



THE EMPLOYMENT TRIBUNALS

Claimant Mr P Graham

Respondent The Chief Constable of Cleveland Police

Heard at **Newcastle upon Tyne Hearing Centre (via CVP video link)**
On 22-26 March 2021 (deliberations in chambers 29-30 April 2021)

Before **Employment Judge Langridge**
Members Mr R Greig
Ms B Kirby

Representation:

Claimant Elliot Gold, counsel
Respondent Andrew Webster, counsel

JUDGMENT

The unanimous Judgment of the Tribunal is that:

- (1) The claimant is a disabled person under section 6 Equality Act 2010 ('the Act') and has been since November 2015, to the knowledge of the respondent.
- (2) The claim under section 15 of the Act is well-founded and succeeds, in that:
 - a. the respondent treated the claimant unfavourably because of something arising in consequence of his disability; and
 - b. the respondent was unable to show that the treatment was a proportionate means of achieving a legitimate aim.

- (3) The Tribunal has jurisdiction to hear these claims, which were brought within the time limit under section 123 of the Act by virtue of the treatment constituting continuing conduct extending over a period of time ending in December 2019 or January 2020.
- (4) The claim of indirect discrimination under section 19 of the Act is not upheld and is dismissed.
- (5) The claim of direct discrimination under section 13 of the Act is not upheld and is dismissed.
- (6) A telephone case management hearing shall be listed for 2 hours, for the purpose of identifying a list of issues for the remedy hearing and to make directions in respect of that. Within 14 days of receiving this judgment both parties are to write to the Tribunal with an agreed date or dates for the case management hearing, as soon as convenient after 1 October 2021.

REASONS

Introduction

1. The hearing of this claim was listed for four days by CVP and despite several technical and procedural interruptions, it was possible to complete the evidence in that time, with submissions being given orally on the afternoon of 29 March by the agreement of the parties.
2. The claimant gave evidence on his own behalf at the hearing. For the respondent, oral evidence was given by the following witnesses: Superintendent A Jackson and Superintendent E Harrison, the claimant's line managers between late 2015 and June 2019; Chief Superintendent Y Teladia, the claimant's line manager from June to September 2019; Chief Superintendent L Theaker, member of the interview panel in October 2019; Mr P Young, HR Manager; and Assistant Chief Constable S Graham, who took up his post from another force in May 2019.
3. The Tribunal was aware that in the period immediately before the hearing there had been some dispute about the adequacy of the respondent's disclosure of documents. That dispute was dealt with on an urgent basis by the Employment Appeal Tribunal and the claim proceeded after the Chief Constable provided a sworn statement saying that all relevant documents had been disclosed and no additional documents existed which were relevant to the issues. This Tribunal

had no involvement in that dispute nor any detailed knowledge of it during the course of this hearing.

4. It transpired during Mr Gold's closing submissions that almost no documents in the bundle (comprising 1130 pages) had been produced by the respondent, with virtually all records disclosed by the claimant. In particular, there were no contemporaneous records of any kind showing the respondent's rationale for its promotion decisions, which were central to the issues in this case.
5. The Tribunal spent the first day pre-reading the papers. We noted that both parties had omitted to offer evidence in their written statements on key issues which would need to be determined. In the claimant's case he did not set out clearly in his statement (which was otherwise comprehensive) his reasons for not bringing a claim in the Tribunal until March 2020, despite relying on events going back to 2015. In the case of the respondent, not one of the six witnesses called included any information in their statements concerning its policy and practice in relation to promotion opportunities, particularly in the context of an officer being given development opportunities through acting up or temporary promotions. Although the respondent's written policy on 'Acting-up and Temporary Duties – Police Officers' was included in the bundle, it was not introduced into the evidence by any witness in their written statements. Both parties were made aware before the hearing began of these omissions and invited to produce supplementary oral evidence if they wished so that the Tribunal would have better evidence on these key issues.
6. In the event the claimant gave detailed oral reasons for the delay in bringing his claim, which was undoubtedly in time so far as it relates to his non-appointment as a Chief Inspector in December 2019. The jurisdictional question related to events dating back from then until as long ago as 2015. In the respondent's case, the witnesses did not introduce any supplementary evidence in chief relevant to the question of its written policy or its implementation in practice, though we took the opportunity to ask questions in an effort to clarify the point.
7. Before the hearing began we dealt with an application from the claimant not to admit into evidence the respondent's handwritten notes relating to a later Chief Inspector promotion process in September 2020. Those notes were barely legible, no attempt had been made to transcribe them, and no witness had been called to produce them. Given the lack of probative value of those notes, in circumstances where the respondent had already destroyed its official records from that promotion process in spite of the existence of the Tribunal claim, we granted that application. Surprisingly, the respondent made no attempt to explain how or why the records relating to the recruitment process had not been retained for the purpose of these proceedings. While the respondent's policy requires the retention of such documents for six months, that period expired three months after the issue of the ET1.
8. Another omission in the respondent's evidence in chief was the factual basis on which it might advance a justification defence in relation to the claims under sections 15 and 19 of the Act. Its legitimate aims and the proportionality of its

decisions in that context were not identified through any witness or documentary evidence, and were set out only in the respondent's submissions.

9. Points of dispute arose during the course of the hearing which are not necessary to recite here, except to note that in several instances the claimant was being pressed on cross-examination to make concessions on matters neither in the respondent's evidence nor forming part of its case. At one stage, one of the respondent's witnesses (Superintendent Harrison) referred during re-examination to the fact that one of the comparators in this case was a disabled person, something which had at no previous time being identified as an issue in the case. That person had not identified himself as disabled when applying for promotion, nor had the respondent taken any issue with his being named as a comparator. The point had not been pleaded, no disclosure had been given in relation to it, the claimant had not been cross-examined on this basis, nor was his representative even made aware of the information. For these reasons, and on objection from Mr Gold we agreed to ignore that evidence.

Issues and relevant law

10. The parties helpfully produced a detailed agreed list of issues identifying the core legal and factual allegations to be determined by the Tribunal, which we have incorporated into this part of the judgment. All statutory references in this judgment are to the Equality Act 2010 ('the Act').

Disability status

11. The claimant's case is that he was a disabled person at the material time by virtue of a degenerative condition resulting in physical symptoms of neck pain, pain in the lower back and pain radiating to the legs. The respondent admitted that the claimant was disabled for the purposes of the Act, but only from 10 November 2015 and not in the preceding period beginning on 20 July 2015. The respondent further admitted that it had knowledge of the claimant's disability from 10 November 2015.
12. The Tribunal was therefore invited to determine to make a determination under section 6 (having regard to Schedule 1 paragraph 8) in respect of the period between 20 July 2015 and 9 November 2015.
13. Section 6 provides a starting point for determining the question of disability:
 - (1) *A person (P) has a disability if—*
 - (a) *P has a physical or mental impairment, and*
 - (b) *the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*
14. The supplementary provisions in Schedule 1 paragraph 8 of the Act clarify that:
 - (1) *The effect of an impairment is long-term if—*
 - (a) *it has lasted for at least 12 months,*

- (b) *it is likely to last for at least 12 months, or*
- (c) *it is likely to last for the rest of the life of the person affected.*

Factual allegations

15. Nine key issues of fact were identified, namely, did the respondent:
- i. On 20 July 2015 deploy the claimant to the role of Inspector in the FCR which position provided no or no adequate opportunities for acting up in the role of Temporary Chief Inspector?
 - ii. Fail from 20 July 2015 to 6 January 2020 to appoint the claimant to perform any acting up Temporary Chief Inspector duties?
 - iii. Fail from 20 July 2015 to 6 January 2020 to provide the claimant with any or any adequate opportunities to become a Chief Inspector and or demonstrate his suitability for the same?
 - iv. Fail to take any or any adequate action in respect of the claimant's requests to be given promotion opportunities?
 - v. Fail to take any or any adequate action in respect of the claimants complaints that he was being given no or no adequate promotion opportunities and/or that other Inspectors appointed after him were being promoted above him?
 - vi. Fail to appoint the claimant to the role of Temporary Chief Inspector and/or Temporary Superintendent of the FCR in late 2018 / early 2019?
 - vii. Fail to appoint the claimant to the role of temporary Chief Inspector in Community Safety in September 2019?
 - viii. Fail to appoint the claimant to the rank of Chief Inspector on 16 December 2019?
 - ix. Require the claimant to report to officers who had been more junior to him?
16. Subject to the question of disability in the disputed period, to those issues of fact we were asked to apply the law under sections 13, 15 and 19 of the Act.

Direct discrimination

17. Section 13 prohibits acts of direct discrimination:
- (1) *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
18. Insofar as any of the above factual allegations are established:

- 19.1 Has the claimant adduced facts from which the tribunal could decide, in the absence of any other explanation, that the respondent treated him less favourably than he treated others?
- 19.2 Has the claimant adduced facts from which the tribunal could decide, in the absence of any other explanation, that the respondent treated the claimant less favourably because of the protected ground of disability?
- 19.3 If so, has the respondent shown that he did not treat the claimant less favourably than he treated others because of the protected ground of disability?
19. The claimant identified a number of colleagues as comparators: Inspectors Murphy-King, Cowie, Barker, Tomlinson, Motson, Morris, Galloway, Bainbridge, Snaith, Harvey, Dimelow, Robinson, Dewell, Walker, Ward and Fenny.

Indirect discrimination

20. Indirect discrimination is defined in section 19:
- (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.*
21. Here, the question was whether the respondent applied any of the following alleged PCPs to the claimant:
- i. Persons appointed to the rank of Chief Inspector and / or Temporary Chief Inspector be able to perform arrest, restraint and or full officer safety training;
- ii. Not to appoint persons on restricted duties to Temporary Chief Inspector posts;
- iii. Not to provide development opportunities to inspectors who had not completed the formal promotion process for the rank of Chief Inspector;

- iv. Not to take into account at any stage of the promotion process of an applicant's disability;
 - v. Not to make adjustments to operational roles where there were elements that a disabled police officer could not fulfil.
22. The respondent denied applying the alleged PCPs to the claimant. Insofar as it was found to have done so, the respondent admitted that PCPs (i), (ii) and (v) would be discriminatory within the meaning of s.19(2).
23. Insofar as PCPs (iii) and (iv) are concerned, if they were applied to the claimant did they or would they put disabled officers at a particular disadvantage when compared to non-disabled officers?
24. Insofar as PCP (iv) is concerned, if it was applied to the claimant was it was a proportionate means of achieving the following legitimate aims:
- creating a level playing field;
 - eliminating/minimising conscious and/or unconscious bias;
 - ensuring that the process is seen to be fair;
 - fairness; and/or
 - promoting equality?
25. Insofar as PCP (v) is concerned, if it was applied to C was it was a proportionate means of achieving the following legitimate aims:
- operational efficiency;
 - meeting operational demand;
 - operational flexibility; and/or
 - ensuring the safety of officers and the public?

Discrimination arising from disability

26. Section 15 of the Act provides that:
- (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.*
27. The parties further agreed that for the purposes of this claim, the “something arising” from the claimant’s disability was his physical symptoms and limitations and that this arose in consequence of the claimant's disability. The respondent also accepted that it had knowledge of the disability for the purposes of s.15(2), from November 2015.

28. To the extent that any of the factual allegations were established, the Tribunal had to decide:
- 28.1 whether the alleged treatment constituted unfavourable treatment;
 - 28.2 whether the Claimant had adduced facts from which we could decide, in the absence of any other explanation, that this was because of something arising in consequence of his disability;
 - 28.3 If so, whether the Respondent had shown that he did not treat the Claimant unfavourably because of something arising in consequence of the claimant's disability?
 - 28.4 In relation to factual allegation (i), was it a proportionate means of achieving the following legitimate aims:
 - assisting an officer to remain at work;
 - meeting an officer's health needs;
 - fulfilling an officer's wishes to be moved; and/or
 - keep an officer, his colleagues and the public safe?

Limitation

29. Section 123 sets the applicable limitation period:
- (1) *Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of—*
 - (a) *the period of 3 months starting with the date of the act to which the complaint relates, or*
 - (b) *such other period as the employment tribunal thinks just and equitable.*
 - (3) *For the purposes of this section—*
 - (a) *conduct extending over a period is to be treated as done at the end of the period;*
 - (b) *failure to do something is to be treated as occurring when the person in question decided on it.*
30. Do the above factual allegations amount to conduct extending over a period within the meaning of section 123(3)?
31. If not, were the claims lodged within such period as the Tribunal thinks just and equitable within the meaning of section 123(1)?

Burden of proof

32. Section 136 sets out the statutory position on the burden of proof:

(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.*

Submissions for the claimant

33. Both parties submitted extensive written submissions on the legal and factual issues relevant to the case. The following is but a summary of some of the key points made, and is not an exhaustive account of all the submissions.

34. For the claimant, Mr Gold submitted that the process of drawing an inference of discrimination is fact-specific, not to be complicated by sophisticated quasi-rules of law: Hussain v Vision Security Ltd (2011) UKEAT/0439/10/DA at [16]:

... The process of drawing an inference of discrimination, including deciding whether “Igen stage one” is satisfied, is a matter for factual assessment and, as we have said, situation-specific.

35. He referred to the two stage process set out in Efobi v Royal Mail Group [2019] EWCA Civ 18; ICR 750 at [10]:

The authorities demonstrate that there is a two-stage process. First, the burden is on the employee to establish facts from which a tribunal could conclude on the balance of probabilities, absent any explanation, that the alleged discrimination had occurred. At that stage the tribunal must leave out of account the employer's explanation for the treatment. If that burden is discharged, the onus shifts to the employer to give an explanation for the alleged discriminatory treatment and to satisfy the tribunal that it was not tainted by a relevant proscribed characteristic. If he does not discharge that burden, the tribunal must find the case proved.

36. And where the tribunal considers what inferences it is appropriate to draw from the primary facts, it must assume that there is no adequate explanation for them: Igen Ltd v Wong [2005] EWCA Civ 142; [2005] ICR 931.

37. Given the “real difficulties” in establishing discrimination because of the obvious fact that it is never admitted and has to be inferred from the circumstances, the claimant is not required to provide any positive evidence that the difference in treatment was based on disability: Griffiths-Henry v Network Rail Infrastructure Ltd [2006] IRLR 865 at [18]:

[Counsel] says that in order to establish a prima facie case there must always be some positive evidence that the difference in treatment is race or sex, as the case may be. That seems to us to put the hurdle too high. As the courts have frequently recognised, there are real difficulties in establishing discrimination because of the obvious fact that it is never

admitted, and it has to be inferred from the circumstances... Provided tribunals adopt a realistic and fair analysis of the employer's explanation at the second stage, we see no justification for requiring positive evidence of discrimination at the first stage.

38. Mr Gold emphasised that the Tribunal may take into consideration the Respondent's failure to keep adequate records, whether to show compliance with its Acting-up and Temporary Duties Policy or where interview notes are destroyed without good reason: Ryglewicz v Hanson Quarry Products Europe Ltd (2013) EAT 1401482/12. In that case, the Tribunal considered that on the respondent's having destroyed all the interview documents, it offered no explanation for the claimant's failure to obtain promotion other than poor interview technique, which was not enough to discharge the burden of proof
39. At the second stage, the Tribunal may take into consideration a Respondent's failure to disclose relevant documents – per EB v BA [2006] IRLR 471 where it was held that employers should not be permitted to escape the reverse burden provisions by leaving to claimants to prove their case, as this would otherwise render the reverse burden of proof provision of little use.
40. Where the burden of proof has shifted, the respondent must prove that the treatment was “in no sense whatsoever” on the ground of disability. That requires the respondent to prove that discrimination was not a ground for the claimant's treatment. Since the facts necessary to prove an explanation should be in the respondent's possession, the Tribunal should expect cogent evidence to discharge the burden of proof: Igen Ltd v Wong [2005] ICR 931.
41. On the facts of this case, he submitted that we should take account of the absence of material emails from the respondent spanning a four year period. Furthermore, no material records were produced by the respondent with respect to:
 - a. the selection or appointment of the Temporary Chief Inspectors during 2016-2019
 - b. the selection for the head of the Force Control Room in 2018 (Supt Harrison), the Temporary Chief Inspector for the Force Control Room project in 2019 (T/ChIns Ward) or the Temporary Chief Inspector for Community Safety in 2019 (T/ChIns Cowie).
 - c. No records were produced pursuant to the Acting-up and/or Temporary Duties Policy, in respect of selection methodology, the rationale for decisions, the ratification documents from the Workforce Planning Meeting, or steps taken to ensure the Policy applied equal career opportunities to all officers and did not detriment anyone.
 - d. No witness evidence as to whether any such documents were created and then destroyed or not created at all when the Policy states that these should be recorded and retained for audit purposes.

- e. No documents or records as to why officers other than the Claimant were permitted to occupy or were selected for Temporary Chief Inspector roles for substantial periods of time.
 - f. No material records of any of the meetings the Claimant had with T/ChSupt Sutherland or the provision of the latter's daybooks or notebooks.
 - g. No documents or records as to the 2019 promotion interviews marking, where they are supposed to be retained for six months and where the respondent led no evidence as to when the records were destroyed despite the Claimant's filing of his claim.
 - h. The respondent has led extensive evidence as to the circumstances in which officers are offered temporary promotion opportunities after having completed promotion boards but has disclosed not a single policy document or other administrative record or document supporting this [and that evidence materialised only in response to the Tribunal's request].
 - i. The respondent has not only failed to disclose the daybooks of T/ChSupt Sutherland but elected not to call him as a witness.
42. The respondent has been guilty of "disclosure failure", being a "matter of concern": Dias and others v Chief Constable of Cleveland Police (2017) PT/15/586/CH, IPT/16/448/CH. In light of Cleveland Police's history as shown in this Investigatory Powers Tribunal decision, we were invited expressly to state our dissatisfaction, or at least real concern, with how the respondent has litigated this case – and to direct that a copy of its decision be sent to the Chief Constable, the Police and Crime Commissioner and the Independent Office of Police Conduct.
43. Mr Gold submitted that the claimant has shown evidence of primary facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent discriminated against him directly or by subjecting him to unfavourable treatment. He suggested that the respondent decided not to seek promotional opportunities for the claimant because he was disabled and on restricted duties. He identified the key facts as follows:
- Knowledge of disability from April 2015
 - Deployment to the Force Control Room
 - Failure to appoint to any Acting or Temporary Chief Inspector duties or provide promotional opportunities
 - Failure to appoint the claimant as Force Control manager in late 2018

- Failure to appoint the claimant to the Force Control project inspector in May 2019
- Failure to appoint the claimant as the Communities Temporary Chief Inspector
- Failure to appoint the claimant to the rank of Chief Inspector on 16 December 2019

Submissions for the respondent

44. In its amended Response to the claims the respondent denied that officers need experience of Acting or Temporary roles in order to be eligible for promotion. It did accept that the “opportunity to demonstrate leadership qualities” is one of the requirements, as is the ability “to effectively present such evidence” during promotion board interviews.
45. In his submissions for the respondent Mr Webster said that the claimant's disability had no bearing upon the matters about which he complains. He requested a move in 2015 and that was acceded to, through his deployment to the Force Control Room. The claimant professed himself to be happy with that role, enjoyed its challenges, and did not request a move away from there until 2019. The removal of the Chief Inspector post from that department in October 2016 did not prompt the claimant to request a lateral move to a department which retained that rank. Furthermore, the claimant's postings provided him with the opportunity to accrue ample evidence to support a promotion application. He elected not to apply for promotion in 2016 and 2017 despite being encouraged to do so. When the claimant eventually did request a lateral move in 2019, his request was granted. By the time of his application to the promotion board in late 2019, his disability was unknown to the decision-makers, and the claimant candidly accepted that he performed badly in interview. Less than a month later he was made a Temporary Chief Inspector and has retained that post since. Ultimately the claimant's restrictions had no bearing upon his undertaking that role, whether permanently or otherwise.
46. On the limitation question he directed us to the Court of Appeal decision on acts extending over a period in Hendricks v Metropolitan Police Comr [2003] IRLR 96.
47. Mr Webster cited the same passage as Mr Gold from Efobi v Royal Mail Group Ltd [2019] IRLR 352 on the two-stage process to be applied in relation to the burden of proof.
48. He submitted that there was no evidence of direct discrimination. Relying on Shamoon v Royal Ulster Constabulary [2003] IRLR 285, he said the ET must identify ‘*the reason why*’ treatment was afforded. In Nagarajan v London Regional Transport [1999] ICR 877 the House of Lords held that ‘*if racial discrimination... had a significant influence on the outcome, discrimination is made out*’ (his emphasis).

49. Mr Webster submitted that unreasonableness of treatment, or incompetence, do not show the reason why, and referred the Tribunal to Glasgow City Council v Zafar [1998] IRLR 36, Qureshi v London Borough of Newham [1991] IRLR 264, and also Law Society v Bahl [2003] IRLR 640.
50. Turning to the indirect discrimination claim, Mr Webster identified the potential PCPs for the purposes of section 19 as:
- i. Persons appointed to the rank of Chief Inspector and/or Temporary Chief Inspector be able to perform arrest, restraint and/or full officer safety training.
 - ii. Not to appoint persons on restricted duties to Temporary Chief Inspector posts.
 - iii. Not to provide development opportunities to Inspectors who had not completed a formal promotion process for the rank of Chief Inspector;
 - iv. Not to take into account at any stage of the promotion process of an applicant's disability;
 - v. Not to make adjustments to operational roles where there were elements that a disabled police officer could not fulfil
51. He referred the Tribunal to authorities on the nature of a PCP, and the need for any PCP to have been applied to the claimant (per Iteshi v General Council of the Bar UKEAT/0161/11). He cited Nottingham City Transport Ltd v Harvey UKEAT/0032/12, in support of the argument that "Practice" has to have something of the element of repetition about it.
52. He submitted that:
- ...[A] lack of competence in relation to a particular transaction cannot, as a matter of proper construction, in our view amount to a "practice" applied by an employer any more than it could amount to a "provision" or "criterion" applied by an employer (Carphone Warehouse Ltd v Martin UKEAT/0371/12.*

53. And that:

It is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words "act" or "decision" in addition or instead. As a matter of ordinary language, I find it difficult to see what the word "practice" adds to the words if all one-off decisions and acts necessarily qualify as PCPs...

All three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again... (Ishola v Transport for London [2020] EWCA Civ 112)

54. Mr Webster's submissions on the section 15 claim included directing the Tribunal to the following passages from Pnaiser v NHS England [2016] IRLR 170, where the EAT summarised the proper approach to determining section 15 claims:

- (a) *A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*
- (b) *The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. [...] 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 for or cause of it.*
- (c) *Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572...*
- (d) *The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links...*
- (e) *For example, in Land Registry v Houghton UKEAT/0149/14, a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.*
- (f) *This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator...*

55. The authority of Charlesworth v Dransfields Engineering Services Ltd UKEAT/0197/16 884 was cited in support of the two stage approach identified by section 15: there must be something arising in consequence of the disability; secondly, the unfavourable treatment must be "because of" that "something".

