EMPLOYMENT TRIBUNALS

Heard at: Exeter **On:** 31 August to 8 September 2021

Claimant: Mr John Levins

Respondent: Chief Constable of Devon and Cornwall Police

Before: Employment Judge E Fowell

Mr I Ley

Mr K Sleeth

Representation:

Claimant: In person

Respondent: Ms I Egan of counsel

JUDGMENT

1. The complaint of constructive dismissal is dismissed.
2. The complaint of direct discrimination on grounds of disability is dismissed on withdrawal by the claimant.
3. The complaint of discrimination arising from disability is dismissed.
4. The complaint of harassment on grounds of disability is dismissed.
5. The complaint of victimisation is dismissed.

REASONS

Introduction

1. Mr Levins worked for the Devon and Cornwall Police Service for about 20 years until his resignation on 3 January 2020. For much of that period he was a Police Enquiry

Officer, dealing with queries from members of the public at the police station in Torquay. He had a number of physical health problems, including psoriatic arthropathy – a type of arthritis that affects the joints - Crohn's disease – a type of inflammatory bowel disease - and ankylosing spondylitis – an inflammation of the lower back. There was a three-day preliminary hearing in this case in November 2020 when Employment Judge Smail concluded that all these conditions amounted to a disability.

2. Those conditions are largely in the background of this claim however. Mr Levins also has a long history of mental health problems and Judge Smail held that he suffered from "generalised anxiety disorder, or a tendency to the same", which also amounted to a disability. The respondent, or the Force as they have generally been referred to, accepts that they knew about his physical health problems and that they knew about his anxiety, but not that it amounted to a disability. The focus of this hearing has therefore been on his mental health.

3. Those mental health problems resulted in a period off sick in August 2016, lasting until January 2017. Part of the problem was that his relationship with his manager, Ms Stephanie Treeby, had become strained. It did not improve on his return and was exacerbated by a further absence in June 2017 when he broke his finger. He was off work for five weeks, rather longer than she thought was called for. On his return there was further friction over the time off he needed for medical appointments, of which there were a good many, and the application of the absence management procedure – he felt in particular that his long absence should have been regarded as disability-related and so not counted for these purposes, and also some of the time off with his finger. In due course she confirmed to him that the Force policy was to allow paid time off for the actual appointments but not for the travel time; that had to be made up from Time Off In Lieu (TOIL) or if necessary by unpaid leave. He felt that was unfair, and discrimination on grounds of his disabilities.

4. He raised a grievance about all this in August 2018. Shortly afterwards an issue then arose about his parking at work in the disabled parking bays and not displaying a blue badge. He felt this was a vexatious complaint by one of his colleagues and went so far as to look at CCTV footage at work to see who had been inspecting his car. That led to misconduct proceedings both for the lack of a badge and for viewing CCTV for non-police business.

5. This grievance process and the disciplinary allegation rumbled on for months and on 24 January 2019 he brought the first of two tribunal claims, alleging harassment and discrimination arising from his disability.

6. A further conduct issue was then raised over claiming a payment for acting as a Fire Warden; the Force say that he was not carrying out these duties such as carrying out a fire alarm test once a week.

7. In April 2019 he went off sick again, in response to the stress of these events and remained off sick for the rest of his employment. During his absence, his grievance went to the appeal stage and separate misconduct proceedings continued over the CCTV and the fire warden issue. There was also an absence management process underway involving Occupational Health. These tribunal proceedings were also underway by then and there were a number of preliminary hearings. On 2 January 2020 the respondent says that he was sent notice that there was a case to answer in relation to the fire warden issue, which might result in dismissal for gross misconduct. He says that he never received that letter, but it is agreed that he resigned the next day, 3 January 2020, with immediate effect.

8. The second claim form was then lodged on 2 April 2020, adding complaints of constructive dismissal and of victimisation, following his grievance. After a number of case management hearings there was the lengthy preliminary hearing on the disability issue which was resolved in Mr Levins' favour, which also gave case management orders for this hearing. A complaint of direct discrimination on grounds of disability was not pursued (and is now dismissed) and so the remaining complaints are as follows:

    a. constructive dismissal under section 95(1)(c) Employment Rights Act 1996;

    b. discrimination arising from a disability (under section 15 Equality Act 2010)

    c. failure to make reasonable adjustments (under section 21 Equality Act 2010)

    d. harassment (under section 26 Equality Act 2010) on grounds of disability

    e. victimisation (under section 27 Equality Act 2010)

Procedure and evidence

9. In addressing these issues we heard evidence from Mr Levins, and on behalf of the respondent from:

    a. Stephanie Treeby, his line manager;

    b. Juliette Waite, his second line manager, i.e. Ms Treeby's manager, who handled the grievance;

    c. Deborah Lane, a Senior HR Officer, who investigated the CCTV issue;

    d. Stacey Wilkins, another Senior HR Officer, whose evidence dealt with the absence management process;

    e. Beth Holmes, HR Manager (a more senior position) who investigated the fire warden complaint.

10. Two other witnesses supplied statements but were not required to attend as the

contents of their statements were not in dispute. Both are what is known as Assessment Officers. The first, Fleur Wills, received a report from Ms Treeby about the CCTV incident, decided that it met the threshold of potential misconduct and then referred the matter to HR for investigation, and it was then handled by Ms Lane. The second, Fiona Angliss, played the same role in relation to the fire warden complaint. (Both these witnesses worked for the Professional Standards Department, which is an independent body within the Force which reviews and considers whether to pursue disciplinary allegations.)

11. Mr Levins was representing himself, and the experience of giving evidence and cross-examining witnesses has obviously been unfamiliar and challenging. On the first morning he raised concerns at the presence of Ms Holmes, and expected that witnesses would have to wait outside until they were called. We explained that it was usual in employment tribunal cases for the witnesses to be present throughout. He returned to this point on Friday, 3 September, and also raised concerns that the witnesses were passing around a copy of the bundle which contained a lot of personal information about him. For reasons given at the time we did not consider that any feature of the case required a departure from the normal position so it would not be in the interests of justice to exclude witnesses from the hearing or to hold the hearing in private.

12. We concluded the evidence on the fifth day of the hearing, heard submissions on the sixth morning. Our findings are as follows.

