decision to dismiss was therefore because of something arising in consequence of the claimant's disability.

352. In terms of justification, the legitimate aim of upholding satisfactory attendance is not in dispute. We do not find that the decision to dismiss the claimant was a proportionate means of achieving that legitimate aim. This was the stage 3 part of the UAP process, and the consequences for the claimant, who was by this time facing dismissal squarely in the face, were at their absolute highest. We do not consider that the stage 3 panel gave sufficient consideration to alternatives to dismissal.

353. There is nothing before the Tribunal to suggest that the stage 3 panel gave active renewed consideration to the redeployment of the claimant away from AFO duties, whether temporarily or permanently.

354. The panel and the claimant had, by sheer coincidence, had the benefit that day of speaking to an officer at St Athan who had been doing the vetting role. It had become clear, whatever the cause of the misunderstanding, that the claimant now had a better understanding of the responsibilities of the vetting role. Whilst occupational health had never signed the claimant back to work, there is nothing before us to say that the vetting role had ever been put as a specific option to occupational health. It was a very different role to the claimant's substantive role as AFO. The

claimant was self-reporting as having improved in terms of his mental state since he was last seen by OHA, although he was still battling fatigue.

355. The Tribunal considers that it would have been reasonable for the stage 3 panel, who actually raised what the other UKSV seconded officer had been saying with the claimant, to have asked the claimant if he was now interested afresh in the opportunity of such a secondment. If so, we consider that it should have been put as a specific proposal to OHA for comment upon. The panel were clearly aware that secondments had in fact continued. It would have offered the claimant meaningful non-operational work for a time whilst rehabilitation as an AFO was explored.

356. The Tribunal accepts that the UKSV role was not a permanent posting and as Inspector Carr explained to us it was not possible for the claimant to "broader band" over to that role. However, it remained what it originally was intended to be; an opportunity to get an officer on long term sickness back into work as part of a rehabilitation programme and avoid the claimant's dismissal at that time. The officer that the panel and the claimant spoke to that day at St Athan had been doing the role for around 12 months and it was therefore a good potential opportunity both for the claimant and for the respondent.

357. The Tribunal in reaching this decision had taken due notice of the OH evidence available to the respondent, which was unable to say when the claimant was likely to return to work even with potential adjustments and the claimant's continued sick note. We also took notice of the fact that the claimant had not produced his own medical evidence to say that he was fit for work or likely to be so shortly. We do not doubt that there was more than could have been done on the claimant's side of things to better prepare and advance his case at the stage 3 panel. However, the OH report did not say that the claimant was permanently disabled from operational duties. It said in fact that the claimant was likely to recover; Dr Scott just could not say when. The Tribunal considers that given the claimant was now self-reporting improvement in his condition, that the lack of clarity he had previously was improved and it was fatigue that was his remaining symptom, and given (if the panel had properly reflected upon it) the renewed potential opportunity of the UKSV role, it was reasonable to put it as an option to the claimant and then to OH, and put what the claimant was saying about the potential improvement in his health to OH.

358. In turn, it gave the potential with more time, for OH to comment upon the timescales for the claimant to return as an AFO in due course. We consider that it would have been reasonable for the respondent to have extended the claimant's Final Written Improvement Notice to allow these steps to happen. If the claimant had been able to return to these rehabilitative duties, it would have met the respondent's aim of upholding

standards of attendance, without the claimant being dismissed at that point in time.

359. If the claimant ultimately was unable to meet the extended Final Written Improvement Notice and could not, for example, rehabilitate at the UKSV before returning to be an AFO, then the respondent still had the option of picking back up the UAP. The claimant was on nil pay (other than the minimal pensionable pay rate) there was no immediate cost to the respondent of exploring this options. We acknowledge the respondent was having to meet the cost of overtime backfilling the claimant's role and that it could not recruit to replace him if he was in the complement numbers, however, it was for a limited further period of time. The respondent would have made a substantial investment in the recruitment and specialist training of the claimant across the range of weapons he was trained in as an AFO. We do consider it was short sighted on the part of the respondent not to have raised it again given the change in circumstances.

360. We consider that the above would have been the optimum reasonable approach for the respondent (and indeed the claimant) to have taken. Even taking into account what the OH report said, we also consider that it would have been reasonable for the stage 3 panel to have explored with the claimant, in general, whether he considered he was fit for, or likely to be shortly fit for a phased return to work. The claimant was saying there was some improvement in his condition, other than his ongoing fatigue. He had also spoken about his previous wish to work part time. The panel were asking when the claimant was likely to be back. The Tribunal considers it odd that there was no discussion about what that return to work would look like and considers that it would have been reasonable to have had that discussion themselves with the claimant.

361. The Tribunal considers that if there had been that discussion then it is likely the claimant's previous concerns about a phased return to work being too fast would have come to light. It would have given another opportunity for there to have been a meaningful discussion about the potential to adjust a phased return to work programme to the claimant's needs. It does not appear to the Tribunal to be in serious dispute that there was non-operational work that could be done at Hereford as part of temporary rehabilitative duties (as opposed to being a substantive posting) bearing in mind even on the respondent's own account the claimant could not just return immediately "on the guns".