56. In Robinson v Department of Work and Pensions [2020] IRLR 884 the court said:

Both s 13 and s 15 use the same phrase 'because of' ... Both sections require the ET to ascertain whether the treatment (whether less favourable

or unfavourable) was because of the protected characteristic and, as such, require a tribunal to look at the thought processes of the decision-maker(s) concerned.

I also agree with the observation of Simler P in the EAT in Dunn that 'just as with direct discrimination, save in the most obvious case, an examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary' if a s 15 claim is to succeed. As Underhill LJ said in this court, a prima facie case under s 15(1) is not established solely by the claimant showing that she would not be in the situation of being the victim of delay and incompetence if she were not disabled.

57. The final element of the respondent's submission on section 15 related to the justification defence under section 15(1)(b). Mr Webster submitted that the claimant's deployment to the Force Control Room was reasonably necessary to:
- assist an officer to remain at work
 - meet an officer's health needs
 - fulfil an officer's wishes to be moved; and/or
 - keep an officer, his colleagues and the public safe

Findings of fact

58. The respondent constabulary is a small force, both in terms of the numbers of police officers and its geographical boundaries. This facilitated communication between officers on an informal level and enabled management to gain a good understanding of the work of the officers reporting to them.
59. Having joined the respondent as a Police Constable on 27 August 2002, the claimant was promoted to permanent Detective Constable on 21 September 2005, then to substantive Sergeant on 30 June 2008. In 2010 he was appointed as an Acting Inspector on various shifts and on 6 August 2012 he was given an opportunity to operate as a Temporary Inspector for a seven week period. A similar opportunity arose in early March 2013, though on this occasion the claimant was appointed as a Temporary Inspector for longer, over 48 weeks. On 5 June 2014 the claimant was appointed to act up as a Chief Inspector for three weeks but then appointed as a substantive Inspector on 1 July that year. In the period of over 5 years between mid-2014 and January 2020 the claimant stayed at the same rank of Inspector, being appointed as a Temporary Chief Inspector following his unsuccessful application for substantive promotion to that rank in late 2019.
60. The claimant's early time with the respondent reflected his commitment and success in the role, and his relatively early achievement of promotions. He was consistently rated very highly by his line managers, who were aware of, and in principle supported, his ongoing promotion aspirations. The claimant's annual Personal Development Reviews (PDRs) were also consistently excellent.

61. During the period relevant to this case the respondent's approach to promotion opportunities for police officers was an informal one. Periodically it opened up a formal recruitment exercise to both internal and external candidates, with posts being advertised and candidates submitting formal applications and attending an interview with the promotion board. Such exercises for promotion to Chief Inspector were carried out in October 2016 and October 2019. They provided an opportunity for officers seeking promotion to substantive new roles and ranks. Between promotion boards the respondent did not operate any formal or structured policy in the way it made promotion or development opportunities available. For the most part, such decisions were made through informal discussions between line managers and senior officers, without being advertised or publicised internally.
62. The respondent has a written policy titled 'Acting-up and Temporary Duties – Police Officers' dealing with officers carrying out duties in other roles ('the Policy'). This was approved on 1 September 2012 and the most recent review relevant to these events was carried out in June 2017. The reviews did not alter the substantive content. The following are material extracts from the introductory parts of the Policy:

“1. Policy statement

This policy must be applied fairly, equally and consistently to all Police Officers irrespective of age, disability, gender reassignment [...]

2. Purpose

The purpose of this policy is to clarify under what circumstances an individual should be asked to perform duties at a higher rank and to ensure a standardised approach to this across the organisation.

Acting up and Temporary opportunities for supervisory and management posts will occur from time to time. [...] The intention of this policy is to ensure that wherever possible only qualified individuals undertake an acting or temporary role.

The procedures set out in the process will apply to all Police Officers.

3.1 General principles

Heads of Command and/or Service Unit Managers should carefully consider their rationale for appointing an individual to undertake a period of acting and/or temporary duties. Managers should use the principles outlined in the National Decision Making Model (NDM) to help support their selection methodology. The reasons and rationale for decisions with regards to the selection and selection method of an individual for acting up and/or temporary duties should be recorded and retained for audit purposes.”

63. The Policy clarifies what is meant by the terminology of ‘acting up’ and ‘temporary’ appointments. In this judgment, references to ‘Acting’ or ‘Temporary’ are used with the meanings ascribed by the Policy.

“3.1.1 Acting-up duties

A Police Officer should only perform the role of ‘acting up’ when the substantive postholder is not available for a period of absence which exceeds 7 consecutive working days.

3.1.3 Acting-up eligibility criteria

A Police Officer shall be chosen for acting duties in accordance with a list of criteria. The following criteria are amongst those that can be considered; they are not in a particular order:

- Police officers who are qualified for promotion to the next rank and have passed a promotion board and are awaiting promotion;
- Police officers personal development in line with a Personal Development Plan (PDP);

The Performance Development Review (PDR) process will be the mechanism for individuals to record their career aspirations and allow the organisation to facilitate development opportunities.

To allow all Police Officers an equal opportunity to develop their skills in preparation for the next rank, careful consideration should be given to limiting the acting period to a maximum of up to 56 days [...] for each individual. Where acting periods extend beyond 56 days, an application to the Workforce Planning Meeting for the successful Police Officer to be promoted on a temporary basis should be made. Heads of Command and/or Service Unit Managers should be mindful once an individual is promoted to the next rank on a temporary basis they are then eligible to receive annual increments at the next rank and therefore a temporary promotion has a financial impact on the individual’s pension.

Selection for acting up will be done on an objective basis, taking cognisance of the eligibility criteria outlined in Section 3.1.3 of the policy.

3.2 Police Officers

People Services and training administration will maintain a record of all Police Officers who are qualified for the next rank and who are seeking promotion to the next rank.

3.4 Temporary Duties

Temporary promotion should be used when a shortfall has been identified in a particular rank which is likely to be for a lengthy period of time [...], with the period being more than 56 days. Temporary promotion does not have a defined cut off

point and therefore can provide key experience of performing the duties of the higher rank over a longer time period than acting up.

A Police Officer can be chosen for temporary duties in accordance with the following principles:

- Temporary promotion to a particular rank. Approval should be sought from the appropriate level of authorisation.
- [...]
- Other eligibility criteria listed in section 3.1 of the policy not mentioned above.

If it is anticipated that at the outset of a period of acting that the time spent in a higher rank will exceed 56 days, application for a Temporary promotion should be completed using the form available on the force intranet.

Applications for temporary promotion should be ratified by the Workforce Planning Meeting (WPM)."

64. The last part of the Policy (which comprises 8 pages in total) provides as follows:

5. Compliance and monitoring

The Acting-up and Temporary duties procedure will require on going review and evaluation every two years. It is important to ensure that the policy applies equal career opportunities to all Police Officers and does not detriment anyone.

People Services will be responsible for ensuring individuals career aspirations are supported where appropriate."

65. In practice, the respondent did not have regard to the requirements of the Policy in its decision-making, and in fact the senior officers who gave evidence to this Tribunal had either no knowledge or no familiarity with its provisions. ACC Graham conceded he had not seen the policy before this claim arose and no one had brought it to his attention after he joined the force in May 2019.
66. The practice followed by the respondent when making decisions on acting up or appointments to Temporary posts was wholly informal and depended in large part on officers being in the right place at the right time, in order to be considered for such opportunities as operational needs required. It was difficult to piece together from the oral evidence of the respondent's witnesses what this informal policy or practice was.
67. Supt Jackson said that the respondent did not "just pick people up and put them into posts". She acknowledged that acting up in a Temporary role was an opportunity to develop and it can be an advantage. She said it is an opportunity given to applicants who have failed at promotion boards, and explained that "the respondent does that now" because it helps applicants be better prepared, to be able to demonstrate their abilities in the actual Chief Inspector role.

68. When asked about opportunities outside the 'silo', as the claimant saw his deployment in the Force Control Room (FCR), she said that on occasions Temporary opportunities arise that people can apply for. If there was a T/Chief Inspector post for a prolonged period, there should be an application process. She was not sure what opportunities were available that the claimant could apply for, as none existed in the FCR but she believed there were "lots of other opportunities" elsewhere.
69. When asked how anyone would be offered an Acting or Temporary position outside the formal application process, she said, "If I had been doing it and had a post I would look in the first place at someone in the FCR". She understood there would be a selection process if more than one person was interested.
70. When asked what the policy is across the force, Supt Jackson said that if an officer is absent for less than 54 days they will put someone into the role to on an Acting basis. If the period is more than 54 days the role would be advertised. She clarified that what tends to happen is that someone in the immediate area will be put in an Acting role initially, where the period is less than 54 days. That period may then be extended and the officer would then be entitled to Temporary status. She acknowledged that the respondent recognises some potential unfairness around that, and said everyone should be given the opportunity to apply.
71. When asked how an officer would be appointed straight into a Temporary post, Supt Jackson answered by reference to her own case. Both times she had a Temporary appointment it was known that the period would be more than three months, and so the position would be advertised. When asked how the claimant would be aware of vacancies, she qualified this by saying, "It should be advertised, but it wasn't in the past, but they do recognise the unfairness". She could not identify when the respondent started to advertise and said she knew of people being put into positions without a fair process of selection in 2015, and this continued for a couple of years. She recalled that a meeting took place in around late 2016 where the respondent reviewed all the existing Temporary positions in the force to see whether they needed to advertise further such opportunities, for example where a person was already in the Temporary post. When asked whether that applies to a person getting into a Temporary post in the first place, she said this was not the case previously. She said the situation has changed over the last few years and there are now fewer people in Temporary posts because there are substantive promotion processes most years.
72. In his witness statement Mr Young said that:
- "Development opportunities in the form of temporary Chief Inspectors positions are available to applicants who have been unsuccessful at a promotion board. Selection for such temporary roles is based upon Officers' scores at interview. This is deemed to be the fairest way to provide development opportunities at that rank. [...] As Peter Graham did not apply in the promotion process rounds in 2016 and 2017 he would not be offered development opportunities for this reason."

73. In oral evidence Mr Young explained that if a promotion board process takes place, then roles are advertised. This is linked to a workforce planning meeting. They also rely on information from PDRs. They look primarily at the officers who have applied but not been successful, for promotion opportunities outside the board. He acknowledged that people would not be offered such opportunities if they did not apply to the board.
74. His written statement noted, in relation to the Inspectors who failed the promotion board in 2019 that “force protocol is to offer development opportunities where available”. Mr Young accepted that in practice, anyone who fails the board is allocated to a Temporary Chief Inspector role, if one is available. He confirmed that the pool of candidates for a Temporary role was those who had applied for substantive posts. He added that ideally there will be sufficient candidates for the vacant substantive posts, otherwise a selection is made. They hold people who were not appointed on a “talent pool”. In other words, if they are successful, but there are fewer posts than candidates, they will be considered first before other candidates.
75. When asked what the procedure was, if a Temporary post became vacant in the interim, and there was no one in the pool who had failed the board, he said that if the role would be available for more than a certain period, it should be advertised so that they would then follow the standard recruitment process, including shortlisting and interview. He repeated this was what actually happens in practice, but conceded on cross-examination that “in this particular case there is no evidence that what I've described has actually happened.”
76. Mr Young made repeated concessions as to the requirements of the Policy, including that it “must be applied fairly, equally and consistently” to all officers. He agreed that the Policy requires records to be made for audit purposes, and that there should be documentation of decisions. He agreed that the PDR is the mechanism to record career aspirations. He accepted that posts are not necessarily advertised, and that a manager “may just decide to appoint someone”. He agreed that if a person is not aware that a Temporary post has been created, they cannot apply.
77. He confirmed that no documents exist in relation to Inspectors Ward or Cowie, or any of the other Inspectors referred to in the bundle. He agreed that there was no evidence of compliance with procedures, nor documentation showing that written forms (available on the intranet) were completed in the case of Temporary appointments, nor any document showing any ongoing review or evaluation under Part 5 of the Policy. He conceded that senior officers including the ACC should follow the Policy with care and set an example to the force.
78. When asked whether, if an officer does not or cannot apply to a board, that means they are not in consideration for Temporary appointments, Mr Young answered, “I can't say” and suggested that “ACC Graham may know”.
79. ACC Graham's oral evidence on the Policy and the practice actually followed added little clarity to the position.

80. In the claimant's witness statement he had alleged that in November 2020 (after the time of these events), he was required to reapply for his position as Temporary Chief Inspector, which role was advertised after only ten months and despite his positive appraisals and commendations. He felt this was a targeted decision and very unusual, as he has never known it happen with colleagues in the same situation. When ACC Graham was asked to comment on this, he did not give any explanation, referring instead to there being insufficient candidates for the vacancies, and so a decision was made to appoint others who had failed in the process.
81. When asked how the respondent would decide who the potential candidates for promotion are, if the policy being followed is an informal one, ACC Graham said that decisions on Acting posts would be dealt with at local Command level, for example to cover leave. If it was a period of more than 56 days that would trigger a Temporary appointment. They would look at the role, whether there was a specialist skill set, and then decide how to go forward. He said, "No process is necessary if we have someone available". He added that "Now, the force would typically advertise and run a process for that. If there was no select list from a promotion pool we would advertise. We would go to that list first." In cross-examination he identified the pool of potential candidates if a Temporary vacancy arose by reference to the position where the number of successful candidates outnumbered the available vacancies. In that example, the successful but not appointed officers would be on a select list until a vacancy arose. "If there is a Temporary opportunity, we would use that pool if possible." This was qualified, however, on re-examination when ACC Graham said that the officers on that list are those who have applied to a board but been unsuccessful. Such officer will be provided with a development opportunity, as happened when the claimant was appointed as a Temporary Chief Inspector from January 2020.
82. During the claimant's oral evidence he set out his understanding of the position. Although initially happy with his deployment to the FCR, he felt he was operating in a silo. He worked hard to make his senior colleagues aware of his aspirations and was "shouting from the rooftops" about it. He felt the onus was on him. The claimant received lots of positive words of support and encouragement from Supt Jackson but no actions were ever taken and he was never afforded an opportunity to experience a T/Chief Inspector role.
83. The claimant's expectation was that, if an opportunity to become Temporary Chief Inspector was available, the line manager would make him aware of it. It was not a case of applying for such jobs, as they were not advertised. They were usually "given out", with officers "just placed into them", as opposed to being appointed through a selection process.
84. The claimant felt that this lack of process is what disadvantaged him, along with the need to be in the right place at the right time. The only process that he knew of was to make his intentions known through the PDR reviews, otherwise he felt it was random. He agreed that it is not a requirement to have had Acting or Temporary experience, but said it is helpful. Not having such opportunities

impeded his ability to gain relevant experience, including networking with senior officers which he felt was a great advantage.

85. Having reviewed carefully the unclear and at times inconsistent explanations for how the respondent operates its written Policy, or its informal policy and practice, on Acting and Temporary appointments, the Tribunal finds as a fact that the respondent:
 - 85.1 Did not have regard to either the letter or the spirit of the Policy in its arrangements for making development opportunities available to officers.
 - 85.2 Did not operate a cohesive, coherent or transparent policy or practice in this respect.
 - 85.3 Gave no thought to the position of the claimant as a disabled person, or other officers with disabilities, when making such arrangements.
 - 85.4 Routinely made decisions on Acting and Temporary appointments without making the claimant aware of them, through advertisements or otherwise.
 - 85.5 Routinely turned to a narrow pool of officers for selection for Acting and/or Temporary appointments, being those who were working in the immediate area of the vacancy, who were already known to managers at local Command level, and who were slotted into posts without any selection process being carried out.
 - 85.6 Did not routinely advertise or follow any selection exercise between potential candidates, where opportunities arose to be appointed on a Temporary basis without being first in the Acting role.
 - 85.7 Routinely allowed officers to move from Acting into Temporary positions once a period of 56 days had elapsed, without opening up the Temporary positions to others, including the claimant.
 - 85.8 Did not consider making opportunities available to the claimant because of his position in the FCR, which meant he was confined to that department and not considered for Acting or Temporary opportunities elsewhere.
 - 85.9 Did not carry out any exercise in matching the claimant's skill set with potentially suitable opportunities.
 - 85.10 Did advertise promotion opportunities arising from periodic promotion boards and make them available for all interested candidates to apply.
 - 85.11 Maintained a "select list" or "talent pool" limited to those officers who had applied to a promotion board but not been appointed into a substantive

post, to which it would turn first if further promotion or development opportunities arose.

- 85.12 Did not make such promotion or development opportunities available to the claimant or other officers who did not or could not apply to a promotion board because of disability.
86. Returning to the chronology of relevant events, early in his career with the respondent, in December 2004, the claimant had sustained an injury to his neck while on duty. He has also had difficulties over a long term period as a result of a degenerative condition affecting his neck, back, hips knees and ankles. The symptoms include pain in the neck, lower back and radiating into the legs. His physical limitations and impairments deteriorated over the following years and by November 2015 these were such as to render him a disabled person.
87. On 31 March 2015 the claimant was referred to Occupational Health (OH). He discussed his health problems with Chief Superintendent Gudgeon in mid-July that year and requested redeployment arising from his increasing difficulties with physical limitations. He was unable to fulfil all the duties required of an active officer, such as arrest and restraint, dealing with physical confrontations, and full officer safety and fitness training. There was no discussion about the team to which the claimant would or could be redeployed and he was aware that there were few if any options at Inspector level other than the one offered, namely a posting to the FCR. This took effect from 20 July 2015. At the time of his discussion with Chief Supt Gudgeon the claimant did not make him aware of the impact his deteriorating health had on his day to day activities, and was unable to identify for the Tribunal any such impact existing at that time. The claimant was not unhappy with the move to the FCR and agreed that it was a supportive step to help manage his physical limitations. It was only later, with the benefit of hindsight, that he realised that being based in the FCR became unfavourable to him because it limited his opportunities to develop into other roles. It was in October 2016 when he came to the view that there was a glass ceiling he could not get through. At the time of his move in 2015 the claimant believed there would be prospects of moving to a Chief Inspector role because one existed in the structure at the time, though this rank was removed from the structure in around October the following year. The claimant nevertheless felt that the position of Temporary Superintendent would be a natural career progression for him if the Chief Inspector role was being phased out, though no such opportunity arose.
88. The role offered to the claimant in the FCR was a new one, created to help him manage the respondent's problems in the number of calls requiring the deployment of a police officer. The purpose of this unit, the Incident Crime Management Team (ICMT) was to limit the number of such calls and manage resources better. The success of the team was largely due to the claimant's strong leadership. The role gave him the opportunity to demonstrate such skills and abilities at the level of Inspector, the last rank which involves going out and leading teams. By contrast the Chief Inspector rank is more strategic and desk-based and there are no inherent obstacles to the claimant carrying out the functions of that role. Although the claimant had an early opportunity to act up as a Chief Inspector, for three weeks in September 2015, few such opportunities

arose in his time in the FCR and no Temporary appointments were made available. He spent four years on restricted duties.

89. The FCR was a place where the respondent was able to deploy officers with medical needs or disabilities. According to Supt Jackson, who line-managed the claimant in that team between November 2015 and September 2018, a number of the officers working in the FCR had complex medical needs. Mr Young said that the FCR contained the largest number of disabled officers in the force. Around 90% of the people in that team required reasonable adjustments. The claimant was responsible for managing those medical issues, including sickness absences. On the claimant's arrival in the FCR there was one Sergeant and four PCs in the team. This grew fairly quickly over the next 12 to 18 months until the team included 30 to 40 people. Above the claimant was a Chief Inspector, though this rank was removed from the FCR structure around 15 months later, in October 2016.
90. The size of the respondent was such that colleagues were able to speak regularly, and senior officers would walk through the FCR and speak to officers, including the claimant, when they did so. Senior officers were aware of the high value Supt Jackson placed on the claimant's abilities to lead and drive change.
91. In October 2015 the claimant was referred again to OH, as happened on a periodic basis from that point onwards. By the time of the OH report prepared on 10 November 2015 it became apparent that the claimant's condition was very likely to deteriorate and would need surgery. He would require a treatment plan. There followed internal emails about workplace adjustments needed in relation to the claimant's workstation.
92. At the end of October 2016 the claimant had surgery to replace discs in his neck. A three month recovery period was expected but he was able to start a phased return to work after six weeks. In the period before and after the operation he was not physically or mentally ready to submit a formal application for the 2016 promotion board and in effect the claimant put his career aspirations on hold in 2017 as a result of his health. Although back at work on a phased basis, he still was not fully recovered after six months, and felt better only towards the end of 2017.
93. Although the claimant does not criticise the respondent in respect of this period, he would have liked to have some encouragement from senior officers to help him move forward. There was no reason for that not to happen other than his disability because he was considered an exemplary candidate. However, no one from the respondent approached the claimant proactively about how he might manage an application to the promotion boards, in light of the medical position and his operation. Supt Jackson was very supportive in her discussions with the claimant, but no actions materialised from that support. At an institutional level, managers did not address their minds to the limitations placed on the claimant's career development, by virtue of his redeployment into the FCR without access to opportunities in that environment.

94. Nevertheless, for some time the claimant enjoyed and succeeded in his new role in the FCR. In an exchange of emails between him and Supt Jackson on 11 March 2016, the claimant was told that the “success of ICMT is largely down to your leadership, drive and motivation”. Later that year the claimant was due to have surgery, which Superintendent Jackson was aware of in late June. The respondent opened up a competitive promotion process forward the rank of Chief Inspector in October 2016 but as this was the same month as the claimant was due to have surgery on his back, he did not apply. At around the same time the role of Chief Inspector was removed from the FCR structure, removing from the claimant any opportunity to achieve promotion to that rank in the FCR. The claimant’s operation took place on 20 October 2016, from which he made a good recovery. He was referred again to OH in February 2017. A further opportunity to apply for promotion to Chief Inspector arose in March 2017 but again the claimant did not apply. Although his recovery was going well, and he was able to return to work on a phased basis, he felt he was not ready physically to take that step and furthermore he felt the need for time to recover psychologically following the surgery.
95. In his PDR review meeting on 26 April 2017 with Chief Supt Jackson, the latter expressed that she was very supportive of the claimant’s future promotion prospects. It was through these PDRs that the respondent invited officers to express their aspirations for future development and promotion, as set out in the Policy. At the follow up meeting on 2 October the claimant indicated that he aspired to a Chief Inspector role and was told that his promotion would be supported.
96. Supt Jackson was very well aware of the claimant’s aspirations and these were discussed both formally and informally between them on numerous occasions. On 10 January 2018 they exchanged emails in which the claimant requested that Supt Jackson “move forward consideration for any Temp positions”. He added:
- “On a personal level I've been an Insp. for 4 years and had a handful of days acting over 3 years ago. I watched as others promoted after me are given opportunity, and I have not pursued temp promotion because of my recovery/health and the development of ICMT, of note I've had no recorded sickness for over 12 months. I'm conscious there is limited opportunity in Control Room, my health has some limiting factors and driving change in ICMT have likely to have combined to restrict my options.”
97. Supt Jackson’s reply was positive and endorsed the claimant's suitability for promotion to Chief Inspector. She stated:
- “I will certainly consider you for any opportunities as and when they arise. I think the role you are doing and any subsequent move into the project post would provide the necessary skills to evidence your capability to be a credible and effective Chief Inspector. Essentially we want our Ch/Insp’s to be able to drive change and motivate staff which you can evidence in abundance.”

98. Despite the positive response, and being made aware of the impact of the claimant's health on his opportunities, the respondent took no action to match him to Acting or Temporary appointments as they arose across the force.
99. A few months later, on 18 July 2018 Deputy Chief Constable Nickless told the claimant that his "leadership and passions had been noticeable". There was an email exchange between him, the claimant and Supt Jackson about the FCR statistics for the month of June indicating the success that had been achieved in reducing the number of deployments as a result of improved telephone contact with the force. At a PDR meeting on 23 August, the claimant was told that his leadership was "outstanding".
100. By this time there was no position at the rank of Chief Inspector in the FCR, although a promotion opportunity as Temporary Superintendent did arise in that team and the claimant had been told he was the likely candidate. Supt Jackson's email quoted above envisaged that he might have the chance to move into "the project role". Nevertheless, Chief Insp Harrison was appointed to the position of Temporary Superintendent in September 2018. The appointment had the effect of blocking any promotion opportunity in that team. It was around this time that the claimant first began to believe that he could be experiencing disability discrimination. He did not, however, consider taking any formal steps to complain, or bring a claim, partly because he was ignorant of his rights and partly because of a natural disinclination to take such a route.
101. The claimant reported to Supt Harrison for some months, once she took over responsibility for the FCR. The claimant had seen this position as a natural career progression for him, given the phasing out of the Chief Inspector role in the FCR. Supt Harrison felt the claimant was a strong candidate to act up in her absence on five days' leave, which he did at the level of Chief Inspector. Although he appreciated that support, he felt he was unable to experience the Chief Inspector rank fully. He was unable to make strategic changes or to make his mark in such a short period, such that acting up provided little benefit compared to an appointment to a Temporary position.
102. On 25 October 2018 the claimant exchanged emails with Supt Harrison noting their informal conversation in the canteen about his aspirations. The claimant was again making it known to his line managers that further promotion and development was important to him, pointing out in his email that:

"ICMT is not easy, it is by far my most complex posting to date, and I've loved the challenge of it all, consequently opportunities for my career development have been non-existent with other officers promoted after me now in long term Ch/Insp positions."

103. The subject of the claimant's career aspirations was again discussed at his PDR review meeting on 13 November. Supt Harrison noted:

"We discussed Pete's aspirations in relation to his future, at this time he is content in his role in ICMT. Pete has shown an interest in progression but

feels there may be fewer opportunities with the new rank structure. This will be considered if any arise however.”

104. In his own comments on the PDR form, the claimant wrote:

“Over the last few years I have witnessed numerous officers (Scott Cowie, Chris Motson, Simon Walker, Chris Barker, Darren Bainbridge, Daryll Tomlinson to name a few) promoted after myself be given opportunities to develop as Chief Inspectors. I do believe the lack of development will severely restrict my career progression, more so with the deletion of the Ch/Insp rank and being quite a driven person I am trying to come to terms with this realistic position.”

105. During the course of 2018 and 2019, a number of the claimant’s colleagues (all Inspectors) were appointed to Temporary Chief Inspector positions:

- i. Insp Tomlinson was appointed from 21 May 2018 and retained the post until 6 January 2020. He had been an Inspector since 1 March 2016.
- ii. Insp Galloway’s appointment took effect on 1 August and he held that position until 20 April 2020.
- iii. Insp Smith was appointed on 1 October, having been a substantive Inspector since 14 September 2017.
- iv. Insp Morris was appointed on 2 October, having been substantive Inspector since 1 March 2016.
- v. Insp Harvey was appointed on 2 October, having been a substantive Inspector since 1 March 2016.
- vi. Insp Dimelow was appointed on 5 November (his second appointment) and retained this position until 6 January 2020.
- vii. On 18 November Insp Robinson was appointed.
- viii. On 19 November Insp Dewell was appointed to the role, which she held until 6 January 2020. She had been a substantive Inspector since 3 July 2017.
- ix. On 18 December Insp Motson was appointed until 5 January 2020, having been substantive Inspector since 3 July 2017.
- x. On 11 February 2019 Insp Walker was appointed until 6 January 2020, having been substantive Inspector since 1 March 2016.

106. By the time his 10 colleagues achieved their promotions, the claimant had stayed at the rank of Inspector for four years, since his substantive appointment on 1 July 2014. Aside from a short period of acting up as Chief Inspector in September 2015, and a week of acting up during Supt Harrison’s leave in September 2018, the claimant had had no further opportunities to develop in other Acting Ies. At no time was a Temporary role made available to him. Prior to his appointment as Inspector, and before his health issues played a part, he had had four such opportunities.

107. On 21 February 2019 Supt Jackson was promoted to Temporary Chief Superintendent. She and the claimant exchanged messages on WhatsApp when he congratulated her on the promotion and referred to another colleague moving on. He added:

“So you may need a dynamic ch/insp to motivate north side with loads of thrive and demand / staff knowledge. I'd love the challenge.”

108. In reply Supt Jackson said:

“well just temporarily!! They have assigned our chief insps in that they have left everyone where they are. There are some gaps and I think they are going to do a process. I think control room is one where a CI hasn't yet been assigned. I would have you tomorrow as a CI if I have a vacancy so leave it with me!!”

109. However, no such vacancies were identified by the respondent or made available to the claimant. In her oral evidence Supt Jackson endorsed her view that the claimant was a good candidate for promotion and said he “absolutely did” have an aspiration to be promoted to Chief Inspector.

110. The claimant's next PDR review meeting took place with Supt Harrison on 17 April 2019. His success in driving performance in the ICMT was noted, as well as the fact that he had managed well the needs of a team with “complex and challenging needs”, including managing returns from long term sick leave. It was noted that the claimant is a “strong candidate” for the future Chief Inspector promotion board.

111. The following month, with effect from 13 May, the claimant took a lateral move as Inspector in the Community Safety team reporting to Supt Teladia (his then rank). The claimant had previously been reluctant to request such a move because to him it did not represent an advantage and potentially was disadvantageous to his prospects. He felt it was important to maintain a strong relationship with a supervisor who knew his work and could endorse the promotion. A lateral move would also put him in a different position to other officers, as it was usual for them to make vertical moves.

112. It was the appointment of a colleague, Insp Ward, to the position of T/Chief Inspector in May 2019 to work on an FCR Future Project, which prompted the claimant to speak to Supt Harrison about this lateral move. Insp Ward had been an Inspector since 1 April 2013, 15 months before the claimant's promotion to that rank. He was able to continue in the T/Chief Inspector role until his substantive appointment as Chief Inspector in the December 2019 promotion board. The claimant felt overlooked for the new project role, which he felt would have been a suitable opportunity for him even though his role had involved him in managing staff. The remit of the new project role was to transform the FCR but the claimant was not considered for that opportunity.

113. When asked at this hearing whether there was a role profile for the job to which Insp Ward was appointed, Supt Harrison said she had rarely been given such a document herself and did not believe one existed in this case. She would expect people's skills to be matched to a role profile, and for any discussion about suitable candidates to be recorded in a note or minute which would be kept. She was not aware of any documentation in the case of Insp Ward's appointment.

She acknowledged that there should be a record if inspector Ward had done any work in the FCR and confirmed that there was not one. When asked why there were no documents or a written role profile she said that the appointment came through former ACC Harwin and she would imagine he would have a record if it had been kept.

114. It was Insp Ward's appointment that led the claimant to start thinking there were difficulties, given that this opportunity had been given to a colleague when the claimant himself was so highly thought of. He started becoming frustrated, but had no thought at that time of raising a grievance, nor bringing a claim. He felt it was very difficult to take a grievance out against a senior officer and that it would be detrimental to his career. Instead, he focussed on informal ways of making progress with his career, through discussion with the senior officers concerned.
115. In May 2019 the claimant took up his new role in the Communities team reporting to Supt Teladia, who found him to be "hard working and conscientious, diligent, passionate and professional". Although the claimant had no previous experience of the role, he quickly got to grips with the complexity of it and made changes which improved the efficiency and effectiveness of the department.
116. A promotion opportunity arose in this team shortly afterwards, in August 2019. According to Supt Teladia, this was partly because he was leaving to take up a new role, and the new post-holder would be covering the role he had been performing. The vacancy was not advertised. There were only two Inspectors in Communities and of them only the claimant was interested. The claimant was Supt Teladia's preferred option to take over, and he approached him to say that he was "the best candidate". The claimant said he would welcome the opportunity. In his evidence Supt Teladia reiterated that the claimant "was the best candidate I had in the department internally and also across the force." He expected the role to be done at the level of a T/Chief Inspector, as had been suggested internally in the context of a restructure.
117. No explanation of the rationale for Insp Cowie's appointment was set out by the respondent in its Amended Response to the claim. In his witness statement ACC Gaham said that the structure of the Communities team did not include a funded Chief Inspector post. The department had been led by Supt Teladia until he was posted elsewhere. He could only vaguely recall that Supt Teladia "may have made a passing comment" about wanting the claimant to become a Temporary Chief Inspector in that team. It was not a formal request and he made no record of the meeting in his day book. He said in evidence that "To create such a post would require a funded business case for growth." Insp Cowie was asked to oversee Community Safety to fill the gap when Supt Teladia was moved. He was an existing T/Chief Inspector and already funded via a drugs portfolio, and he had capacity to temporarily oversee the function pending a decision on a substantive appointment. In his evidence, Supt Teladia agreed that a funded business case would have been needed if it was a new function, but it was not the creation of a new function and so that was not necessary.

118. In answer to questions about Insp Cowie's appointment Mr Young agreed that his position was supernumerary and that there was nothing in the evidence to show that Insp Cowie had combined roles.
119. The claimant' was dismayed by Insp Cowie's appointment as T/Chief Inspector in the Communities team, within days of this conversation. Insp Cowie already held a T/Chief Inspector role for more than three years by then, even though he was appointed as Inspector after the claimant. Had he not been reappointed as T/Chief Inspector on this occasion, Insp Cowie would have gone back to his substantive rank. Instead, he moved ahead of the claimant.
120. Having heard somewhat inconsistent evidence about the rationale for Insp Cowie's appointment, we found that the claimant's suitability for the post was not given proper consideration, that there was no exercise in skills-matching nor any comparison of the merits of the claimant and Insp Cowie. The claimant had the endorsement of his line manager, needed no training in the role, and could have been offered at least an Acting position pending further decision. The Tribunal found the evidence on this appointment unclear and unsatisfactory.
121. The claimant spoke with Supt Teladia about his disappointment. By now he was becoming disheartened and he spoke frankly about how the latter would feel "if it was a race thing", making it clear that he was drawing a comparison with a scenario in which, if roles were reversed, the Superintendent might consider this race discrimination.
122. This discussion was followed up by an exchange of emails on 19 August in which the claimant told Supt Teladia he felt he had been "treated unfairly and disadvantaged" compared to others, and that his adjusted duties were a limiting factor. Supt Teladia's reply of the same date said that this had been discussed with T/Chief Supt Sutherland (his line manager) and ACC Graham. Supt Teladia said: "my steer is if you could pause ...", referring to the possibility of the claimant taking any action such as a grievance. The pause was intended to allow for further discussions and a decision at senior level. Supt Teladia felt the decision was not yet definite and he wanted to speak to his senior officers. The claimant believed this to mean there would be some sort of follow up with him. In fact there was not.
123. Supt Teladia did speak with T/Chief Supt Sutherland numerous times, and once with ACC Graham in his office, at around the time of the above email exchange. He made it clear that the claimant was his preference for the role, and he had an expectation that his view would carry weight. He did not want anyone else in the role, partly because the claimant was familiar with it and no training would be needed. He was also one of the most experienced Inspectors in the department. T/Chief Supt Sutherland said he would speak to the claimant himself, and Supt Teladia was expecting him to raise it with ACC Graham as well.
124. In his conversation with the ACC, Supt Teladia recalled his senior officer saying he wanted to avoid appointing more Chief Inspectors or T/Chief Inspectors. He relayed that Insp Cowie felt he could do both this and his currently funded post as well. Supt Teladia felt that ACC Graham was not definitively saying he would

not have the claimant in the post, though he seemed to have made up his mind in favour of Insp Cowie. They discussed the lack of process for appointing to Temporary posts. Although ACC Graham was aware that the claimant was disabled, he said that this conversation focussed on general unfairness not disability. The ACC agreed that the respondent needed to formulate a process because it could be seen as unfair. At that time ACC Graham was not aware of the respondent's Policy.