Findings of Fact

13. Mr Levins is now 64. He joined the police in June 1999 after a previous career in the armed services. While in the police he was in the Scenes of Crime department as a Vehicle Crime Technician until that unit was disbanded, and in April 2013 he was redeployed as a Police Enquiry Officer (PEO), initially in Exeter, then in Torquay.

14. It is a role which involves helping the public with their enquiries on the counter at the police station, and a wide range of related tasks. At least two PEOs have to be on shift at the same time.

15. The first record we have about his health is in March 2014. There was a referral to Occupational Health after two days off for a back condition which he believed was brought on by increased stress at work. Report noted that he had a history of physical and mental health problems, including stress. It mentioned his Crohn's disease and Ankylosing Spondylitis. The report said that "the main issue is stress/anxiety/depression which is in relation to the uncertainty surrounding his post and the forthcoming recruitment/selection procedures for him." This related to a reorganisation in which everyone had to apply for a limited number of jobs, but in which he was successful.

16. From November 2014 he began reporting to Stephanie Treeby. She was also managing the Plymouth and Bodmin stations, with a team of 12 PEOs in all. This period was not covered in any detail in the witness statements but we heard that a number of disagreements arose between the claimant and his colleagues at that time. The main problem with another PEO, a female colleague called AC. When we asked Mr Levins about the causes of these disagreements he referred to her turning off the air conditioning, disputes about who sat at which desk and her not using two screens as per policy, which he said was irritating. Although all that seems rather minor, his evidence was that by the time he went off sick in August 2016 he had lost all trust and confidence in his manager Ms Treeby, presumably for not doing more to address his concerns..

17. Another dispute was with a Gareth Kitson, who in fact attended the hearing as a support for Mr Levins on one day of the hearing and so we will name. Mr Levins and another (male) colleague, JW, seem to have fallen out with Mr Kitson, and planned together to take their holidays at the same time so that Mr Kitson could not take his when he wanted to. Having booked their time off they would then often cancel it. JW admitted to this at the time when challenged by Stephanie Treeby, but Mr Levins' was unapologetic, merely saying that he was entitled to book his leave when he wanted. The only other explanation, at this hearing, was that it was possibly a game. At the team meeting when this plan was exposed, Mr Kitson told Mr Levins that he was an idiot, and at that, Mr Levins walked out, not to return for another five months.

18. It is impossible for us to make any finding about who was most at fault or how this situation arose, but despite his own part in this "game", Mr Levins' clearly felt that he was the victim, hence his comment that all trust had gone by then. This was a point he repeated very often in his evidence, to the extent that he was reluctant to refer to Ms Treeby by name, preferring to use the term "supervisory". Generally that meant just her, but sometime seemed to extend to her manager in turn, Juliette Waite. Ms Treeby was surprised to hear this evidence, and there is no indication that she had any ill feeling towards Mr Levins at any stage, but we accept that their working relationship had broken down by then, at least from his point of view. That explains many of the subsequent difficulties.

19. She carried out the usual attendance management steps during his absence. They had a meeting on 17 October 2016 and his view then was that he had been on a two year decline, given what he saw as massive changes in that time. He was due to see a counsellor through his GP shortly and felt that that support was sufficient for his mental health.

20. There was then a follow up meeting on 3 November, the day after an appointment with Occupational Health, but by then he was not willing to consent to Ms Treeby seeing the resulting report. His concerns were about work issues, i.e. mental health issues, such as staffing levels, meal breaks, annual leave and there being "no lines

of communication going up." We were not provided with his medical certificates but, as noted by Judge Smail, they began with "low mood" and in all he was signed off for 118 days for low mood and depression. He was put on a counselling course and remained on antidepressants. His physical health problems do not appear to have been a cause for concern, or at least did not affect his attendance in any way.

21. One curious feature of this case is that despite Mr Levins declining to release his Occupational Health reports – which are not available to us either – he was under the impression throughout that his managers had an obligation to obtain specialist medical advice about his situation at each stage, including during the grievance process or the later absence management process. It is unclear to us how that misapprehension arose, but that is simply not viable without his consent.

22. Nevertheless Mr Levins did return, on 9 January 2017, on a phased return, as recommended by Occupational Health, a point Ms Treeby took on trust from him. At the same time she had written advice from HR that she would need to manage his performance, including dealing with any "further outbursts" and "the effect his behaviour is having on the team." That seems to reflect Ms Treeby's view that he was largely responsible for the bad feeling at work. We see no reason to dispute that view. In fact, in his evidence to us, he did not deny some aggressive behaviour or outbursts but attributed it to his poor mental health, and felt that Ms Treeby should have recognised that.

23. The Force uses some software called *MySelf* to record absences. The basic system is that the line manager inputs the reason for the absence, as they understand it at the time, and uploads any medical certificates. When the individual returns to work, they can go onto the system and correct or amend what is written. That will generate an automatic message to the line manager, in case of disagreement, but the onus is on the individual to state the reason.

24. Ms Treeby recorded the absence under the category "Psychological disorder", citing "depression" but there is a further entry that can be made to indicate that it was disability-related leave. This was not done by either of them. On Ms Treeby's part, that is understandable. He had existing disabilities but his absence was unrelated to those conditions and was only off work for a few months. At the time we can see nothing to show that Mr Levins believed that his mental health amounted to a disability.

25. On his return to work there was no improvement in the working atmosphere. A month later he lodged a grievance about AC and another colleague, SW. We have no record of what when on, but Ms Chamberlain apparently said that he was "not right in the head", which he viewed as a hate crime and wanted dealing with accordingly. The Professional Standards Department did not accept that description.

26. Shortly afterwards, in February 2017, Ms Treeby asked him about an allegation that

he had been on his personal mobile phone arranging a holiday for an hour. He handed his phone over to show that he had only used it for nine minutes on the day in question. This was the first of several incidents which he blames on JW. By then he felt that JW was trying to get him into trouble at every turn. These allegations were all raised under the Force's Whistleblowing policy, D111, so it impossible to know who had made the allegation. That must have been an extremely difficult situation for him to deal with at work. He described the atmosphere as toxic.

27. Ms Treeby took no action against the whistle-blower. Her view was they should be able to sort out such small disagreements among themselves. That was not the case however, and she was not there that often to regulate matters. It is not clear how often she was there; she said that there were difficulties in getting there as she needed to arrange a car. At one point a Chief Inspector who lived in Torquay offered to spend work time there to see if that would make a difference; she carried out no direct management action but she too observed that it was a toxic environment.

28. In an effort to address this, Ms Treeby had a lengthy meeting with the Claimant in May or June 2017. She asked him for a list of the issues which were troubling him (which we do not have) and he produced a list of 30 - 40 issues, some going back as long as eight years earlier. Again, this illustrates the depth of grievance felt by Mr Levins, but also shows a rather negative response to her positive offer to help.

29. It is worth noting that during 2017, indeed almost from the point of his return, he had bad relations with JW, with whom he had previously been colluding to deprive Mr Kitson of holiday, and made up his differences with Mr Kitson.

30. Then on 20 June 2017 Mr Levins broke his finger. He was off work for five weeks until 31 July. Again, he says that this should have been recorded as disability related leave, or that at least two weeks of it should have been treated in this way, because in that event he would not have been subject to the same attendance management process.

31. He did not raise any concerns about this at the time however. There was a long meeting to review his absence, with Ms Treeby, on 21 August 2017. He was unaccompanied but Ms Treeby had with her an HR Adviser, DG, and an assistant HR Officer to take notes. When asked why he had been off so long, rather than coming in and doing some recuperative work, he said that his immune system was slower to recover and there was a risk of someone leaning through the counter window hatch and pulling his finger, causing more damage. She was sceptical of this explanation.

32. We can see no real basis to describe this as disability related, but again, Mr Levins had the opportunity to record it as such had he felt that it was at the time. The significance of the two weeks, which he says should have been recorded as disability related, is that his absence would have been less than 28 days. That is a trigger for Stage 1 of the absence management process. However, the policy does

not in fact distinguish between disability-related leave and leave for other reasons. There are various triggers, including a Bradford Factor score, (usually the result of frequent short term absences), but a 28 day absence was a separate trigger, and recording it as disability-related leave would have made no difference under the policy.

33. The meeting with Ms Treeby, called an Absence Review Meeting, resulted in the formal conclusion that his attendance was below the standard expected and so it was necessary to progress to the first stage of the Formal Capability Process. The outcome letter noted that he had ongoing stress and anxiety which needed support and suggested a case conference with a Dr Smallwood or someone else from Occupational Health to advise on his existing medical conditions along with the stress and anxiety.

34. He had had a further short absence from 24 August relating to depression. A work stress assessment then took place in September 2017, carried out by the Health and Safety representative, Martin Coombes, who noted that he was suffering from stress and anxiety. Dr Fletcher from Occupational Health also saw him on 26 September and advised that he had a number of disabilities, *including mental health*. She recommended a reduction of hours to 20 per week for the next 2 to 3 weeks and that a case conference or case review meeting be held with her and with Mr Levins and his union representative.

35. At some point which we were not able to identify with any accuracy, there being no written record in the bundle, Ms Treeby asked him into a meeting where a Chief Inspector was waiting and told him that the HR Officer, DG, had accused him of recording the Absence Management Meeting on 21 August. He denied this. It is now accepted that he made no such recording. It is not clear how this misapprehension arose but he was aggrieved at the accusation.

36. The first stage capability meeting followed on 3 October 2017, again with Ms Treeby. This time it was recorded and then transcribed over 46 pages. It lasted one hour and 37 minutes. DG was also present as an HR Adviser and Mr Levins was accompanied by his union representative. They discussed his refusal in the past to supply Occupational Health reports, a request which he described as harassment. They talked about the issues at work, the grievance he had raised against AC, her comment about not being right in the head, and what further support might be needed on the mental health side. At several points his representative became quite agitated with him.

37. In particular they discussed the recommendation that he reduce to 20 hours for a period. His working pattern involved working four ten-hour shifts a week, less a 45 minute lunch break, amounting to 37 hours in total. There was a rotating shift pattern involving weekend working, which meant that everyone had at least one day off from Monday to Friday each week, and one weekend day. Ms Treeby took the view that

20 hours per week meant that came in each day for fewer hours, he thought it meant just 2 days a week. Her reason for that belief was that they had discussed the difficulties which his Crohn's caused in starting early and finishing late, in particular if a member of the public turned up just before 6 pm, which caused him stress, so she felt that two long days was not what was intended.

38. After that meeting she tried to clarify with the doctor, but the doctor did not reply in time and so the issue was never resolved, and no reduction in hours took place. He took some annual leave instead.

39. The case conference recommended by Dr Fletcher did take place on 31 October 2017 but Mr Levins did not attend. He had undergone a procedure the day before. A new union representative did attend, together with Dr Smallwood, Ms Treeby and an assistant HR officer. It is not clear to us why it was not postponed in his absence, but it seems to have been a genuine attempt to address his issues at work and the impact of his health. Ms Treeby said she was aware that his mental health had deteriorated over the last year and was not really sure why. His behaviour at working was difficult to manage. She referred to an occasion when he posted a noted in the office which read "Beware Judas, Karma will get you" – a reference to whoever had reported he was on the phone for an hour. Also that his productivity had dropped considerably. Dr Smallwood felt that it might not be appropriate for him to continue in the PEO role. No actions were taken but information was shared and the upshot was that Ms Treeby hoped that Mr Levins he would continue to see Dr Smallwood.

40. However, the time off for these appointments was also an issue. He was booked to attend a course of regular Cognitive Behavioural Therapy (CBT) sessions, in addition to his existing regular hospital checks and Occupational Health appointments. The first was to take place on Monday 20 Nov 2017, which was on a non-working day. He told Ms Treeby that he was not prepared to go in his own time, even though he was told he could claim back the time later. She then raised the position with an HR manager, Claire Flounders, who advised that he was not in fact entitled to unlimited time off work for medical appointments. The Force policy was that there was no obligation on them to fund medical treatment as this was usually provided by the NHS, although there some funding available from the Medical Intervention Fund, through Occupational Health. Further, medical appointments should be arranged outside working hours; where this cannot be achieved, reasonable time off was allowed in the working day, preferably at the beginning or the end of the day, and that travel time to and from the appointment was not payable. It needed to be made up from TOIL, annual leave, or unpaid leave. She set this out in an email to him on 21 November 2017.