362. We consider that it would have been reasonable for the respondent to have explored afresh such an adjusted phased return to work for the claimant and, if there had been a positive exchange with the claimant, to have then raised it with OH together with a short extension to the Final

Written Improvement Notice. Again, this would have been working towards ultimately returning the claimant back to AFO duties.

363. We do also consider that the respondent should have asked the claimant afresh if he was interested in a transfer within the Ministry of Defence or the wider civil service. The claimant had previously expressed an interested in the MGS but had then stated he wanted to return as an AFO. He said that, however at stage 2 and not stage 3. By the time of the stage 3 meeting the claimant was at the final stage squarely facing dismissal in the face. It is natural that an individual's perspective on this may change as at the point of dismissal. If the claimant ultimately could not be rehabilitated as an AFO then a transfer within the civil service and in particular to a body such as the MGS would be potentially beneficial to him in keeping him, as a disabled employee, in the world of work. It would have been reasonable to have explored this with the claimant afresh and if he was interested to have extended the Final Written Improvement Notice by a short period to allow those investigations to happen. For the reasons already given there would have been minimal cost, and it would be proportionate for the respondent to do so.

364. Alternatively, we consider that this would amount to a failure to make reasonable adjustments. The respondent in dismissing the claimant applied a PCP to him in respect of their attendance requirements. It placed the claimant at a substantial disadvantage compared to other officers who were not disabled as they would not have faced dismissal. It would have been reasonable to have taken the steps that we have outlined above. They would have had a prospect of returning the claimant to work and avoiding dismissal. The steps the Tribunal has set out are more than simply consulting with the claimant or taking occupational health advice as they are about ultimately substantive actions in conjunction with extending the Final Written Improvement Notice with the prospect of returning the claimant to work through either the UKSV role, or an alternative bespoke rehabilitative phased return to work at Hereford with the view to the claimant ultimately returning as an AFO. Alternatively, it was about alternative redeployment in the MOD or wider civil service, such as the MGS.

365. The claimant's complaints of direct discrimination, harassment related to disability, discrimination arising from disability and a failure to make reasonable adjustments are therefore well founded and are upheld in respect of the decision to dismiss. The Tribunal does not uphold the claimant's complaint of indirect discrimination as we do not consider that particular disadvantage was sufficiently demonstrated to us.

Time Limits

366. Our findings of discrimination can be summarised as follows:

(a) In respect of the UKSV role there was a failure to make reasonable adjustments in respect of not discussing with the claimant what the barriers were with that role and the claimant's request for part time working; not reassuring the claimant about the role and reoffering it to him and/or suggesting that he try out the course; not explaining, offering and potentially implementing a sufficiently flexible phased return to work or a temporary part time working arrangement in the UKSV role. Such steps should reasonably have been undertaken by Inspector Musto on 13 June and by Inspector McIlwraith on 13 September and 27 November 2018;

(b) In respect of the UKSV role the above also amounted to discrimination arising from disability with the unfavourable treatment occurring on the same dates;

(c) In respect of rehabilitative duties at Hereford there was a failure to make reasonable adjustments in not communicating with the claimant about his perceived difficulties with a phased return to work and why he was pressing for part time working; not explaining, offering and potentially implementing a sufficiently flexible phased return to work. Such steps should reasonably have been undertaken by Inspector Musto on 8 May, and 13 June 2018 and by Inspector McIlwraith on 13 September and 27 November 2018;

(d) That also amounted to discrimination arising from disability with the unfavourable treatment occurring on the same dates;

(e) The comments and questions about use of lethal force, at the stage 3 meeting on 29 January 2019, were dismissive about the claimant continuing in employment and amounted to harassment related to disability;

(f) The decision to dismiss the claimant on 29 January 2019 amounted to direct disability discrimination, harassment related to disability, discrimination arising from disability and a failure to make reasonable adjustments (not extending the Final Written Improvement Notice in conjunction with revisiting the UKSV role or a sufficiently flexible phased return to work, or revisiting redeployment outside of Hereford).

367. The claims in respect of 29 January 2019 are within time. The Tribunal also finds that the earlier acts are all part of a course of conduct extending over a period culminating in the claimant's dismissal and are also in time.

The Tribunal is satisfied that the incidents are sufficiently linked such as to amount to a continuing discriminatory state of affairs. They all relate to the handling of the same continuing period of sickness absence by the claimant's line management team and thereafter the stage 3 panel, who were acting as the relevant managers and decision makers under the UAP regulations. There are repeats of the same or similar findings of discrimination (for example, the handling of the claimant's withdrawal from the UKSV role, and how a phased return to work was set out to the claimant) which continued through to the decision to dismiss itself. There are no significant gaps in the chain of events.

368. The parties should write in (ideally jointly) within 28 days with their proposals in respect of remedy case management orders and the listing of a remedy hearing.

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Employment Judge R Harfield
Dated: 9 April 2021

JUDGMENT SENT TO THE PARTIES ON 22 April 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS