THE EMPLOYMENT TRIBUNALS

Claimant: **Mr Jordan Miller**

Respondent: **Chief Constable of Cleveland Police**

Heard at: **Newcastle – by CVP** **On:** **26, 27 and 28 May 2021**

Before: **Employment Judge Beever**
Members: **Ms B Kirby**
Mr S Carter

Representation:

Claimant: Mrs Callan, Counsel
Respondent: Mr Menon, Counsel

RESERVED JUDGMENT

1. The claimant's complaint of direct discrimination is not well founded and is dismissed.

2. The claimant's complaint of failure to make a reasonable adjustment succeeds.

3. The claimant's complaint of discrimination arising from disability succeeds.

4. The tribunal will set a date for a remedy hearing and notify the parties accordingly

REASONS

Introduction and the issues

1. This has been a remote hearing, which was consented to by the parties. The form of remote hearing was V: Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and the liability issues could be determined in a remote hearing. The documents the Tribunal referred to are named below and were in the trial bundle prepared by the parties. The witness statements were also prepared by the parties.

2. By an ET1 presented on 10 April 2020 and by Further Particulars dated 30 October 2020 the claimant brings claims of disability discrimination which arise in connection with his dismissal from the Respondent police force which took effect on 31 December 2019. There is an agreed list of issues which was subject to further discussion with the advocates at the beginning of the hearing.

3. On 9 April 2018, the claimant suffered a haemorrhagic stroke which has a substantial adverse long-term effect on his ability to carry out day-to-day activities arising from permanent loss of peripheral vision in his left eye and epilepsy. The respondent accepted that the claimant is a disabled person for the purposes of the Equality Act 2010 (EqA).

4. The issues which the tribunal needs to determine arise under EqA and are as follows:

    4.1. Section 13 EqA - did the respondent treat the claimant less favourably by dismissing him
        4.1.1. The comparator was hypothetical, and there was a substantial dispute about the appropriate comparator. The tribunal deals with this in detail below

    4.2. Section 15 EqA - was the claimant's dismissal unfavourable treatment because of something arising in consequence of the claimant's disability
        4.2.1. The "unfavourable treatment" relied on by the claimant was the subject of discussion both at the outset of the hearing and again in closing submissions. The claimant relied on "the termination of his employment relationship with the respondent". The tribunal deals with this in detail below
        4.2.2. The legitimate aims relied on by the respondent were (para 8 at [29]) that of operational efficiency and maintenance of public confidence in constables; and (para 11 at [30]) that of conserving and allocating the funding for the respondent's police force.
        4.2.3. The respondent also argued that the fact that the respondent did not slot the claimant into a civilian post without dismissing him should not defeat its statutory defence of justification

4.3. Section 20 EqA - did the respondent fail to make reasonable adjustments
   4.3.1. The PCP relied on by the claimant was the respondent's policy of student police officers, whether subject to Regulation 13 or otherwise, not being offered suitable police staff roles
   4.3.2. The substantial disadvantage relied on by the claimant was the risk of not obtaining a police staff role and the consequent increased risk of termination of employment
   4.3.3. The reasonable adjustment relied on by the claimant (para 46iii, at [65]) was the offer of an alternative role as a Police Staff Investigator

Evidence

5. The tribunal heard oral evidence from the following witnesses: Mr Miller, the claimant and Mr Richard Murray in his capacity as the claimant's police federation representative. For the respondent, the tribunal also heard from Deputy Chief Constable (DCC) Ian Arundale, Ms Heather Clynch, senior HR business partner and Ms Julia Moffatt, resourcing specialist. All witnesses were cross examined.

6. The tribunal read the witness statement of Assistant Chief Constable (ACC) Graham. He was not able to attend the hearing and his statement was adduced under an affidavit attesting to the truth of its contents. The tribunal had regard to the contents of the statement and noted that the weight it placed on the evidence is affected by fact that the witness has not been cross examined therefore the claimant has had no opportunity to test the evidence.

7. There was a bundle of documents numbered to 585 pages in its PDF format. There was also a useful chronology and cast list. Both parties provided written closing submissions and made brief supplementary oral submissions. The tribunal has not set out the detail of those submissions but we have taken careful consideration of what has been said and the case authorities provided helpfully by both sides.

8. The tribunal made its findings of fact having regard to all of the evidence and did so on a balance of probabilities. The tribunal has endeavoured to only make findings of fact on the evidence that relates to the issues that it has to determine. We have not made findings of fact on all the evidence in the hearing but only on those matters within our remit.

Findings of Facts

9. The claimant joined the Cleveland police force on 26 March 2018 following a successful application to become a police constable. He began a probation period of two years training as a student officer. For the purposes of the present case, the terminology of "student officer" is interchangeable with "probationer" and/or "police cadet" the latter being used in EqA.

10. Upon the commencement of his probation period, the claimant came under the remit of the Police Regulations 2003. Regulation 12 provides for the imposition of a probation period. Regulation 13 provides for termination of the services of the officer.

11. The probation period involves undertaking the initial police learning and development programme (IPLDP) over the course of a number of weeks, which entails both classroom activity and on-the-job patrolling with an officer tutor as well as subsequent independent patrolling and evidence gathering. The purpose of the extended probation period of two years is to ensure that a police officer achieves the necessary level of skill and competence.

12. The respondent is a large employer. DCC Arundale estimated that the number of employees was in excess of 2,000. For the purposes of the present case, such employees might broadly be categorised as either (i) “police officers” including student officers, who hold office under the Crown, and in respect of whom the respondent has statutory obligations under the Police Regulations 2003, or (ii) “police staff” post holders who separately are engaged under more typical terms and conditions of employment including contracts of employment. DCC Arundale had been recently appointed to the respondent and he held a remit to deal with complex legacy issues, including HR issues, across the respondent organisation encompassing both police officers and police staff post holders.

13. Unfortunately, on 9 April 2018, only two weeks after starting his probationary period, the claimant had a major health incident when he suffered a haemorrhagic stroke followed by hospitalisation and neurosurgery. There were numerous complications but which fortunately improved over the following months and with extensive rehabilitation. He was however left with continuing permanent loss of peripheral vision in his left eye and seizures as a result of epilepsy.

14. The claimant remained sick for a number of months and during that time the claimant made every effort that he could to assist his own recovery. In those initial months of rehabilitation, the claimant was hopeful of being able to resume his police training and the initial medical advice from the Force Medical Adviser (FMA) was similarly hopeful.

15. The path to recovery was however not straightforward as the claimant suffered further seizures in August and September 2018. The claimant has described in detail how over the ensuing months he worked hard in trying to get fit enough to return to work whilst at the same time facing further setbacks for example suffering a further seizure in January 2019 and having had to be admitted to hospital. It is common ground that the respondent was supportive of the claimant during his extended absence.

16. The medical position started to plateau by February 2019. On 26 February 2019, the FMA concluded that the claimant was medically unfit for a role as a police officer and that this was likely to remain the case on a long-term basis. The FMA recommended exploring suitable alternative duties in a more sedentary capacity.

17. The prospect that the claimant could not return to work as a police officer was, in the claimant's own words, "devastating" but the claimant remained determined to continue working within the respondent in some capacity. The claimant returned to work in March 2019 and was placed at the Police Treatment Centre undertaking various exercise programs which was sufficient for him to be regarded as having resumed duties for pay and absence management purposes.

18. The claimant's continuing inability to resume his police officer training duties meant that the respondent initiated a Regulation 13 process to review his continuing employment. The process was delayed initially by operational demands and legal issues raised by Mr Murray (in April 2019) and subsequently as a result of a change in senior personnel (in June 2019). It was in those circumstances that the matter finally came to ACC Graham and it was not until 25 September 2019 that a Regulation 13 meeting took place. This is dealt with further below.

19. In the meantime, by May 2019 the medical position had crystallised in that the claimant was now regarded by the FMA as permanently unfit for operational response duties. The claimant accepted this as the new reality, and as early as June 2019 he had identified the police staff post holder role of police staff investigator (PSI) as a job of potential interest to him.

20. By June 2019 the claimant was working on recuperative duties. As part of these duties, the claimant was placed in the force control room for part of the week and worked on operation Phoenix, essentially a database exercise, for the remaining part of the week. Regrettably a further partial seizure occurred on 19 July 2019 which rendered him unfit to work pending further medical advice. Despite that setback, the claimant was demonstrating improvement in relation to the management of his epilepsy and his understanding of the triggers for seizures and the medication that would help combat them.

21. On 14 August 2019, the FMA considered that the claimant was fit to return in his recuperative role but remained unfit for response duties. With the support of the respondent, the claimant began working in the Stockton CID team with an experienced former detective inspector undertaking a variety of tasks both administrative and supportive of the detectives. The claimant regarded this as invaluable experience of an investigative nature which he knew would help him in a future PSI role. In terms, as the claimant said in evidence, he put himself out there asking for these opportunities as he understood that he needed training and experience in order to be successfully redeployed. Indeed, despite the pessimism of the FMA that the claimant would not be able to increase his working hours from 20 hours per week, the claimant was later able to build up to working full-time hours by November 2019.

22. Turning back to the Regulation 13 process, this is a reference to the Police Regulations 2003. Regulation 13 is a statutory mechanism for dispensing with the services of an officer where the chief officer considers that the officer is not fit physically or mentally to perform the duties of his office.

23. The claimant had a Regulation 13 meeting on 25 September 2019. The chair of the meeting was ACC Graham. As the decision maker, it was his task to make a recommendation to the Chief Officer. The claimant was accompanied by Mr Murray as his police federation representative. HR and legal advice and support was provided by Ms Clynch and Ms Hatton respectively.

24. The tribunal has considered carefully the evidence around the detail of the Regulation 13 meeting and the supporting medical evidence available to the respondent. The tribunal finds that there was no material dispute between the claimant and the respondent that the FMA had concluded the claimant was unfit to do police officer training due to medical restrictions arising from his loss of vision and the risk of auras and seizures. The tribunal finds that this was a fair reflection of the medical evidence not least because the claimant accepts it to be so. The claimant accepted that the new reality was that he was not able to continue as a police officer.

25. Put bluntly, the claimant's case is that whilst he recognised that he could not realistically continue in his role as a (student) police officer, what has gone awry is that he nevertheless remained fit to work in an alternative role and should as a result have been redeployed.

26. The recommendation of ACC Graham is at [p285]. Following the hearing on 25 September 2019, and in the light of the FMA evidence, ACC Graham concluded that "the only option open for the chief constable is to dismiss PC Miller and either dispense with his services or establish if there is an alternative police staff role for him". ACC Graham considered that "the claimant must be dismissed as a police constable and apply for a new role" and that "there must be a vacancy it would be suitable for claimant to apply for". ACC Graham recommended that during the claimant's notice period, HR should ascertain whether there are any suitable police staff roles vacant the claimant can apply for.

27. It was obvious to the claimant that he needed to find alternative employment and as we have found he did everything he could in order to make that happen including researching the roles and seeking relevant training. Unfortunately in the intervening period pending the chief officer determination, the claimant was not greatly assisted by the respondent who took the view that it was necessary first to await the formal determination of the chief officer [323].

28. Despite that, the claimant was aware of a PSI role at the Cleveland and North Yorkshire Major Investigation Team (CNYMIT). The claimant continued to be interested in a PSI role, and having already built up his investigative skills in Stockton CID, he obtained a secondment to CNYMIT which provided him with further useful hands-on experience which would be relevant in any future PSI role: it was, in the words of DCC Arundale, the best type of training that the claimant could have had in the meantime. He was, as already identified, now working full-time hours.

29. DCC Arundale was the chief officer responsible for the determination of the claimant's case. His rationale is at [p334]. He identified it as a "sad, unforeseeable

and no fault situation". He agreed with the assessment that the claimant's position as a police officer could no longer continue. He formally determined that, "the claimant should be dismissed as a police officer in accordance with regulation 13 on the grounds that his medical condition renders him physically unfit to perform the ordinary duties of a constable". DCC Arundale directed that, "such lawful and reasonable assistance as is necessary to help [the claimant] gain alternative employment should be provided as long as this does not subvert established processes for fair and equal treatment of potential employees nor disadvantage existing police staff members".

30. This outcome was conveyed to the claimant both in writing and verbally at a meeting on 3 December 2019. The claimant was informed that he was going to be dismissed with effect from 31 December 2019 and was asked whether he wished to work his notice period. The claimant wanted to work his notice as he had the support of his existing secondment managers and he believed that the respondent would seek to redeploy him if suitable. The claimant asked for a training course but did not receive a response.

31. Following the chief officer's formal determination, the respondent did provide some assistance to support the claimant in his efforts to find alternative employment. The underlying premise of the support provided to the claimant was to assist him in making job applications in effect as an external candidate given his dismissal as a police officer. The respondent did not provide any internal redeployment opportunities to the claimant. When challenged about this, DCC Arundale affirmed that the role of an officer was different to that of a staff member. He said that it was necessary to terminate as an officer and in effect leave the organisation and make an application for a staff role. This was necessary both to ensure that a proper skills assessment of the individual was carried out and to ensure that existing police staff members and even potential employees were treated fairly. An adjustment provided to the claimant was that in any such application the provisions of the respondent's Disability Confident Scheme (see below) (DCS) would guarantee the claimant an interview if he met certain criteria.

32. On 12 December 2019, the claimant met with Ms Moffatt and she gave him guidance on how to go through the application process for police staff posts, how to provide evidence to meet the criteria for vacant roles in which he was interested and some interview techniques. No doubt this was invaluable guidance to improve his application prospects. However, it was not a discussion about his skills or an assessment of whether he had the skills to meet the criteria for the PSI role. Ms Moffatt also printed out all of the other relevant vacancies available at that point but the claimant did not apply for any other vacancy except for the PSI role in the CNYMIT.

33. Following that meeting, the claimant filled out an application form of the PSI (CNYMIT) role: the form allowed him the opportunity (subject to word count limits) to evidence the skills he had to meet the essential criteria for the role. His application was received by the respondent on 17 December 2019.

34. The claimant was dismissed with effect from 31 December 2019. The claimant appears to have found alternative work outside of the respondent by virtue of his being an electrician by trade.

35. The claimant's application for the PSI role was the subject of an anonymised shortlisting process. The form at [p410] suggests that the claimant was marked on 3 March 2020. His scores appear as "PS579/008". He scored 26. The tribunal was directed to the "essential skills and abilities" score of 2, which was defined as, "just below satisfactory evidence". The claimant did not succeed in securing an interview. The scoring was not disclosed to the claimant until these tribunal proceedings and he was not aware of the reason why he did not obtain an interview and he was not given feedback. Ms Moffatt told us and we accept that the threshold for interview was a score of 28 but in the case of a disabled candidate, the implementation of the DCS removed the threshold scoring provided that the disabled candidate had provided at least satisfactory evidence of the essential criteria. The claimant did not in that one respect and therefore was not successful.

36. The claimant's undoubted resilience was never more evident than when he applied a matter of months later a second time for a PSI role. His evidence was that his application was virtually the same as the first application. In cross-examination he said that "I didn't really change the application form between the two application forms". This second time, the claimant was successful in meeting the threshold, in being interviewed and being offered a post which he commenced on 26 October 2020.

37. It is necessary now to turn to discuss the respondent's policies and procedures.

38. There is a sharp division in practice inside the respondent between police officers and police staff. There is a statutory requirement for police officers to successfully complete a period of probation. The respondent's consistent case has been that the claimant's role as officer needed to be terminated before he was in a position to apply for an alternative police staff role and necessarily as a result be treated as an external candidate. In the words of DCC Arundale, "there is no ability for seamless migration between the police officer and police staff posts and vice versa". He emphasised in his oral evidence the significant differences between officer roles and staff posts that an officer whose services were being dispensed with then needs to "terminate in order to migrate". The overriding consideration in the view of DCC Arundale was the operational effectiveness and credibility of the police force and in terms of alternative roles in order to maintain credibility there needs to be an application process (albeit one mitigated by the DCS) in order to maintain an effective level of assessment.

39. The division in practice between police officers and police staff is clearly apparent from the differing policies in operation.

40. The "Limited Duties" policy applies to police officers only [p509]. Its purpose, at [p510] is to provide guidance on the use of restricted duties as a means of facilitating an Officer's return to work. An Officer who is subject to an "Adjusted duties" assessment will be categorised in accordance with the degree of medical restriction

[p.511]. The purpose of the assessment is in effect to determine a suitable role for deployment. Paragraphs 3.22 – 3.25 identify the opportunity for a "case conference… to determine a suitable role for deployment". The case conference identifies the Officer's individual capabilities and the Officer is "fully involved" in the process. Paragraph 3.24 provides that, "as a reasonable adjustment an Officer may be posted to a role in which they are medically capable of performing but which they do not have all the necessary skills or experience. In these circumstances a reasonable period of up to 6 months for retraining will be afforded".

41. The "Redeployment Policy" [p.518] applies only to police staff post holders. The policy is underpinned by a Redeployment Register in which police staff may be placed. In the event of vacancies, a police staff post holder who meets at least 70% or more of the essential criteria of the post [p.521] will, if they wish, be invited to an informal interview and thereupon be offered the post without competition (unless there is more than one employee on the redeployment register who is deemed suitable for a particular vacancy). It is only in the event that the position is not filled from the redeployment register the role is then advertised to open competition.

42. Neither the Limited Duties policy nor Redeployment Policy was applied to the claimant.

    42.1. Ms Clynch confirmed that the claimant did not have an adjusted duty assessment as he had only undertaken 11 days training prior to taking ill and the Limited Duties policy is, "only for those who have completed their probation training and are deemed effective",

    42.2. The tribunal was told that the Redeployment Policy applied only to police staff post holders and not to police officers.

43. Ms Clynch accepted in cross examination that the claimant "fell between stools" and the tribunal finds that to be an apt description. Indeed, the respondent's evidence was that the claimant had found himself in "unique circumstances" and because of that he was provided with "extra support" by the respondent. DCC Arundale emphasised that the support provided to the claimant was "over and above policy requirements", including guidance given to him in completing applications and in interview preparations and interview techniques which services are not normally offered to an officer who is being dismissed under Regulation 13.

44. The respondent operates the DCS scheme. The document referred to the tribunal was a gov.uk Internet document [p.443]. The purpose of the scheme is to encourage applications by offering an interview to an applicant who declares they have a disability. It is not an automatic interview. The scheme removes the scoring threshold but requires that the disabled applicant meet the minimum essential criteria in order to be progressed to interview.

<u>The Law</u>

45. As to direct discrimination, section 13 of the EqA 2010 stipulates that "*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*". Section 23 deals with the issue of comparators. It states that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case. In most cases a suitable actual comparator will not be available and a hypothetical comparator will have to constitute the statutory comparator. *Shamoon v Chief Constable of the RUC [2003] IRLR 285*.

46. In relation to direct disability discrimination complaints, the circumstances related to the case include a person's abilities if, on a comparison for the purposes of section 13, the protected characteristic is disability. In a complaint of direct discrimination, the relevant comparator is someone who does not have the particular disability of the disabled person, whose relevant circumstances are the same as, or not materially different from those of a disabled person; *Aylott v Stockton on Tees Borough Council [2010] IRLR 994 CA*. The need to include a person's abilities in the comparison is illustrated in *Ahmed v Cardinal Hume UKEAT/0196/18.*

47. In *Nagarajan v London Regional Transport [1999] IRLR 575(HL)* it was stated that many people are unable or unwilling, to admit even to themselves that actions of theirs may be (racially in that case) motivated. It is not necessary for the prohibitive characteristic, in this case disability, to be the sole reason for the less favourable treatment. As long as it has significantly influenced the reason for the treatment, discrimination is made out. An employer may genuinely believe that the reason why he acted in that way had nothing to do with the employee's protected characteristic but after careful and thorough investigation of a claim, it may be the proper inference to be drawn from the evidence is that, whether the employer realised it or not, the protected characteristic was the reason why he acted as he did

48. As to discrimination arising from disability, section 15 of the EqA 2010 states that: "*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.*"

49. The way in which a Tribunal should approach section 15 claims was set out in *Pnaiser v NHS England [2016] IRLR 170* as follows:- (a) the Tribunal should first identify whether there was unfavourable treatment and by whom. (b) the Tribunal must then determine what caused the impugned treatment, or what was the reason for it. The focus is on reason in the mind of the alleged discriminator at this point; (c) the "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant or more than trivial influence on the unfavourable treatment, and so amount to an effective reason or cause of it; (d) Motive is irrelevant; (e) the causal link between the "something" that causes unfavourable treatment and the disability may include more than one link. The more links in the chain of causation, the harder it will be to establish the necessary connection. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator; (f) the knowledge required is of the disability only, and does not extend to knowledge of the

'something' that led to the unfavourable treatment; (g) it does not matter in which order these are considered by the Tribunal.

50. Unfavourable treatment will not amount to discrimination arising from disability if the employer can show that the treatment is a "proportionate means of achieving a legitimate aim". It is an objective test and the burden of proof is on the employer. The respondent must produce evidence to support their assertion that the treatment was justified and not rely on mere generalisation. Guidance was given in the case of *Chief Constable of West Yorkshire Police v Homer [2012] ICR 704* in which it said of objective justification, noting that in order for a measure, or treatment to be proportionate it "has to be both an appropriate means of achieving a legitimate aim and (reasonably) necessary in order to do so". The legitimate aim must correspond to a real need of the respondent and treatment which is appropriate to achieve the aim but goes further than is reasonably necessary in order to do so may be disproportionate.

51. The tribunal should not simply review the employer's reasons applying a margin of discretion, but must carry out a "critical evaluation" and determine for itself whether, objectively, the means used are proportionate to any legitimate aim, balancing the detriment to the claimant against the legitimate aim and considering whether that aim could have been achieved by less detrimental means (*Allonby v Accrington and Rossendale College and others [2001] ICR 1189*). The Tribunal should make its own objective assessment of the relevant facts and circumstances, having regard to the employer's reasonable business needs, business considerations and working practices.

52. The respondent referred to the case of *Hart v Chief Constable of Derbyshire Constabulary [2008] EWCA Civ 929*. The claimant in that case was a probationary police officer who was by reason of disability unable to perform those duties. She claimed that a reasonable adjustment in her case was to offer her a staff post to enable her to complete her probationary period. The completion of a probationary period was a statutory requirement to ensure that the individual was fitted to perform the duties of a police constable. The position of someone who has passed the probationary requirement is different from someone who has not. It was thus not reasonable to transfer the claimant to an alternative staff role in order to enable her to complete her probationary training because it would have had the effect of waiving the strict statutory requirement for an individual to be fit to perform the duties of a police constable.

53. Thirdly, as to reasonable adjustments, section 20 of the EqA imposes on the employer a duty to make adjustments including where a PCP (provision, criterion or practice) of the employer puts a disabled person at a substantial disadvantage in relation to relevant matter, in comparison with persons who are not disabled.

54. By subsection (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 were not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. The employer is not under a duty to make adjustments if the employer does not know and could not

reasonably be expected to know that a disabled person has a disability and is likely to be placed at the substantial disadvantage.

55. Section 21 of the EqA defines a substantial disadvantage as something that is more than minor or trivial. An employer who fails to comply with the duty to make reasonable adjustments discriminates against that disabled person.

56. It was decided in *Project Management Institute v Latif [2007] IRLR 579* that the claimant must show evidence from which it could be concluded that there was an arrangement or a PCP causing a substantial disadvantage and that there was some apparently reasonable adjustment which could have been made. If the claimant does this the burden shifts. Once the burden has shifted, the claim will succeed unless the employer is able to show that it did not breach the duty.

57. In *Griffiths v Secretary of State for Work & Pensions [2015] EWCA Civ 1265* the Court of Appeal confirmed that a failure to comply with the section 20 duty to make reasonable adjustments amounts to an unlawful act of discrimination. The section 20 duty required affirmative action in certain situations and see also Archibald v Fife Council [2004] ICR 9454 HL and the Equality and Human Rights Commission Code of Practice on Employment (2011) para 6.2. This was not about expecting the claimant to have set out particular obligations that he had asked the respondent to address, it is a duty on the employer to take reasonable steps to remove the disadvantage.

58. In order to engage the duty to make reasonable adjustments, there must be a PCP which substantially disadvantages the appellant when compared with a non-disabled person. *Griffiths* concerned the application of a sickness management procedure and the correct formulation of the PCP was held to be that the employee must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. That was the provision breach of which may end in warnings and ultimately dismissal. Therefore, a disabled employee whose disability increases the likelihood of absence from work on ill-health grounds, is disadvantaged in more than a minor or trivial way. That group of disabled employees whose disability results in more frequent and perhaps longer absences will find it more difficult than non-disabled employees to comply with the requirement relating to absenteeism and therefore will be disadvantaged by it. The Court also referred to the judgment in *Archibald* where the substantial disadvantage was that the employee was at risk of dismissal. The purpose of the reasonable adjustment was to prevent the terms of her contract from placing her at that substantial disadvantage.

59. The case of *Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10/JOJ* stated that if there is a real prospect of an adjustment removing a disabled employee's disadvantage, that would be sufficient to make the adjustment a reasonable one.

60. The Claimant referred to the case of *Chief Constable of South Yorkshire v Jelic [2010] IRLR 744*. Each case turns on its own facts and the scope of the duty of reasonable adjustments on employers cannot be precisely defined. The duty to act reasonably towards employees is not an unfamiliar concept in employment law.

Certainty for employers is sufficiently achieved by the application of the objective standards of reasonableness in the particular circumstances of the case.

61. The Tribunal was also assisted by the Equality and Human Rights Commission Code of Practice on Employment (2011) (CoP). Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments (CoP paragraph 5.20). An employer must do all it can reasonably be expected to do to find out whether an employee has a disability which places him at a substantial disadvantage (CoP paragraph 5.20). What is reasonable will depend on the circumstances. If an employer has failed to make a reasonable adjustment which could have prevented or minimized the unfavourable treatment, it will be very difficult for it to show that the treatment was objectively justified. (CoP para 5.21). Even where an employer has complied with a duty to make reasonable adjustments in relation to the disabled person, they may still subject a disabled person to unlawful discrimination arising from disability. This is likely to apply where, for example, the adjustment is unrelated to the particular treatment complained of.

62. The duty to make reasonable adjustments is an objective duty which therefore does not depend on the employer's subjective decision as to whether or not it considered that it was under a duty or as to the steps that could be taken. The Code of Practice suggests the following factors may be taken into account: (a) whether taking any particular steps would be effective in preventing the substantial disadvantage; (b) the practicability of the step (c) the financial and other costs of making the adjustment and the extent of any disruption caused; (d) the extent of the employer's financial and other resources; (e) the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and (f) the type and size of the employer.

63. It is also necessary to make reference to the burden of proof. The burden of proving the discrimination complaint rests on the employee bringing the complaint. However, it has been recognised that this may well be difficult for an employee who does not hold all the information and evidence that is in the possession of the employer and also, because it relies on the drawing of inferences from evidence. Section 136 of the EqA 2010 was introduced to address that and follows on from the cases of *Igen v Wong* and other authorities dealing with shift in the burden of proof. Section 136 provides that: "*(1) This section applies to any proceedings relating to a contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provision*."

64. The reverse burden of proof applies to all claims: – direct discrimination, disability - related discrimination and reasonable adjustments. In the case *Laing v Manchester City Council [2006] IRLR 748*, tribunals were cautioned against taking a mechanistic approach to the proof of discrimination in following the guidance. In essence the claimant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination. The tribunal can consider all evidence before it in coming to the

conclusion as to whether or not a claimant has made a prima facie case of discrimination. In every case, the Tribunal has to determine why the claimant was treated as he was. This will entail, looking at all the evidence to determine whether the inference of unconscious or conscious discrimination can be drawn.

Discussion and Conclusions

65. The claimant suffered a haemorrhagic stroke in April 2018, the consequence of which was that he became a disabled person within the meaning of the EqA with substantial long-term adverse effects in respect of significant restriction in his vision as well as liability to epileptic seizures. These were features which were known to the respondent at all material times indeed through its Force Medical adviser, the respondent was fully apprised of the ongoing medical condition of the claimant and understood that it was serious enough that the claimant became permanently unable to perform the role of a police officer and that alternative more sedentary roles should be explored.

66. Police officers are deemed employees for the purposes of the EqA (by section 42). The claimant was therefore entitled at all times to the protection of the EqA.

67. The claimant was dismissed from his employment with effect from 31 December 2019. This has triggered his claim under the EqA section 13 for direct discrimination and under section 15 for discrimination arising from disability and under section 20 for a failure to make a reasonable adjustment.

Direct Discrimination

68. Turning first to direct discrimination, the tribunal is well aware that overt discrimination is rarely seen and it is astute to examine circumstances in which an inference may be drawn that an act of less favourable treatment may be the result of discrimination.

69. The claimant complains of the fact of his dismissal as a police officer on 31 December 2019. In order to establish less favourable treatment, the claimant relies on a hypothetical comparator. The comparison requires that there must be no material difference between the circumstances of the claimant and the comparator. The comparator for section 13 purposes includes a person's abilities, as is clear from section 23.

70. The claimant's further particulars at [p.63] contend that "a nondisabled student probationer in the same position would not have been dismissed under regulation 13 because they would have passed the entry level exam continued with their probation". The tribunal finds that this is an inaccurate way of identifying the relevant comparator. This is so for two reasons. First, the claimant has not substantively

relied on evidence relating to any entry level eye exam and instead the substance of the claimant's evidence was that it was his loss of peripheral vision and also susceptibility to seizures (auras) that resulted in a medical conclusion that he was unable to continue in his police officer duties. The claimant's proposed comparator is thus factually incomplete. Secondly, and more fundamentally, the proposed comparator by implication does not have comparable functional restrictions. The requirement imposed by section 23 means that for there to be no material difference between the claimant and the comparator, the relevant circumstances must include a person's abilities: in this case, such restrictions which have resulted in an FMA medical opinion that the individual is unfit to perform the duties of a police officer.

71. The tribunal finds that the appropriate comparator for the purposes of section 23 and section 13 is of an individual who for reasons other than the claimant's disability is considered to be unable to perform the duties of a police officer for the foreseeable future. Given that comparison the tribunal does not find that the claimant was subject to less favourable treatment.

72. Further, the tribunal is satisfied that it was implicit in the statutory probationary requirements set out in the Police Regulations 2003 that an individual must be fit physically and mentally to perform the duties of a police constable and that successful completion of a period of probation was a statutory requirement. In the claimant's case as a consequence of his stroke in April 2018, the claimant was absent for a significant period of time and by May 2019, the medical evidence pointed to the clear conclusion that he was permanently unable to undertake police officer duties. The respondent was supportive of the claimant during his absence and managed his absence constructively including obtaining comprehensive medical evidence. The conclusion that the claimant became unable to undertake police officer duties and thus it was no longer feasible for him to continue as a student officer became an inevitable one.

73. The tribunal reminds itself that the evidence of ACC Graham was not tested under cross examination. Nevertheless, his was a recommendation only and the effective decision maker was DCC Arundale whose skills and experience showed that he was perfectly able to make his own decision. DCC Arundale was cross-examined at length around the process relating to alternative roles. By contrast, there was no challenge to the determination that the claimant could no longer undertake police officer duties. DCC Arundale took care to understand that the claimant was through no fault of his own unable to undertake police officer duties. He was also quite properly mindful of the operational need to ensure the credibility of police officers was maintained. The conclusion that the claimant could no longer undertake police officer duties and as a consequence would be subject to the Regulation 13 process was one which DCC Arundale came to genuinely and responsibly in the light of the medical evidence.

74. It is clear to the tribunal that the reason for the dismissal of the claimant was his incapacity to complete his training and to undertake the duties of a police officer. It may be said that the dismissal was due to the adverse effects of disability but it

cannot in those circumstances realistically be contended that the dismissal was directly because of disability. See *Ahmed*. The section 13 claim must fail.

Reasonable Adjustments

75. We turn next to the reasonable adjustments claim.

76. What was the PCP applied by the respondent? The claimant relies on the PCPs in para 44(i) and (ii) [p.64], which are, "(i) the Respondent's policy of student police officers not being offered a suitable police staff role; (ii) the Respondent's policy of student officers subject to the Regulation 13 process, not being offered suitable police staff roles". In the circumstances of the present case, these PCPs amount to different ways of saying the same thing.

77. The respondent in practice adopted a very clear divide between the position of a police officer, including a student police officer, and the position of a police staff post holder. Throughout the evidence, the respondent emphasised its view of the significance of the differences between the two. DCC Arundale gave evidence that police officer and police staff post holder matters were not the same and that very different criteria applied to the separate and different sections of the respondent. He said that there was no "seamless migration" between police officers and police staff posts and vice versa. He stood by that assertion during cross examination. He described that the main reason for this was that police officers were under the remit of the Police Regulations whereas police staff posts were within standard employment law processes, so that they were separate issues and involved different policies. He reaffirmed in evidence that the practice of the respondent was that an officer would need to terminate his employment and "need to leave the organisation" and then to apply, if appropriate, for a police staff post.

78. This situation is illustrated by the way in which the policies were implemented: the claimant had no access to the Redeployment policy, available only to police staff post holders; and the Limited Duties policy did not extend to deployment into police staff posts.

79. It is the tribunal's judgement that the respondent did operate a policy of student police officers not being offered police staff posts including when under a Regulation 13 process.

80. The respondent suggested that the claimant's proposed PCP was not the correct PCP. The respondent's position, as reaffirmed in closing submissions is that the correct alleged PCP is that set out in the respondent's response to further particulars, at paragraph 16.2(i) and (ii) at [p.71]. In other words, "the correct PCP is offering suitable staff roles to student police officers who are disabled (and thereby unable to perform in that role) if they have the qualifications, and satisfy the requisite criteria, the post within the context of the Disability Confidence Scheme".

81. There are a number of difficulties with this analysis. Factually, the respondent did not offer staff roles to student police officers who are disabled. At its highest, the respondent offered a (competitive) interview to any disabled applicant, including student police officers, who satisfied the terms of the DCS. In addition, in order for a PCP to be pertinent, it needs to capture the essence of the disadvantage. By contrast, the respondent's proposed PCP simply highlights the adjustment that is made for any disabled applicant. In the tribunal's judgement this is not a neutrally formulated PCP as it refers to disability. The tribunal rejects the respondent's alternative proposed PCP.

82. Did the application of the PCP put the claimant at a substantial disadvantage in comparison with persons were not disabled? Did the respondent know or should the respondent have known that the claimant was placed at such a substantial disadvantage?

83. Case law identifies that a like for like comparison is not required in a reasonable adjustments claim. If the PCP bites more harshly on the disabled employee, putting that employee at a substantial disadvantage compared to the non-disabled, then that is sufficient. The effect of the policy of not offering police staff posts was to increase the likelihood of the claimant's employment relationship with the respondent being terminated and the consequent need for him to leave the organisation and (if he wanted to stay) be treated as an external candidate in competition with others who sought to join the respondent. The claimant was denied the benefits of any internal redeployment process. The fact that the respondent operated the DCS, which may have mitigated the disadvantage, did not prevent substantial disadvantage arising. The disadvantage of being an external candidate was plainly more than minor or trivial.

84. It is the tribunal's judgement that the PCP applied to the claimant put the claimant at a substantial disadvantage in comparison with persons who are not disabled. It is the tribunal's judgement that the respondent knew or should have known that the claimant was placed at such a substantial disadvantage.

85. Did the Respondent make adjustments that were reasonable to avoid/reduce that disadvantage?

86. It is not for a claimant alone to identify the reasonable adjustment that is needed. It is open to a tribunal to consider, having regard to the evidence and the submissions made by the parties whether there is a reasonable step that the respondent has failed to take. In that regard is important to note that it is no defence to a claim for a respondent to identify – as perhaps is the case here - a number of steps that it has taken in order to support the claimant if nevertheless the tribunal is satisfied that the respondent has failed to take such steps as it is reasonable to have to take to avoid the disadvantage.

87. That said, the tribunal views the adjustment sought by the claimant at paragraph 46iii at [p.65] as one that is (i) clearly defined and (ii) pertinent to the circumstances of this case and (iii) fully tested in evidence and submissions. The claimant alleges that a number of roles were available at the material time and should have been offered as a reasonable adjustment. The tribunal is mindful that the respondent provided the claimant with a list of all available vacancies and the claimant was interested in only one – and consistently in only one – opportunity, namely the PSI (CNYMIT) role.

88. The question of what is a reasonable step is not circumscribed by statute and it is a matter of considering all the circumstances of the case. The case of *Jelic* referred to by the claimant serves as a practical reminder of the width of reasonable adjustments. The duty to make reasonable adjustments subsists until the termination of the claimant's employment. The transfer of an employee to fill an existing vacancy can perfectly feasibly be described as a reasonable adjustment if the particular facts of the case support such a finding. There is no reason in principle to exclude the transfer of a police officer to a civilian post.

89. The case of *Hart* referred to by the respondent did not in the event assist the tribunal as the claimant in that case was seeking an adjustment in order to enable her to complete her probation and retain her status as a police officer. The tribunal well understands the operational necessity of maintaining the credibility of police officers which in turn requires evidence of fitness. The claimant in the present case was not seeking to retain his status and instead had realistically recognised that he could no longer continue to be a police officer.

90. The statutory code of practice on employment, at paragraph 6.28 identifies a number of factors, as set out above. No single factor is determinative as it is a matter for the tribunal having regard to all the circumstances of the case.

91. The respondent made some adjustments for the claimant. It provided a comprehensive level of support to the claimant during his absence and his recuperation. Having determined that the claimant could no longer be a police officer, the respondent also sought to support the claimant in his applications for alternative roles. This does not sufficiently answer the question. The respondent knew that a vacancy for a PSI (CNYMIT) had arisen prior to the termination of the claimant's employment. The respondent did not transfer the claimant to that vacancy and instead required the claimant to make an external competitive application. The question for the tribunal is whether it was a reasonable adjustment for the respondent to make to deploy the claimant to the role of PSI (CNYMIT).

92. If the claimant had been a pre-existing police staff post-holder of the respondent, he would have been able to access the Redeployment Register as a consequence of which he would have been considered by HR as potential match for existing vacancies and treated as a priority in advance of any potential competitive process. The criteria that would have applied would broadly have been an assessment of

whether his skills met a 70% match to the criteria for the role. The respondent's policy enabled individuals to take up roles with a 70% match. The claimant would more likely than not have been deployed to the PSI role in such circumstances.

93. As a police officer, and according to the Limited Duties policy, a police officer who is subject to restricted duties is also entitled to a skills assessment, typically a case conference, comprising an HR adviser, a member of senior management and the officer himself, to determine a suitable role for deployment, see [p.513]. Paragraph 3.24 expressly provides for an Officer to be "posted to a role" even in circumstances where they, "do not have all the necessary skills and experience" for which a further period of up to 6 months training might be afforded.

94. In fact, as it transpired during the course of the hearing, the claimant was never able to access the Limited duties policy because the respondent's practice was to use it "only for those who have completed their probation training and are thus to be deemed effective". To do otherwise, the respondent says, would undermine the operational credibility of police officers and the statutory requirement imposed on the respondent to operate a police force with officers who are fit to perform officer duties.

95. That rationale may explain the caution with which a student police officer who seeks restricted duties during the course of their probation is treated. Hypothetically, it may also explain precautions taken in the case of the migration of a police staff post holder to a police officer role. However, contrary to DCC Arundale's expression of opinion, the "vice versa" does not hold true, In the tribunal's judgement, it is not a rationale that explains the treatment afforded to a police officer who accepts that their time as a police officer must come to an end and seeks alternative, i.e., non-police officer, duties. The statutory requirement for a successful period of probation for a police officer or the need for operational credibility of police officers is not apt to explain the claimant's difficulties in transferring away from a police officer role and into a police staff post.

96. DCC Arundale also added a qualification to his determination, at [p.334], when he said that assistance with alternative employment should be provided as long as this does not "subvert established processes for fair and equal treatment of potential employees nor disadvantage existing police staff members". In effect, the claimant was required to undertake a competitive application process (albeit mitigated by the DCS) because to do otherwise would disadvantage others. That appears not to have been a consideration in the case of police officers seeking to be "posted" into a role or in the case of police staff job holders seeking to be redeployed. Given those circumstances, the respondent has not satisfied the tribunal on the evidence that there is a reason to distinguish the claimant who had not completed his officer training but who accepted that his role as a police officer would have to come to an end in any event.

97. The fact that the claimant was effectively excluded from the Limited duties policy may have served to exacerbate the difficulties that he found himself in but does not change the underlying premise that in both the Redeployment Policy and the Limited Duties policy there is provision to transfer, a.k.a. to deploy or to "post", an employee to a role following a collaborative skills assessment and notwithstanding a skills match of no more than 70% and/or despite lacking some of the skills and experience that could be obtained through a reasonable period of up to 6 months for retraining.

98. The claimant did not have a collaborative skills assessment. This was despite the fact he consistently expressed an interest in a PSI role and that he was seconded to the MIT and was in effect gaining relevant experience for a PSI role and he had active support from his DCI line manager at the time. The claimant did successfully obtain an interview and a job offer for the (second) PSI role within a matter of months of termination of his employment which plainly is suggestive of the fact that he had appropriate skills and experience. Nor is the fact of his failure to obtain an interview in March 2020 for the (first) PSI role instructive given that the only evidence before the tribunal of any shortcoming in skills and experience is that in one category only he achieved a "just below satisfactory evidence". This remains unevidenced and unexplained. Bearing in mind also the burden of proof which sits with the respondent, the tribunal having found a PCP and substantial disadvantage, the tribunal concludes that the shortlisting exercise merely reflected the claimant's own attempt at evidencing his skills and the respondent has not satisfied the tribunal of the nature of the claimant's apparent shortcoming (if any) in essential skills or that it would have materially affected his ability to carry out the role of PSI (CNYMIT) from December 2019.

99. By 3 December 2019, at the latest, following the determination of DCC Arundale to dispense with the services of the claimant as a police officer, there arose a duty on the respondent to consider alternative employment so as to avoid the disadvantage of the termination of the claimant's employment and the consequent need for him to apply for alternative roles as an external candidate.

100. The tribunal finds that there was a vacancy for the role of PSI (CNYMIT) in December 2019. If the claimant had been a pre-existing police staff post holder, it is likely that he would have found himself on the Redeployment Register and liable to be deployed to the vacancy without an application. The claimant was denied that option because he was a police officer. The statutory standards that police officers must undoubtedly maintain does not explain why the claimant could not be offered an appropriate police staff role that was vacant. The fact that such an offer might amount to preferential treatment is plainly anticipated by the reasonable adjustment scheme (and see *Archibald*) and even if relevant it cannot be a significant consideration that others might be disadvantaged. Something akin to the existing collaborative skills assessment processes undertaken by the respondent would provide sufficient reassurance that the claimant would be suitable to be able to undertake the role.

101. The offer of an existing PSI vacancy to the claimant would plainly have been effective in preventing the substantial disadvantage accruing to him of having to endure a termination of his employment relationship with the respondent and the need to make a competitive application as an external candidate.

102. The fact that the claimant was undertaking practical work experience with the MIT and had the active support of his then line manager is indicative of him being able to take up the PSI role successfully. Within a matter of months he had in fact successfully applied and obtained a PSI role in any event. The prospect that the reasonable step would have been successful in avoiding the disadvantage amply meets the test set out in Leeds Teaching Hospital.

103. The practicability of that step is not diluted by the respondent's undoubted need to maintain the operational credibility of police officers. The claimant had recognised that he could no longer be a police officer. In effect, an offer of an existing PSI vacancy would have been practically the same as he would have obtained if he had been a pre-existing police staff job holder. The fact that he was an exiting police officer should not have created an additional obstacle.

104. The respondent is a substantial and sophisticated employer with the benefit of dedicated HR resourcing and legal services. The fact that the claimant was perceived as finding himself in a "unique circumstance" does not explain why he should have to find himself outside of the redeployment processes widely available within the respondent. The divide between police officers and police staff employees in this specific context is illusory as the claimant had recognised that he would no longer be a police officer. *Archibald v Fife* reminds us that the claimant might well legitimately receive preferential treatment over others.

105. The conclusion of the tribunal is that the posting of the claimant to the PSI (CNYMIT) role that was vacant in December 2019 was a reasonable step for the respondent to have taken. Had that step been taken, there was at least a prospect that the claimant could either have resigned as an officer in order to be re-engaged or have undergone an administrative dismissal with a simultaneous re-engagement.

106. It is the tribunal's judgement that the claimant's claim that the respondent has failed to make a reasonable adjustment is well-founded. By 3 December 2019, the latest, the respondent failed to offer the claimant the vacant role of PSI (CNYMIT).

Discrimination arising from disability

107. Was the claimant's dismissal treating him unfavourably because of something arising in consequence of his disability?

108. The respondent did not challenge the fact that the claimant's disability resulted in him being unable to perform the role of the police officer and consequently his dismissal.

109. The respondent determined that the claimant should be dismissed as a police officer pursuant to Regulation 13 of the Police Regulations 2003. In doing so, the respondent also offered assistance to the claimant to gain alternative employment with the respondent on the basis that the claimant would "leave the organisation" (in the words of DCC Arundale) and reapply for any roles. The claimant was treated as an external candidate. The respondent did not permit the claimant to transfer to an alternative role within the respondent once his dismissal as a police officer was determined.

110. The tribunal reminds itself of the steps set out in the *Pnaiser* case above.

111. The parties' Agreed List of Issues carries a subheading of "s.15: Dismissal as a student officer". The respondent says that the claimant must be held to his pleaded claim, per *Chapman v Simon*, and argues that the unfavourable treatment is solely the act of dismissal made by DCC Arundale as communicated on 3 December 2019.

112. The tribunal clarified this at the beginning of the hearing. Counsel for the claimant stated that the unfavourable treatment is to be seen in context, namely, the dismissal under Regulation 13 without the position of other roles being considered, and that if the claimant had been offered the police staff role it would have kept him in employment. In closing submissions, Counsel for the claimant reaffirmed that the unfavourable treatment was the "termination of the employment relationship with the respondent" which incorporated termination pursuant to Regulation 13 without moving him at the same time into alternative employment. This was described by Counsel for the respondent as a "more expansive view" of unfavourable treatment but in respect of which the respondent relied upon the same arguments as had been proffered in respect of the section 20 claim.