41. This was a major change to Mr Levins' understanding of the position. Ms Treeby had been allowing him and others to take time off for medical appointments and travel time as necessary. However, there was a force wide policy which she had

not been following and now needed to apply.

42. Mr Levins' position, even at this hearing, was that this was not correct, and that these more rigorous arrangements only applied to flexi -workers, but on our reading of the policy that is not the case, and there is no reason to question the Force's interpretation of its own policy. However, Mr Levins was very aggrieved at the change.

43. Ms Treeby had in fact phoned the CBT facilitator to see what flexibility he could offer over appointments. He told her that he was very flexible, offered weekend appointments, or even a Skype appointment. She then emailed Mr Levins to ask if he could book ahead so that the rest of his appointments were on a day off. His response, was to cancel his next appointment and to say that he would not be continuing with it. It is of course very difficult to help someone with that approach.

44. After that however, things went quiet. No further real concerns were raised until 24 April 2018 when Mr Levins had his appraisal (PDR) with Ms Treeby. Her assessment was that he was graded "not yet competent". She gave a number of positive comments about the way he did his job, including his handling of the public and dealing with vulnerable people, but also recorded that:

    a. he had been involved in multiple interpersonal issues;

    b. he struggled to engage in the attendance process (rather than the fact of his attendance management issues);

    c. he sought to challenge management instruction and on occasions did so in an aggressive and confrontational manner;

    d. he focussed on minor details seeing things as some form of personal injustice, had constant disgruntlements distracting him from performing his role, was a perfectionist and focussed on the negatives.

45. There is also a box on the form for attendance, and his was marked as "of concern" which was the appropriate category for someone who had had an absence of more than 28 days in the previous 12 months. She says that this did not affect the outcome, i.e. that he would have got the same grading with full attendance. Given the extent of the documented concerns, which do reflect the long run of incidents and disagreements, we accept that that is the case on this occasion.

46. That was in April 2018 and was an assessment of how things had gone over the previous year, although as noted, most of these events took place in 2017. Things continued without major incident for some further time. Juliette Waite took over as Ms Treeby's line manager in July, and then on 3 August 2018, when she was visiting the Torquay office, Mr Levins handed her his formal written grievance. He did not present it to Ms Treeby in the first instance as she was the subject of most of his

complaints. Then, having handed it over, he went on planned leave for the next three weeks.

47. The grievance was a detailed, seven-page document, reflecting some legal research or advice; it referred for example to discrimination arising from disabilities and failure to make reasonable adjustments. It covered the handling of his absences in 2016 and 2017; the allegation about using his phone at work; the fact that no action was taken against JW afterwards; the alleged hate crime comment by AC; the way the attendance management meetings were conducted by Ms Treeby – said to be "intimidating and degrading" – and the inaccurate minutes of those meetings; the failure to record his absence as disability related - the first mention of this – and being told that the time off for his broken finger was disproportionate; the delay in getting a workstation assessment, the first written warning for absence despite the absences being for reasons beyond his control, and the failure to allow him time off work to attend his CBT appointments. He also complained about the failure to reduce his hours to 20 on a temporary basis. In short, he raised all of the matters which became the subject of his later employment tribunal claim.

48. We emphasise that almost all of these events took place in 2017. His attendance was much better by August 2018. His first written warning for absence was due to expire in October that year and there were no ongoing processes. He was unhappy about his PDR but there was no reason to suppose that this would not improve. The only real live issue at the time of his grievance was in relation to time off for medical appointments, where the same policy was being applied to him as to others, although he had many more appointments than most.

49. It is accepted by the Force that this grievance was a protected act for the purposes of his victimisation claim. Having set out the background events leading to this point it is necessary to depart from chronology and deal with each of the subsequent processes separately.

The grievance process

50. This process took a long time to complete. It was handled by Ms Waite, who worked part time, for 17 hours a week, and had to manage 190 direct reports. She held an investigation meeting with Mr Levins on 11 October 18 and the Stage 2 meeting took place on 7 February 2019. (Stage one would have involved his line manager but was dispensed with as she was the focus of the complaints). The outcome was that she did not accept the grievance. That was notified to Mr Levins on 18 March 2019 and he appealed on 5 April. By then however, on 24 January 2019 he had submitted his first employment tribunal claim.

51. There were various reasons for the delay apart from her workload. The grievance was lengthy, amounting to more than twenty separate issues or allegations which required investigating. Many went back some way. He was off for the first three weeks and then she too had various absences, as did he. Meetings were adjourned

because of the unavailability of his union representative or because Mr Levins was sick. Each rearrangement meant several further weeks were lost in rearranging diaries, and all meetings had to be recorded and then transcribed, which took time. We are satisfied that there was no deliberate delay at any stage.

Fire Warden issue

52. Each station has a number of fire wardens. There is an honorarium of £250 paid to those who carry out these duties. It involves, among other things, a weekly fire alarm check which is recorded in a register, and which should be monitored by the building controller and/or health and safety manager. The honorarium is paid annually, in arrears, supposedly after an audit check to ensure it has been completed.

53. On 29 August 2018, shortly after Mr Levins returned to work after the three weeks leave (immediately after handing in his grievance), he sent an email to Martin Coombs, the health and safety manager, "Hope you are well, Gareth and myself were wondering about the April payment for Fire Warden".

54. A series of emails followed, discussing this request. Mr Levins forwarded it to the union health and safety advisor, who confirmed that there had to be an audit by Martin Coombs first. Mr Coombs was away and he forwarded the request to Ian Stevens, the Building Controller. Mr Stevens referred it in turn to Ms Treeby. There was then a discussion about the fact that the role had not been carried out. Inspector Ian Stevens (not Ms Treeby) then escalated this concern to the Professional Standards Department. His report is dated 12 September 2018 and stated "2 PEOs have not conducted weekly checks as their role as Fire Wardens but have requested payment."

55. This was passed to Fiona Angliss in the Professional Standards Department, who completed the rest of that form. Her conclusion, reviewed by a DCI, was that it was potential gross misconduct. She recommended that it be investigated on that basis so, as is usual, it was referred back to HR to complete the investigation.