125. Although none of the respondent's witnesses recalled the use of the words 'disability' or 'discrimination' in these conversations, they were nevertheless aware of the claimant's health issues and the physical limitations on his ability to do his job.
126. It was these events which led the claimant to become more concerned about his position. At that time he was hoping for a remedy of some kind, and a fair outcome. He did not believe a grievance would have been helpful. It would have been against the Chief Superintendent and the Assistant Chief Constable and he considered that to be career threatening. In his evidence Supt Teladia confirmed that putting in a grievance in such a small organisation could potentially mean getting a reputation, which could cause issues in the future.
127. The email exchange with Supt Teladia was the first time the claimant had referred so bluntly to the limiting factors. It was the first time he thought that this was discrimination. He felt it could only be about his disability because he was the best candidate. By this time a number of the respondent's senior officers were aware of the claimant's career aspirations and they also knew that he felt his disability was creating barriers to promotion.
128. In oral evidence ACC Graham said that the Communities team had been led by a Superintendent and as he was moving to another role, someone was needed to cover his post. He said the context was that Chief Supt Theaker was moving on and the respondent had to backfill her post. He said that at this time no decision had been made about how to do this, and that this team was not a priority at the time due to the existence of significant challenges that needed to be addressed.
129. The ACC said it was not strictly correct to say that the new appointee, a T/Chief Inspector, would be taking on a Superintendent's function, though he was unable to give an explanation for saying this. He confirmed that there was no Superintendent above T/Chief Insp Cowie, who reported to a T/Chief Superintendent. When asked whether that meant a T/Chief Inspector was in effect holding the reins of a Superintendent post, ACC Graham said he did not expect all the elements of the role would be covered. He added that Insp Cowie was not given the Superintendent role "in its entirety" but was asked by him to "oversee things pending future changes". He reiterated that Supt Teladia was moving, they were considering how to backfill posts, and Insp Cowie was asked to fill the position. Nothing was put forward to say why it was he who was asked to fill the position, or why it was not the claimant.

130. The ACC confirmed on cross-examination that the T/Chief Inspector post was not a new one and “no new post was created”; there was a vacancy at Superintendent level. When asked whether the post-holder would be performing functions in place of a Superintendent, he said that an existing T/Chief Inspector, Scott Cowie, had some capacity. That is why the ACC requested him. That was the full extent of the explanation for why he was selected.
131. No documents about Insp Cowie's appointment were made or retained. ACC Graham said it was not a selection process as such, but a short term appointment to provide cover. He said there was no record that he had made about the rationale for selecting one person over another. He said he was also unaware of the claimant's restrictions when he promoted Insp Cowie again in December 2019.
132. On the conversation with T/Chief Supt Sutherland, the ACC's evidence was that he did not recall any detail of the discussion. He said that if unfair treatment had been mentioned, he was sure he would remember that and would have made a note. Nevertheless, he did accept that general unfairness (not discrimination) was part of the conversation. ACC Graham said he was not aware that the reason the claimant was alleging unfair treatment was because of disability, until this Tribunal claim. He disputed that T/Chief Supt Sutherland raised the question of discrimination, or said the respondent was not following proper processes. Had he said these things, ACC Graham agreed it would be very serious and would be investigated. He would expect T/Chief Supt Sutherland to have raised it with him, if the issue had been brought to his attention. The Tribunal finds that these issues were raised by Supt Teladia as a result of his conversation with the claimant. Even if the word ‘discrimination’ had not been used, our finding is that the nature of the claimant's concerns was undoubtedly connected in these conversations to the limitations on his health and physical abilities, and so sufficient information was provided to senior officers to enable concerns about disability to be explored and addressed.
133. It was on 6 September 2019 that the claimant spoke personally with T/Chief Supt Sutherland about Insp Cowie's appointment, expressing his disappointment at the unfairness and the existence of what he saw as an unhealthy culture in the force. The claimant made a brief record in his pocket notebook noting:

“Ch Supt Sutherland 13:30

- No opportunity
- others promoted after me – now top paid C/I
- others are now seen as C/I
- Financially & CPD I am disadvantaged – agreed
- ? Matt Murphy King / Simon H
- DS to speak to ACC”

134. The conversation lasted around 40 minutes. T/Chief Supt Sutherland apologised for the fact that the claimant had not been offered any T/Chief Inspector opportunities. He felt there were process failings rather than personal issues related to disability and that the processes were the reason the claimant was disadvantaged. The claimant did not consider making a claim at the time of this meeting. He felt that he and T/Chief Supt Sutherland had spoken frankly and understood that the matter would be followed up in discussion between with ACC Graham. The claimant did not know whether the intended conversation took place, but expected that it would because the matter was serious. He felt he was pointedly raising an issue about unfairness and discrimination and furthermore he would expect that to be recorded.
135. At around this time the claimant was also expecting a formal promotion board to be opened up, which it did in October 2019. Having had the support of Supt Teladia, who said he would be an excellent candidate, the claimant focussed on preparing for the interview. He was waiting for the process to complete and if he had passed, he would not have brought a claim. He did not want the stress or the damage to his career.
136. Before his interview took place the claimant spoke to the Police Federation for the first time in around November 2019, and to solicitors just prior to the interview in December. He had not previously sought such advice and had been unaware of his legal rights and first learned about time limits for bringing claims from his solicitors.
137. On 17 September the claimant attended a PDR meeting with Supt Teladia, who recommended support for future development opportunities, describing the claimant as a "very strong candidate" and saying that he would "unreservedly support" any application he made.
138. The following day, 18 September, Insp Robinson was promoted to Temporary Chief Inspector, having held her substantive Inspector role since 3 July 2018, a little more than a year. Another colleague, Insp Fenney, was appointed Temporary Chief Inspector on 4 November 2019 until 6 January 2020, having been a substantive Inspector since 1 March 2016.
139. The October 2019 promotion board was the first opportunity to apply for promotion to a substantive Chief Inspector role since October 2016. Although on this occasion the claimant felt able to submit an application, he felt disadvantaged in his ability to provide details of key experience in an Acting or Temporary role. He felt unprepared and lacking in confidence and unable to answer questions at interview in depth as these were based on Chief Inspector competencies of which he had not had experience. Although he had previously discussed with Supt Jackson the prospect of support such as mentoring to help him prepare for such an opportunity, no such steps were put in place. The claimant was unsuccessful in his application and accepted in his evidence that he had not performed well at interview. He said he lacked confidence and found it difficult to explain the values and competences of the Chief Inspector role, having never had that experience.

140. Of the thirteen new appointments, eleven were internal promotions among the claimant's group of colleagues. All eleven had benefited from previous opportunities as T/Chief Inspectors, including Insp Ward and Cowie whose experience at that rank was significant. In the case of Insp Cowie, his first appointment as T/Chief Inspector was on 14 August 2016, less than 6 months after his substantive promotion to Inspector. The following table summarises the position of the claimant and his colleagues at the time of the 2019 promotion board:

Name	Appointed Inspector	No. of days as T/ChInsp
Ward	1.4.13	294
Dimelow	27.5.14	532
Claimant	1.7.14	0
Cowie	1.3.16	1213
Fenny	1.3.16	36
Murphy King	1.3.16	1231
Tomlinson	1.3.16	568
Walker	1.3.16	372
Barker	4.4.16	860
Bainbridge	3.7.17	17
Dewell	3.7.17	386
Motson	3.7.17	452

141. On 6 January 2020 the successful candidates' promotions were put into effect. The claimant, along with others, was appointed to a T/Chief Inspector role, by virtue of having applied unsuccessfully to the promotion board. This reflected the respondent's practice of making such opportunities and support available, but only to those candidates who had made a formal application. The previous promotion board in 2016 had not been an opportunity the claimant could take advantage of for reasons connected to his disability.

Conclusions

Disability status – section 6

142. Our task on this question was limited to the determination of whether the claimant was a disabled person as defined by section 6 of the Act in the disputed period between April and November 2015. We had regard to the medical records in the bundle and the fact that the claimant's condition is progressive and so may well have presented him with difficulties before the Occupational Health report clarified the position in the November. That said, it would not be enough for the claimant to be experiencing similar symptoms from an earlier date, as all of the elements of section 6 have to be met, and the difficulty for the claimant is that on cross-examination he was unable to identify any substantial impact on his day to day activities during the disputed period.

143. In any event the determination of the claimant's status as a disabled person in that short period became moot because we concluded that no unfavourable or less favourable treatment occurred in that time. Had we found that the claimant was disabled by that early stage, then we would have considered his transfer into the Force Control Room as a helpful move and in the nature of a reasonable adjustment to accommodate his physical limitations.

Limitation

144. In answer to the nine key issues of fact identified in the issues above, we have made findings of fact which broadly support the questions posed. It was not in dispute that on 20 July 2015 the respondent deployed the claimant to the FCR as an Inspector, and that from then until 6 January 2020 he was not appointed to perform any T/Chief Inspector duties. Throughout this period the respondent provided the claimant with only very limited Acting opportunities. This in turn deprived him of opportunities to demonstrate fully his suitability to become a Chief Inspector, which disadvantaged his application to the promotion board in late 2019.
145. In respect of the claimant's requests to be given promotion opportunities, it was not in dispute that these aspirations were clearly expressed, and that no opportunities were made available other than the boards in 2016 and 2019. The earlier one was not an option the claimant could take up because of his disability, his related surgery and recovery period. Our conclusion is that the lack of action to help the claimant prepare for the 2019 board did not provide him with an adequate opportunity, as a disabled person, to compete fairly for the substantive promotion. Furthermore, the lack of action in respect of Acting and Temporary opportunities continued throughout the period between July 2015 and January 2020.
146. The respondent had knowledge of the claimant's disability or physical limitations from November 2015 at the latest. It knew also of his suitability for promotion and his aspirations to achieve that. In those circumstances we conclude that the respondent did fail to take any action in respect of the claimant's complaints that he was being given no adequate promotion opportunities unlike other Inspectors who were being promoted above him.
147. The fact of the claimant not being promoted to some specific roles was also not in contention, namely: T/Chief Inspector and/or T/Superintendent of the FCR in late 2018 and in early 2019; T/Chief Inspector in the Communities team in September 2019; and substantive Chief Inspector in December 2019. As demonstrated in the table in paragraph 140 above, officers appointed as Inspectors after the claimant were promoted before him and this put him in the position of having to report to officers who had been more junior to him.
148. Having made those findings on the facts and drawn those conclusions, we asked ourselves whether the factual allegations amounted to 'conduct extending over a period' within the meaning of section 123(3). We took account of the guidance in Hendricks v Metropolitan Police Comr, where it was held that:

When determining whether an act extended over a period of time a tribunal should not allow itself to be side-tracked by focusing on whether a policy could be discerned. Instead, the focus should be on the substance of the complaints that an employer was responsible for an ongoing situation or a continuing state of affairs in which a person [...] was treated less favourably. The question was whether there was an act extending over a period as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.