113. The tribunal reminded itself of the claim form, at [p.8], in which the claimant provided concise details of his claim in which he stated, "I was formally dismissed under Regulation 13. This came as a surprise to me as I was already carrying out duties of the police staff investigator would be. I thought I could have been transferred over to a staff role… I believe they had a duty to find me suitable role, which I was carrying out very well, but instead chose to terminate my employment".

114. The tribunal finds that the unfavourable treatment for the purposes of section 15 is the termination of the employment relationship between the claimant and respondent, which is apt to include both the Regulation 13 dismissal and the failure to offer alternative employment. This does not fall foul of the *Chapman v Simon* principles of pleading because the matter is sufficiently if concisely set out in the claim form. The fact that the list of issues might have suggested a narrower approach is secondary to the pleaded claim and the tribunal is not bound by a List of

issues, even one which might be agreed between the parties, where the facts suggest otherwise, the existing pleading accommodates the desired approach and the parties have had the opportunity of dealing with the relevant matter in the course of the hearing.

115. The termination of the employment relationship arose following the fact that no alternative employment was available to the claimant and that the claimant was medically unable to work as a police officer. The reason why the claimant was in this position was because the respondent had determined to dispense with his services as a police officer. The respondent decided to do this after it was advised by the FMA that the claimant was unable to perform police officer duties. The claimant's medical condition was plainly the reason for DCC Arundale's determination. There are a number of links in the chain but it is the tribunal's judgement that the claimant's inability to perform police officer duties and the consequent risk of termination of the employment relationship linked to the claimant's disability were in DCC Arundale's mind at the time he determined that the claimant was to be dismissed as a police officer and would be required to apply for alternative roles if the claimant wanted alternative employment with the respondent.

116. Subject to justification, the termination of the employment relationship was an act of discrimination arising from disability.

117. Was the unfavourable treatment a proportionate means of the respondent achieving a legitimate aim?

118. The legitimate aim which is pleaded by the respondent, at [p.29], of "only keeping on in the respondent's police force those who were physically and mentally capable of carrying out the functions of Constable (i) efficiently in a manner conducive to operational efficiency and the health and safety of the claimant, his colleagues and members of the public and for (ii) force to maintain public confidence in the constables it appoints" is a legitimate aim in respect of the dismissal of the claimant under Regulation 13 in isolation. If dealing with the Regulation 13 point in isolation, the tribunal would not be likely to take issue with that formulation of a legitimate aim. However, anticipating the proper context of the claim, the alternative formulation of a legitimate aim is pleaded to by the respondent at [p.30] in respect of "not transferring the claimant to a civilian staff post", and the legitimate aim is alleged to be that of "conserving and allocating the funding of the respondent's force which is financially stretched because of governmental budgetary constraints".

119. In general, the respondent will no doubt be mindful of the limits of its budgetary constraints and of the need to conserve or allocate funding appropriately. The tribunal finds however that this legitimate aim does not correspond to a need that is material and substantial in the present case. The claimant's claim is not premised upon the need or requirement for a new role to be created for the claimant or to be placed in a role which is not suitable and for which extensive re-training is required or for material additional expense. The objection of the respondent to the offer of a

staff role, a “seamless migration”, does not derive from financial considerations but from the significant differences that the respondent perceives between police officer roles and police staff posts. The difference is rooted in the respondent’s understandable desire to ensure the operation credibility of police officers. It might also conceivably be explained by a desire to ensure the police staff posts are undertaken by those best equipped to do so. However the rationale is explained, the tribunal does not consider that it is in essence a financial consideration.

120. It is the tribunal’s judgement that the respondent has not established a legitimate aim that is substantial and material to the present case.

121. Furthermore, the test of whether the respondent’s treatment is a proportionate means of achieving a legitimate aim is an objective one. The burden of proof is on the respondent. The question for the tribunal, bearing in mind the law as set out above, was whether the measures taken by the respondent were an appropriate means of achieving its legitimate aim and reasonably necessary in order to do so.

122. The tribunal compared the impact of the treatment on disabled people as against the importance of the aim to the respondent. In our judgement the legitimate aim of conserving or allocating funding or even potentially ensuring police staff posts undertaken by those best equipped to do so is important to the respondent in ensuring that it maintains the best support function for its primary responsibilities of policing. The impact on disabled police officers of having to be forced to terminate their employment relationship and undertake external competitive applications in order to obtain alternative employment with the respondent is detrimental to their working lives and career development.

123. There was a non-discriminatory alternative open to the respondent which was to reflect the existing policies of affording police staff job holders and police officers (who had completed their probation) a collaborative skills assessments with a view to a “post” or “deployment” into an alternative role so as to avoid a termination or (if strictly speaking a termination by virtue of Regulation 13 was unavoidable) to enable a technical dismissal and a seamless re-engagement. This was not a case of simply offering a job without an assessment and would have required a suitable skills match.

124. The statutory requirements relating to, and the operational credibility of, police officers is not impacted in the case of an exiting police officer who is seeking deployment to a police staff role. The respondent has not satisfied the tribunal that the significant differences in roles between police officer and police staff post holder meant that a transfer from officer role to a staff role was not an available option. The burden of proof of justification rests with the respondent and the respondent has not discharged that burden.

125. The claimant was self-evidently keen and determined to pursue an alternative career in a PSI role and by December 2019 had gained experience, as well as the support of his line manager, sufficient for him to be assessed as likely to be suitable for deployment into a PSI role. The fact that he successfully did so competitively a few months later not only corroborates his suitability but also is a testament to his resilience and determination.

126. It is the tribunal's judgement that the unfavourable treatment was not a proportionate means of the respondent achieving its legitimate aim.

127. In summary, it is the tribunal's judgement that:

127.1. the respondent did not directly discriminate against the claimant because of his disability, and the section 13 claim fails
127.2. the respondent failed to comply with the duty to make a reasonable adjustment, by failing to offer the claimant the alternative role of PSI (CNYMIT)
127.3. the respondent treated the claimant unfavourably because of something arising in consequence of the claimant's disability
127.4. the claimant is entitled to a remedy, and the tribunal will notify the parties of a listing for a remedy hearing.

Remedy

128. The parties should send in dates to avoid for the remedy hearing within 14 days of the date these reasons are sent to the parties (and those dates should be dates to avoid for the rest of 2021).

129. The parties should co-operate in the making of a remedy bundle or in respect of matters additional to that which has already been disclosed. If further directions are required, the parties are invited to write jointly to the tribunal whereupon consideration will be given to the listing of a telephone preliminary hearing.

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EMPLOYMENT JUDGE BEEVER

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

14 June 2021

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