56. Neither Martin Coombs nor Insp Stevens had been involved in the grievance process. It follows that the timing of this issue goes back to the email from Mr Levins and was not initiated by anyone else at the Force. It was then escalated in the normal course of events from health and safety manager and building controller, not by any colleague or superior of Mr Levins.

57. The investigation was assigned to Beth Holmes, then a Senior HR Officer, now HR Manager. She held an investigation meeting with Mr Levins on 7 Dec 18, accompanied by his union representative. Mr Levins accepted that there had been failings in carrying out the checks and said he was seeking a pro rata payment only, as in previous years. He accepted that there should have been 52 tests per year but he had only signed as having completed one. Five had been carried out, so he

may have been involved in those two but had not signed to confirm it.

58. Her detailed investigation report was not delivered for nearly a year, on 15 November 2019, again long after the employment tribunal claim was underway. She also had to interview Gareth Kitson but there is no real explanation for the delay. In her witness statement she acknowledged and apologised for it. During that year she was promoted, had other duties and was deflected as a result.

59. Her conclusion was that there were 53 times in the year when he and Gareth Kitson were both at work. There were two allegations – failing to carry out the duties, and claiming payment – and her recommendations were that management advice be given to Mr Levins on each count, and, on the lack of testing, that organisational learning take place. However, in accordance with the Force procedure, this view had to be referred back to the Professional Standards Department to determine what happened next.

60. It was reviewed by a DCI whose view was that this was not appropriate outcome, and that there was a case to answer for gross misconduct in relation to the claim for payment. That is a surprising difference of view, but understandable in our view given that this is the Police and that they were concerned with a question of honesty and integrity. The DCI was not connected in any way with the grievance process and had had no previous dealings with Mr Levins.

61. Mr Levins did not see Ms Holmes' report, so he did not know at the time that she took a more lenient view. She then had to write to him to let him know what the Professional Standards Department made of it, and did so by letter dated 31 December 2019. In it, she advised that this was potential gross misconduct and that he may face summary dismissal.

62. That letter was sent by recorded delivery and a Track and Trace form appears in the bundle. It shows that it was signed for by "J Levins" on 2 January 2020. He was adamant however that he did not receive it. The form does not show any visible signature but Ms Holmes on the other hand says that it was available online at the time of the preliminary hearing in December 2020 and that she showed it to counsel at that hearing. Her view was that the signature was only stored for a limited period online.

63. We have to decide such points on the balance of probabilities. In the ordinary course of events, post rarely goes astray, especially when sent recorded delivery. There is a record that it was signed for, even if the signature is not shown. It cannot be shown conclusively but we find on balance that it was received.

64. That view is supported by the fact that he resigned the next day, in a brief email. He says that this was on a recommendation from his wife, unconnected with any letter, but the timing is significant, after over eight months absence from work.

65. The email simply stated that:

> "Due to my current medical conditions and an ongoing Employment Tribunal against Devon and Cornwall Police, it has become untenable to continue working due to the bullying, harassment and disability discrimination against myself by this Police Force. I wish to resign and terminate my employment with this Police Force with immediate effect."

CCTV issue

66. We also need to return to the other disciplinary allegation raised against Mr Levins. On 13 February 2019 he received an email from Ms Treeby stating.

> Good morning John
>
> When I left yesterday I noticed that there was no blue badge displayed in your car.
>
> We have spoken previously about the necessity for you to display your blue badge when parked in the station car park.
>
> Can I please remind you to do so.
>
> Many Thanks

67. He replied:

> Steph
>
> The contents of your email 13th February 2019 0707hrs have been forwarded to my solicitor to be included in my ongoing Grievance at work, and the forthcoming Employment Tribunal.
>
> John Levins

68. This illustrates the extent of the distrust and lack of co-operation. He acknowledged that it was sent in anger and that he did not have a solicitor at the time. There is no question that he was disabled, and was entitled to park there, but that he should have displayed a blue badge, and Ms Treeby had raised this with him before on one occasion.

69. When he went into work that day he went to check the CCTV to see who had had a look at his car. He wanted to know who had reported him. As before, he suspected JW. There was no difficulty in him accessing the previous day's footage, and it showed Ms Treeby walk over to his car, then back to her own, as she was leaving that day at about 3pm.

70. It now appears that JW was behind this. He emailed Ms Treeby afterwards as follows:

> "Yesterday when you visited and conducted your welfare and management

> visit you asked me to email you ref issues/ concerns I had regarding no one challenging PEO Levins not displaying his disability parking badge which he has not done for the past 3 to 4 months that I have seen whilst parking in the rear yard disabled parking bay.
>
> I explained to you that as someone who is also registered disabled this was not right and we are bound to display our badges in work and out of work when parking in a disabled parking bays or on double yellow lines. I challenged PEO Levins in Jan 2018 and informed him he needed to display it at which he flipped his lid and went off on one as it was in his other car that his wife had.
>
> With this I have not felt comfortable to challenge him again due to his anger and concerns that I would be accused of bullying him nor approach anyone else.

71. There was more in the same vein. Ms Treeby was also uncomfortable about Mr Levins using CCTV to check up on her, sent an email to the Information Management team to ask if this was permitted. She did not do so for several weeks and then it took two months more to get a response, on 29 May. That was rather vague but the email does say that any such request to view CCTV should go through the building controller and be for a policing purpose.

72. She then referred this point on to the Professional Standards Department. Ms Fleur Wills dealt with it and decided that there was sufficient concern to proceed to an investigation for misconduct, but her view was that if nothing further was found it would be suitable for management action. As her statement makes clear, she had no knowledge of Mr Levins.

73. That conclusion therefore led to another disciplinary process. This time it was assigned to Deborah Lane, a Senior HR Officer. And once again it was beset with delays caused by the unavailability of those concerned. The investigation meeting had to be delayed from 11 September to 13 November 2019 for Mr Levins' representative to attend, which was therefore nine months after the incident.

74. There is a transcript of that meeting but there was no real dispute over what had happened. Mr Levins admitted that he had not had a policing purpose. He did have a blue badge but accepted that he did not display it on that occasion, and he used the CCTV to see who had reported him. That was that.