149. We were in no doubt on the facts of this case that the respondent was responsible for an ongoing situation, by virtue of its lack of structured policy or process for making promotion opportunities available to the claimant. In effect, it was a lack of policy and an absence of process which resulted in the claimant being overlooked and, by default, left in the silo of the FCR from which he needed the respondent's proactive support to move upwards. This was not a case involving unconnected or isolated acts, but rather a continuing state of affairs with ongoing consequences for the claimant. That state of affairs continued throughout the period from July 2015 until December 2019 or January 2020. We therefore conclude that the requirements of section 123(3) are met and the claims were brought in time.
150. Even if we had not come to that conclusion, we would have exercised our discretion to extend time on just and equitable grounds, having regard to the weight of the evidence indicating that in a police force context, the bringing of a grievance or a claim against officers at the most senior level was likely to have very damaging consequences for the claimant's career. We also accepted the claimant's evidence about the continuing nature of the respondent's conduct, in the sense that it only gradually became apparent to him that the pattern of his treatment was related to disability. At various stages he preferred to seek a resolution internally, for example by pursuing the move to the Communities team and expressing interest in the promotion opportunity there. Throughout the period, he made his decisions based on the recommendations and support of his line managers which led him to be hopeful that promotion was in prospect. By the summer of 2019, he escalated his message of dissatisfaction to very senior officers, making it clear that he viewed his physical limitations as a barrier to promotion, and he had a legitimate expectation that his serious concerns would be addressed. All of this would have made it unjust and inequitable to have denied the claimant access to the Tribunal to present his claims.

General conclusions

151. Having made detailed findings on the key facts of this case, we considered whether the claimant had provided sufficient evidence from which we could infer that the respondent had discriminated against him in respect of each of his three claims under the Act. Applying the two-stage test under section 136 of the Act and in accordance with Efobi v Royal Mail Group, we noted that, looking at the picture as a whole, there was clear – in fact, undisputed – evidence of the claimant's lack of career progression following his deployment to the FCR in 2015. Up until then he had progressed quickly and was known to perform to high

standards with strong leadership qualities. The change in circumstances was directly connected to his physical limitations, which was the explicit reason for the new deployment.

152. When considering the two-stage test on the burden of proof, we took into account the quality and scope of the evidence it put forward to explain the lack of career progression. Virtually no documentary evidence was produced by the respondent beyond the Policy, and even that was not referred to in any witness statement. Despite the Tribunal inviting supplementary evidence in chief to help us understand the respondent's Policy or practice on promotion opportunities, the respondent chose not to lead that evidence and such explanations as were forthcoming were unclear, lacking cohesion, and elicited only through cross-examination or the Tribunal's questions.
153. The evidence we would have expected to see in this case would include most or all of the following, showing:
- The method and rationale for the selection or appointment of T/Chief Inspectors between 2016 and 2019, and why some officers were permitted to occupy such roles for long periods.
 - The method and rationale for the selection for the head of the FCR in 2018 (Supt Harrison), the T/Chief Inspector for the FCR project in 2019 (T/Chief Insp Ward) or the T/Chief Inspector for Communities in 2019 (T/Chief Insp Cowie).
 - How the Policy was implemented (or the reasons why it was not); what if any impact assessment had been done; records of decision-making; and what training or support had been provided to officers responsible for ensuring it was applied equitably.
 - How in practice the respondent went about offering Acting or Temporary promotion opportunities if not in line with the Policy; and also through the "talent pool" or "select list" compiled after having completed promotion boards.
 - Whether any relevant documents were created and then destroyed or not created at all.
 - What searches had been made for relevant documents (notwithstanding the sworn statement from the Chief Constable), in light of the fact that ACC Graham, for example, gave evidence that he had checked his daybooks and found nothing of relevance – an exercise which was the responsibility of the respondent's legal advisers.
 - The records of meetings between the claimant and T/ChSupt Sutherland, including provision of the latter's daybooks or notebooks, and the calling of him as a witness.

- The rationale for not appointing the claimant in the 2019 promotion board process and the lack of any records relating to that.

154. We accept Mr Gold's submissions on the respondent's approach to disclosure of documents and agree that it was inadequate, appeared to be incomplete and was wholly lacking any robustness. The respondent produced very few of the documents in the extensive bundle, when we would expect the employer to hold most of the relevant records and to produce at least the more recent ones in defending serious allegations of discrimination. The statements of the respondent's witnesses were extremely short and omitted key evidence such as explanations for its Policy and practice on promotion, or its reasons for seeking to justify any indirect forms of discrimination. Crucially, no witness evidence was provided at any point as to why the claimant was denied the Temporary appointments offered to Supt Harrison or Insp's Ward and Cowie. Given that the latter opportunities arose as recently as May and August 2019, there seems to be no good reason why witnesses could not give such explanations, even if relevant documents were not made or kept.

155. Mr Gold referred us to Ryglewicz v Hanson Quarry Products Europe Ltd in support of his argument that a lack of record-keeping may lead to a shifting of the burden of proof. This is especially so where the EHR Employment Code of Practice recommends that employers 'keep records that will allow them to justify each decision and the process by which it was reached and to respond to any complaints of discrimination'. In Ryglewicz the claimant, who was found to have more experience than the comparator who gained the promotion she too had applied for, was successful in her claim of direct discrimination where the only explanation given for her non-appointment was 'poor interview technique' and all records had been destroyed.

156. The respondent's approach to disclosure and the omissions in its witness statements created an appearance of an organisation which does not take seriously its duty to make and maintain records of recruitment decisions, nor its duty to diligently search for and produce records relevant to litigation in accordance with the Civil Procedure Rules. This was illustrated by ACC Graham's evidence that he personally had reviewed his daybooks and determined that they contained nothing relevant. He may not have appreciated that this responsibility lay not with him but the respondent's legal advisers, but nevertheless it led us to doubt that all relevant records had been sought or produced.

Direct discrimination – section 13

157. Having made those general observations on the evidential position and its influence on the burden of proof, we considered whether the primary facts established by the claimant in relation to the direct discrimination claim were such that we could decide, in the absence of any other explanation, that the respondent treated him less favourably than others. If so, and in order for the claim under section 13 to succeed, we would need to address the reason why the claimant was treated less favourably, and whether it was because of his disability.

158. The primary facts relied on by the claimant were that the respondent had knowledge of his disability from April 2015 and deployed him to the FCR for reasons related to that. It then failed to appoint him to any Acting or T/Chief Inspector roles, or provide promotional opportunities. More particularly, it did not appoint him as the FCR manager in late 2018; or as the FCR project Inspector in May 2019; or as the Communities T/Chief Inspector in August 2019. Finally, it failed to appoint the claimant to the substantive rank of Chief Inspector on 16 December 2019.
159. Although those facts were not in dispute, in the context of a section 13 claim we felt that on their own they did not entitle us to draw an inference of disability discrimination. It is not enough for a claimant to point to the simple fact of having a protected characteristic and invite a Tribunal to infer that the way they were treated must be because of that: Law Society v Bahi [2003] IRLR 640. We accepted Mr Webster's submission by reference to the following passage:

...Employers often act unreasonably... It is, however, a wholly unacceptable leap to conclude that whenever the victim of such conduct is black or a woman then it is legitimate to infer that our unreasonable treatment was because the person was black or a woman. All unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour... Absent some independent evidence supporting the conclusion that this was indeed the reason, no finding of discrimination can possibly be made...

160. Acknowledging that it is inherently difficult for claimants to prove direct discrimination, we were unable to conclude that the burden of proof shifted to the respondent on this point. An appearance of direct discrimination was also displaced by the claimant's own evidence that he had performed badly at interview. Although we have criticised the sparse nature of the respondent's evidence to explain the claimant's treatment, we did not consider that section 136(2) was engaged and so this part of the claim is not upheld.

Indirect discrimination – section 19

161. The first question for the section 19 claim was whether the respondent applied any of the alleged PCPs to the claimant. The five alleged PCPs were:
- i. Persons appointed to the rank of Chief Inspector and/or T/Chief Inspector should be able to perform arrest, restraint and/or full officer safety training. The respondent accepted that this would be discriminatory.
 - ii. Not appointing persons on restricted duties to T/Chief Inspector posts, which again the respondent admitted would be discriminatory.
 - iii. Not providing development opportunities to Inspectors who had not completed the formal promotion process for the rank of Chief Inspector.

- iv. Not taking into account at any stage of the promotion process an applicant's disability; If such a PCP was applied to the claimant, the respondent sought to justify it on the grounds that it was a proportionate means of achieving the following legitimate aims:
 - creating a level playing field
 - eliminating/minimising conscious and/or unconscious bias
 - ensuring that the process is seen to be fair
 - fairness; and/or
 - promoting equality
- v. Not making adjustments to operational roles where there were elements that a disabled police officer could not fulfil. This too the respondent admitted would be discriminatory, subject to the question whether it was a proportionate means of achieving the following legitimate aims:
 - operational efficiency
 - meeting operational demand
 - operational flexibility; and/or
 - ensuring the safety of officers and the public

162. Our conclusion is that the respondent did apply the third and fourth PCPs to the claimant, in that it failed at any time to take account of his disability in its approach to making promotion opportunities available, whether Acting, Temporary or substantive. In the latter case, the respondent invites candidates to identify disabilities in their application forms, but its lack of process for supporting disabled officers to be well-placed to make good applications was a practice consistently applied to the claimant. This was particularly marked in the case of making Acting or Temporary appointments available to him, and we are satisfied that this put him at a particular disadvantage compared to his non-disabled colleagues. It may not need to be a requirement to have experience of higher ranks, but the advantage is undeniable, especially for those officers whose Temporary appointments were renewed or extended over significant periods of time. The outcomes at the 2019 Chief Inspector promotion board bear this out.

163. It is, however, not enough to say that these PCPs were applied to the claimant and that he was disadvantaged because of his disability, because section 19(2)(b) also requires evidence of group disadvantage. The claimant would have to show that others sharing his disability would be put to particular disadvantage and this can be difficult to establish. We were therefore unable to conclude on the evidence available that the group disadvantage was present, and accordingly the application of the PCPs was not discriminatory within the terms of section 19.

164. Had we reached the stage of considering the respondent's defence under section 19(2)(d), we would have had no difficulty in accepting the legitimate aims as summarised above, but not that the respondent's actions were a proportionate means of achieving them. On the contrary, an absence of consideration for the barriers faced by disabled officers does nothing to promote equality or to

eliminate unconscious bias or to create a level playing field so that such officers may compete fairly with their non-disabled colleagues.