75. Ms Lane then emailed him to confirm that she was looking to conclude the investigation on 23 December 19 and hoped to have it finalised in January. But by then he had resigned. Her recommendation was simply for more management action. It is unclear whether that view would have been accepted by the Professional Standards Department but given the initial view of Ms Wills, that seems likely.

Final absence

76. A curious feature of the case, is that Mr Levins was off work from about March 2019 until his resignation, but there is no record of when that final absence began. It is not in his or anyone's witness statement, or in the agreed chronology, and there is no medical record to show when it began, just an email from Ms Waite on 23 April 2019 when she noted that she had just came back to work after a period of leave to discover that he had been signed off sick for at least a month. This was shortly after the blue badge issue was raised, so that process took place entirely during his absence.

77. If follows that for his last eight months there were two sets of disciplinary proceedings underway, an ongoing grievance appeal, absence management procedures, and these employment tribunal proceedings. Each process was being handled by different individuals with little or no co-ordination. That is illustrated by the case conference which took place shortly after his absence began. Mr Levins was still attending Occupational Health appointments and seeing a Health and Wellbeing Adviser, RA. In January 19 she recommended a case conference with him present, her, someone from HR and Ms Waite. That suggestion was not taken up for some time. Perhaps it received further impetus when he went off sick. In the HR department this was passed to Stacey Wilkins. Her understanding was that RA wanted to discuss time off for medical appointments, which was something which had been raised in the grievance.

78. On 5 April 2019 Ms Wilkins received a response from RA which said

> "The purpose of the case conference is to provide a neutral space to discuss how to support John regarding his health at work, part of this is to look at how we can facilitate him with the therapy he was referred for. The therapist only works on a Thursday. It might be that we can look at an alternative therapist. Part of the discussion is likely to be around time off and I understand this is a policy matter. I am looking at how we can try and come to a resolution where he can get the support he needs to help with his health".

79. On that basis, with some reservations, a case conference was arranged for 25 April 2019. The notes were provided during the hearing separate from the bundle. It involved Mr Levins, Ms Waite, RA, Stacey Wilkins and an assistant HR officer. They discussed his health, medication, a referral to Action for Happiness, and RA recommended a psychologist instead. It seems clear to us that both Ms Wilkins and Ms Waite were reluctant to go too far into the subject of medical treatment while his grievance was underway. After 15 minutes they left the meeting and left him to speak to RA for the remaining allocated 45 minutes. It is not clear what more could have been achieved by this meeting. Mr Levins continued to see RA and have other support from Occupational Health while the other processes took their course. It may well be that no one really expected him to return to work from then on, and certainly there was no pressure on him to do so.

Conclusions

List of issues

80. There was an agreed list of issues and we were not asked to depart from it although in some respects Mr Levins cast his net a little wider during the hearing. In the event we are satisfied that the outcome is unaffected.

Knowledge of Disability

81. As mentioned at the outset, the only issues here are whether the respondent knew or ought to have known that Mr Levins General Anxiety Disorder amounted to a disability at the relevant times, and if so whether this placed him at a substantial disadvantage. We find that there was such knowledge. There was the Occupational Health report in 2014 referring to his history of mental health problems and stating that "the main issue is stress/anxiety/depression". That was followed by his long absence in 2016 for low mood and depression, recorded by Ms Treeby as a psychological disorder, and then the Occupational Health of Dr Fletcher in September 2016, which advised that his mental health amounted to a disability. It is in our view artificial to attempt to distinguish too far between different mental health problems and to suggest, as here, that the anxiety was separate from depression. Judge Smail's decision confirms and describes his mental health condition, and confirms that it was a disability at that stage, and so we find that there was actual knowledge by Ms Treeby at the latest from the date of that report; alternatively that she ought to have known by then. The fact that this placed him at a substantial or particular disadvantage is shown by his long absence and the need for extensive intervention from then on.

Discrimination Arising from Disability

82. The test under section 15 Equality Act is as follows:

> (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."

83. So, this involves unfavourable treatment as a result of something arising in consequence of Mr Levins's disability. The something arising is said to be either:

a. his absences; or

b. the need to attend hospital appointments in respect of the Crohn's disease and the need to attend the GP surgery for blood tests, in short, the medical appointments.

84. The unfavourable treatment he relies on is:

a. not treating as disability-related the absence of 24 August 2016 to 9 January 2017;

b. not treating as disability-related the last two weeks of the absence of 20 June 2017 to 28 July 2017 when he had a broken finger;

c. in April 2018, being given a "not yet competent" rating for his Professional Development Report due to unacceptable attendance caused by disability-related absence; and

d. being required to take annual leave or TOIL for travel time to hospital/GP visits as above on the following dates:

i. 6 December 2017 (Crohn's disease)

ii. 2 February 2018 (GP – blood tests)

iii. 6 February 2018 (Crohn's disease)

iv. 2 May 2018 (Crohn's disease)

85. As already noted, the issue of disability-related absence appears to us to be a red herring. It would not have made any difference to the decision on whether to give him a first warning if his finger absence had been recorded in this way. That is a minor issue in any event, essentially a record-keeping issue. The warning had expired when he resigned and we see no reason for us to criticise the policy adopted simply because it did not distinguish between disability-related leave and other absences. In any event we are not satisfied that the finger absence was in any way disability related – there is no medical support for that view.

86. As to his PDR, attendance is a matter recorded on the relevant appraisal form. We have accepted that on this occasion it did not make any difference to the outcome, so that was not unfavourable treatment.

87. The time off for travel was a more significant concern for Mr Levins. However, the same policy was applied to all members of staff. The starting point is that his health is not for his employer to manage. Treatment is available through the NHS and there is nothing unreasonable in expecting him to attend appointments in his own time. In practice it is often difficult to get time off for treatment, but he did get the time off for the actual appointments, so that was in fact a favourable arrangement, just not as favourable as he would have liked. There may be an issue over

reasonable adjustments but for the point of view of this section – discrimination arising from disability – we cannot see not being given additional time off can amount to unfavourable treatment.

88. If we are wrong about that, it is open to an employer to justify such treatment. The Respondent relies upon two legitimate aims:

    a. the impact upon the public purse and in particular the need to use public funds appropriately and efficiently; and

    b. the operational resilience of the Police Force and any specific unit affected. i.e. the need to man the station.

89. It seems to us that the policy of encouraging staff to attend medical appointments in their own time does strike a reasonable balance, and aims to discourage people taking time in work unnecessarily, and so adhering to that policy was justified.

Failure to make reasonable adjustments

90. The test here under section 20 and 21 Equality Act is as follows:

> **20. Duty to make adjustments**
>
> …
>
> (3) The first requirement is a requirement, where a provision, criterion or practice [PCP] of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. …

91. Mr Levins says that the Force had n a provision, criterion or practice of:

    a. including attendance on PDRs and

    b. the policy on taking TOIL for medical appointments.

92. Our view is that attendance is used in the PDR process as it appears on the form, even if it made no difference on this occasion, and so that is a PCP. The policy on TOIL is an accepted PCP too. But did they put him at a substantial disadvantage compared with others?

93. On the first aspect, we have already found that it made no difference and so there was no substantial disadvantage. With regard to the TOIL issue, we find that there was some disadvantage, given that he needed far more time off that non-disabled colleagues. The Court of Appeal held in **Griffiths v Secretary of State for Work and Pensions** 2017 ICR 160, CA that a requirement to maintain a certain level of attendance meant that a disabled employee who would find it more difficult to comply with the PCP than non-disabled peers because the disability increased the

likelihood of sickness absence and greater risk of sanctions. The court urged that the PCP be identified in this broader way. But even as formulated here, the requirement to use TOIL, i.e. extra time already worked, must mean that Mr Levins was either having to accumulate more time off than his colleagues, or be reduced (unlike them) to using his leave or taking unpaid leave.

94. So there was an adverse effect, but was it substantial? Substantial means simply more than minor or trivial, but our view, after some deliberation, is still no. We are talking about a total of about two hours in total, half an hour per appointment, over about six months. In view of our conclusions on time limits the point is not essential, but there is, for example, no evidence to show that he could not have taken these appointments in his own time.

95. This issue strikes us a proxy for Mr Levins' wider concerns about his management. He seems to have taken exception to any management of his absences, although in fact Ms Treeby was very flexible and accommodating. Once aware of the Force policy she did have to impose some limit on his work absences, but the effect on him was simply not substantial enough to crystallise into a breach of a legal obligation.

Harassment on grounds of disability

96. The test under section 26 Equality Act is as follows:

> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

97. The only allegation here is that there was a deliberate refusal to certify his absences as disability-related. Again, the second absence related to the finger injury was not disability-related, although the first long absence was. However, we find that there was no such deliberate refusal: Mr Levins could have recorded this himself, and even he had, it would not have made any difference to the outcome and the eventual first written warning. Such warnings are always unwelcome by members of staff, but the application of the normal absence management process in justified circumstances cannot be regarded as harassment.

Victimisation

98. The test under section 27 Equality Act is as follows:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

99. It is of course agreed that the grievance was a protected act. Suffice to say that the evidence fell far short of showing any campaign to dismiss him, mainly because the disciplinary allegations were all passed through the Professional Standards Department, who had no knowledge of his circumstances or the grievance. Fiona Angliss and Fleur Wills in particular, did not know, and their evidence was not disputed.

100. To reiterate, the fire warden allegation followed his own email asking for payment, and after that it was dealt with by the building controller, health and safety manager, HR, then the Professional Standards Department. There is no evidence of any co-ordination, let alone a link to his grievance.

101. The same is largely true of the CCTV issue. This took a long time to resolve, and seems rather minor, but it was never pursued to a disciplinary hearing.

102. The delay in all these processes is complained of, and is significant, but it does not follow that there was a delay in any of them *because* he had raised a grievance. That was not suggested to any of the witnesses during the hearing. Clearly the Force is a large and inevitably bureaucratic organisation. Policies have to be followed. Investigations take time. Much of the delay was down to the difficulty of organising meetings with Mr Levins and his representative, not because he had raised a grievance.

103. The next allegation here is that a Welfare Officer should have been appointed during his final long absence. This is something that happens to employees who are suspended pending disciplinary allegations. Whilst this step might have been desirable in hindsight, Mr Levins did not raise it with the Respondent during the relevant period and there was no such requirement in his case. It cannot be an act of victimisation not to do something in circumstances where there is no obligation to do so.

104. The last aspect is the shortened case conference. Again, a more positive attitude might have been better but there was no obligation to hold a case conference. Some progress was made, then and later, but this came up against the barrier of the policy decision on TOIL for medical appointments, and so it did not progress very far. That was not because he had raised a grievance, but because that grievance had yet to be resolved, so again this cannot in our view be an act of unlawful victimisation.

Constructive dismissal

105. The final complaint is of constructive dismissal. The test for constructive dismissal derives from the wording of section 95 of the Employment Rights Act 1996:

(1) For the purposes of this Part an employee is dismissed by [her] employer if (and, subject to subsection (2) … only if) – …

(c) the employee terminates the contract under which [she] is employed (with or without notice) in circumstances in which [she] is entitled to terminate it without notice by reason of the employee's conduct."

106. A person is entitled to resign where the employer is guilty of a fundamental breach of contract, in this case the implied duty of trust and confidence. According to the House of Lords in the case of **Malik v BCCI** [1997] UKHL 23 such a breach occurs where an employer conducts itself "in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence". Hence it is not necessary that the conduct be calculated (i.e. intended) to have that effect.

107. We have already concluded that there was no discriminatory conduct here, so the question is whether these same acts of alleged victimisation; the delays, the disciplinary issues, and the previous events – mainly the difficulty over medical appointments –amounted to a breach of this duty of trust and confidence.

108. We have already concluded that the delay and the decision to pursue those allegations were not hostile acts by the Force. It seems to us, as outsiders, that this was rather heavy- handed, particularly the CCTV issue, where it was not even clear to Ms Treeby at the time that he had done anything wrong, apart from failing to display his blue badge. However, we accept that she needed raise that as a concern rather than ignore it and that high standards of conduct are expected in the Police. The Professional Standards Department confirmed that it was potential misconduct only, so there was no threat to his job from that issue, but that shows that she was right to raise it.