Discrimination arising from disability – section 15

165. If the respondent treated the claimant unfavourably because of something arising in consequence of his disability, and could not show that the treatment was a proportionate means of achieving a legitimate aim, then that treatment would be discriminatory under section 15(1). The parties agreed that for the “something arising” from the claimant’s disability was his physical symptoms and limitations. The respondent also accepted that it had knowledge of the disability for the purposes of s.15(2), from November 2015.
166. To the extent that the factual allegations were established, we had to decide:
- i. Whether the alleged treatment was unfavourable.
 - ii. Whether the claimant had adduced facts from which we could decide, in the absence of any other explanation, that this was because of something arising in consequence of his disability.
 - iii. If so, whether the respondent had shown that it did not treat the claimant unfavourably because of something arising in consequence of his.
 - iv. Whether the respondent took proportionate means of achieving the following legitimate aims:
 - assisting an officer to remain at work
 - meeting an officer’s health needs
 - fulfilling an officer’s wishes to be moved; and/or
 - keeping an officer, his colleagues and the public safe
167. Applying the guidance summarised by the EAT in Pnaiser v NHS England, we find that the respondent’s failure to make Acting or Temporary promotion opportunities available to the claimant in the period following his deployment to the FCR was unfavourable treatment. It was not the initial decision to deploy him there in April 2015 which was unfavourable, as this was a positive step designed to keep him in work (which he found satisfying) to help manage his physical limitations. What became unfavourable was the treatment which ensued: it was the fact that the claimant was left in the FCR ‘silo’ with adverse consequences on his future career prospects. This was the collective responsibility of the respondent’s senior management, and the promotion practices followed, which gave no consideration at all to the impact on the claimant as a disabled officer.
168. The reason for the treatment arose unconsciously from the respondent’s promotion practices, its culture in relation to that, and its lack of awareness of the steps required to ensure that people with disabilities are not disadvantaged by their impairments. This in turn had a direct causal influence on the unfavourable treatment experienced by the claimant. We accept that this may not have been conscious or deliberate conduct on the part of the respondent, in the sense that

its decisions were not motivated directly by the claimant's disability, but motive is irrelevant.

169. We are in no doubt that what lay behind the unfavourable treatment arose in consequence of the claimant's disability. Had he not been disabled he (like many other officers with health impairments) would not have been deployed to the FCR and, more importantly, left there without access to development opportunities or practical support for his promotion aspirations. That aspect of the respondent's conduct was surprising because it had knowledge of the claimant's physical limitations, his qualities as a strong candidate for promotion, and his desire to progress to Chief Inspector, yet took no practical steps to ensure that his skills were matched with Temporary vacancies after 2015. On the contrary, it made a conscious choice to appoint others in favour of the claimant, most strikingly in the case of T/Chief Insp Cowie. The respondent also knew that the FCR was a team where no promotion opportunities arose after 2016, and where 90% of the officers deployed there had health issues, some significant. Objectively speaking, we conclude that there is a direct and close causal link between the claimant's disability and the unfavourable treatment.
170. The facts of this case demonstrate that, intended or not, the respondent's practice on promotion opportunities was inherently disadvantageous to the claimant for reasons arising in consequence of his disability. As an Inspector he would normally be required to carry out physical duties such as restraint and arrest which his limitations prevented him from doing. As a Chief Inspector, no such impediments would arise and the claimant's disability would not prevent him from fulfilling his duties.
171. The Tribunal is prepared to accept that employers sometimes neglect the detail of their written policies and procedures, but the gap in this case between the terms of the Policy and the practice actually followed was immense. On its face, the Policy indicated that an equality impact assessment had been done, yet we saw no evidence of this. According to Mr Young, if a person does not apply to the promotion board then they do not get development opportunities. He said it is an executive decision as to who to appoint, but the evidence we heard produced no coherent explanation of how the policy operates in practice. Mr Young also agreed that requirements of the Policy should be adopted at all levels, for example as to selection methodology and the keeping of records. Role profiles were not created for matching against officers skills, and the PDR records were not used to inform the decisions affecting the claimant. Mr Young's concessions that the Policy was not followed in this case were not qualified by any assurances that efforts were made to comply at least with its principles and spirit.
172. ACC Graham's evidence on this subject was as unclear as his colleagues'. He said that decisions on Acting posts are dealt with at local Command level, and if it was longer than 56 days that would trigger a Temporary appointment. They would look at the role, whether there was a specialist skill set, and then decide how to go forward. He said, "No process is necessary if we have someone available". They would go first to a select list and then advertise. He gave inconsistent answers as to the potential candidates on the select list, explaining

the position initially by reference to successful candidates at a promotion board where not enough vacancies existed, then saying that the list would include unsuccessful applicants.

173. It was clear from the oral evidence that the respondent has given no thought to the position that a potential candidate would be in if, as happened here, he is unable to apply to a promotion board for disability-related reasons.
174. As already noted, the claimant was initially happy with his deployment in the FCR and was unaware of any options other than in that team. Likewise, the respondent was unable to identify any alternative placement that could have been offered. It was clear from the fact that 90% of the officers deployed there had health issues or disabilities and that this was a department unofficially earmarked for such accommodations to be made. While some officers might be content to stay in such a role on an open-ended basis, the claimant was not. He was still seeking opportunities and hopeful of promotion based on the positive feedback he had received. Once the Chief Inspector post in the FCR was removed from the structure, his only prospects of career development lay elsewhere. He did not make specific requests for named posts but his line managers were well aware of the position, through formal PDRs and numerous informal discussions.
175. We appreciated the good intentions of Supt Jackson and Supt Teladia to provide their personal support to the claimant. However, the lack of a structured or systemic approach in the organisation meant that their intentions were not acted upon. The general lack of awareness of how decisions can inadvertently impact on disabled candidates is demonstrated by the acknowledgment by T/Chief Supt Sutherland that the process was “unfair”, something which ACC Graham appeared to acknowledge, but there was no assessment of how disabled officers might be put at a particular disadvantage compared to non-disabled officers. This was consistent with what we felt was a general lack of awareness of the ways in which indirect forms of discrimination might arise in the workplace. We do not doubt that any of the officers involved were acting without deliberate intent or bias against those with disabilities, but a greater awareness of how an organisation might inadvertently discriminate is needed.
176. By contrast with the claimant, other officers were able to achieve Acting or Temporary promotions. To focus on Insp Ward and Insp Cowie in particular, they had spent broadly similar amounts of time as the claimant in the substantive Inspector role, yet were afforded substantial Temporary opportunities which in our view could not have been anything other than a significant advantage at the time of the interviews in December 2019. In particular, Insp Cowie had been junior to the claimant yet had the benefit of over three years’ T/Chief Inspector experience. This illustrates the unfavourable treatment experienced by the claimant.
177. We examined the evidence to try and understand the respondent's rationale for appointing Insp Cowie, especially in circumstances where Supt Teladia had endorsed the claimant so strongly and the claimant was already in the department without any need for training. We noted that ACC Graham only

“vaguely” remembered what was at best a “passing conversation” with Supt Teladia about the claimant’s suitability for this promotion. This may well have been his understanding of the conversation, but if so then it reflects poorly on the respondent that staffing decisions may be handled so casually. The apparently unmemorable conversation had important consequences for the claimant. We concluded that the ACC’s explanation for appointing Insp Cowie by reference to the need for a funded business case was an exercise in rationalisation after the event. It is difficult to accept that the claimant’s situation – or his disability – were given any thought at the time. While ACC Graham may well have had in mind a desire not to appoint any new T/Chief Inspectors, we were unconvinced by the merits of this explanation. This is because the new appointee was to cover for a Superintendent, thus creating a saving in cost. When asked whether the T/Chief Inspector was in effect holding the reins of a Superintendent post, that being the vacancy which had arisen, the ACC said he did not expect all the elements of the role would be covered, but only some of them. This new aspect to the appointment of Insp Cowie emerged – like much of the respondent’s case – only through the questioning of witnesses.

178. Our conclusion is that on this occasion, as on all others when Acting or Temporary opportunities arose, the respondent simply did not address its mind to the claimant’s potential suitability or the need to proactively consider the limitations posed by his disability on his prospects. It treated him as being confined to the FCR ‘silo’, and that arose directly in consequence of his disability.
179. By around the summer of 2019 the respondent knew that the claimant was making the connection between his physical limitations and lack of prospects compared to others. Even if the words ‘disability discrimination’ were not used in the conversations involving Supt Teladia, T/Chief Supt Sutherland and ACC Graham, the organisation had sufficient knowledge of the claimant’s position and his complaints about it, to be alerted to the need to consider the Equality Act implications. We accept the claimant’s account of the conversations with Supt Teladia as reflected in their email exchange, and note that the Supt did not seek to deny the gist of what was said. The claimant’s account of the conversation with T/Chief Supt Sutherland was unchallenged, as he was not called as a witness, and we accept that he understood the unfairness of the lack of process and the particular impact on the claimant as a person with a disability. Either T/Chief Supt Sutherland did not raise the issues, which were serious, with ACC Graham, or he did and they were not acted upon. Either way, the consequences for the claimant were damaging.
180. Part of the respondent’s case was that the claimant was able to demonstrate leadership qualities regardless of his lack of Acting or Temporary opportunities, but we accepted his evidence that the lack of time actually spent in those roles meant he could not experience the rank or demonstrate its competencies fully. By the time of the 2019 promotion board he was extremely disheartened and his confidence in his application was diminished. He had excelled as an Inspector, and showed good potential for promotion, but not to directly experience the rank for a time put him at an obvious disadvantage. The claimant conceded that his performance at interview was poor, but we are satisfied that if he had not

experienced years of continuing unfavourable conduct, this may well not have been the case.

181. All eleven of the claimant's colleagues who were promoted had benefited from previous opportunities as Temporary Chief Inspectors, including Insps Ward and Cowie whose experience at that rank was substantial. Insp Ward had been in that substantive post for around 15 months longer than the claimant, but had the benefit of 294 days in the T/Chief Inspector role. Insp Cowie was promoted to Inspector 20 months after the claimant, but his first appointment as T/Chief Inspector (on 14 August 2016), came less than 6 months afterwards. He was then allowed to occupy the Temporary role for 1213 days, more than 3 years. Mr Young agreed on cross-examination that 11 of the 13 appointees had had previous Temporary experience, and that there was no mention of this in his witness statement. Similarly, that information was not volunteered by any other of the respondent's witnesses, even though they each gave supplementary evidence about their own experience of Temporary appointments (or rather lack thereof) in an effort to emphasise that this was not a prerequisite for promotion.
182. We conclude that it is inconceivable that prior Temporary experience did not provide those non-disabled officers with a material benefit at the 2019 promotion board. It also conferred on them a visibly higher rank and the self-esteem and authority which goes with that, as well as the tangible financial benefits which flow from a Temporary appointment. By contrast, the loss of confidence caused to the claimant over the years was significant, as his career continued to stagnate for reasons unrelated to his merits and directly connected to his disability.
183. The final aspect of the section 15 claim is whether the respondent produced evidence from which we could conclude that any unfavourable treatment was justified by reference to section 15(1)(b). In his submissions Mr Webster set out the respondent's aims:
 - assisting an officer to remain at work
 - meeting an officer's health needs
 - fulfilling an officer's wishes to be moved; and/or
 - keep an officer, his colleagues and the public safe
184. In principle those aims have legitimacy, but there were two main difficulties with the respondent's argument. Firstly, we heard no evidence about the aims or the means of achieving them, so as to decide whether the treatment was proportionate. We accept that the original deployment to the FCR met the above aims and was proportionate, and we do not find that this action in April 2015 was in itself discriminatory. It was the leaving of the claimant in the FCR without access to development opportunities that was unfavourable, as well as the ongoing approach to decision-making which denied him access to specific promotions as they arose. The second and more fundamental difficulty is that, even if the above aims are legitimate for certain purposes, we cannot accept that the unfavourable treatment was in any way a means of achieving them, never mind a proportionate means.

SE Langridge
Employment Judge Langridge

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON**

21 July 2021

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