109. The fire warden issue was more serious in that it involved potential dishonesty. That was not the view of Ms Holmes, but again the process had to be followed to its conclusion. An employer following their processes does not mean that they are in breach of contract - quite the opposite. It is simply the application of the normal rules and procedures. If allegations were pursued without any basis or with undue hostility or even undue weight, that might still be a breach of trust and confidence, but we can see no evidence of that here. The policies were all followed independently and conscientiously, if slowly.

110. We understand from Mr Levins' point of view, his last year was largely spent in responding to such criticisms and in pursuing his grievance appeal and these proceedings, but there does not seem to have been any intention to force him to leave, and it is difficult to know what else, given their role and procedures, the Force could have done to avoid this, save perhaps more active steps to manage his absence. However, it is also clear that he resisted any attempt at attendance management and was being supported by Occupational Health and his own GP.

111. Much of his own feelings of grievance stem from the dispute with JW, and the allegations that were raised in early 2017 (not just by JW) and then later over the CCTV issue. It is surprising that police colleagues would resort to multiple allegations against one of their number under the cloak of the whistle-blowing policy. However, Mr Levins was clearly seen as difficult, even volatile. He accepted that his mental health might make him aggressive, and we conclude that others may well have felt as strongly about his behaviour as he did about theirs. Hostile attitudes appear to have been entrenched over a long period. At the same time he was very resistant to any management measures, as shown by his email response to Ms Treeby when she raised the blue badge issue. His email reply is on the brink of insubordination. Rather than simply acknowledge the (very minor) point she was raising, he was angry and then took his anger further by seeking to expose whoever lay behind this complaint. It is a small point but it can create a bad impression if someone is parked in a disabled bay and there is no badge. So there was no need for this overreaction, and that overreaction brought in train the whole disciplinary process, about which he complains.

112. Similar comments can be made about his claim for the honorarium which led to the investigation into that issue. The response by the Force was slow and the Professional Standards Department took a more serious view of the matter than Ms Holmes, but her reaction in fact illustrates that there was no intention to remove him or wish to do so. The delay in each case was significant but we bear in mind too that he was off sick for much of this time, which perhaps reduced the urgency, and was already pursing his remedy in this tribunal. We cannot accept therefore that these events, or the combination of circumstances, amounted to a fundamental breach of contract by the force.

113. The Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust 2019** ICR 1, CA, gave guidance to tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed:

    a. what was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

    b. has he or she affirmed the contract since that act?

    c. if not, was that act (or omission) by itself a repudiatory breach of contract?

    d. if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?

    e. did the employee resign in response (or partly in response) to that breach?

114. On the first of these, Mr Levins has never made clear what the last act was. He denies receiving the letter dated 31 December 2019 and received on 2 January

2020. Even if we disregard that point, he resigned promptly on receipt, but for the reasons already given, that letter was not part of a course of conduct amounting to a repudiatory breach of contract.

115. A good deal of attention was paid to the alternative position, that he affirmed the contract by his delay and other steps during 2019. That seems to us an unnecessary diversion here. Our finding is that he did receive that letter. That is potentially capable of reviving earlier breaches, if there were any, but for the reasons already given, we do not accept that there were, either individually or as a whole, and so it was not part of any such course of conduct.

116. If we agreed with Mr Levins that he did not receive that letter, his position would be weaker still. It would be necessary to consider why he resigned then and not earlier. Given that he had been continuing to take sick pay over about eight months, to report sick, to liaise with Occupational Health throughout and most recently by engaging in a Stage 3 grievance meeting on 3 October 2019, we have to find that he had affirmed the contract in a number of respects before receiving this letter.

Time Limits

117. The extreme lateness of these allegations also has to be considered. Time begins to run from the last act of discrimination, or failure to act, as set out in s.123 EA:

> "(1) …. proceedings … 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.

118. It is for the Claimant to persuade the Tribunal that the earlier acts form conduct extending over a period, or that it is just and equitable to extend time to allow him to bring claims in respect of the out of time acts.

119. Applying the guidance in **Hendricks v Metropolitan Police Comr** [2002] EWCA Civ 1686, the Claimant has to prove, in order to establish an act extending over a period, that

a. the incidents are linked to each other, and

b. that they are evidence of a continuing discriminatory state of affairs.

120. We note that almost all of the main concerns go back to 2017. Almost all of his questions in cross-examination of Ms Treeby went back to that period, to the disputes at work, the finger absence, and the medical appointments. The PDR was in April 2018, then the grievance in August that year, but even that was about 18 months before he resigned. The first ET1 was lodged on 24 January 2019, but our

view is that there was no continuing act here. If we are wrong about that however:

a. the last act of unfavourable treatment under section 15 was a medical appointment for which he had to take TOIL in May 2018, well over 3 months before he submitted his claim;

b. that was also the last reasonable adjustment mentioned;

c. the last alleged harassment was the failure to record absence as disability related in July 2017.

121. All these arose long before 30 September 2018, which is the start of the normal time limit period.

122. The issue over the fire warden was raised in the first ET1 and was referred to Professional Standards Department on 12 September 2018. We accept however that this disciplinary process was a continuing act and so it was raised in time. That is therefore the only point in that first claim which was. Different time limits also apply to the (other) acts of victimisation and constructive dismissal, which were raised in the second ET1 on 2 April 2020, and so these too were in time.

123. However, we remind ourselves of Mr Levins' evidence that his working relationship had broken down in mid 2016 when he went off sick, and that appears to have set the scene for the events which followed. For the reasons already given, we do not hold the respondent responsible for the processes which were later put in place, which were in our view all a response to things done or raised by Mr Levins. Events then played themselves out over a long and difficult period, but the damage had been done much earlier. Far from taking action against him, Ms Treeby in particular appears to have been reluctant to raise issues with him, as shown by the blue badge issue. Ms Waite and her colleagues in HR also showed him every consideration. Overall therefore we find that there was no unlawful discrimination or unfair treatment here.

124. For all of the above reasons the claim is dismissed.

Employment Judge Fowell
Date 22 September 2021

Reasons sent to the parties: 21 October 2021

FOR THE TRIBUNAL OFFICE