



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4100055/2021**

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**Held In Glasgow on 6 to 10 December 2021**

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**Employment Judge S MacLean  
Tribunal Member P McCall  
Tribunal Member A Grant**

**Mr A Donnachie**

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**Claimant  
Represented by:  
Mr D Japp,  
Solicitor**

**Chief Constable Police Service of Scotland**

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**Respondent  
Represented by:  
Mr S Healey,  
Solicitor**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

25 The judgment of the Employment Tribunal is that the claims are dismissed.

**REASONS**

**Introduction**

1. The claimant sent a claim form to the Tribunal on 7 January 2021. Further particulars were provided. The claimant makes the following complaints.

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a. Direct disability discrimination (section 13 of the Equality Act 2010 (EqA)) about the following:

(i) Being told to go home and not permitted to continue during the 11-week initial probation training (Module 1) in July 2018.

b. Direct race discrimination about the following:

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(i) The claimant's removal from Module 1 in July 2018.

- (ii) Discharging the claimant.
- c. Failure to make reasonable adjustments (section 20 of the EqA).
- d. Discrimination arising from disability (section 15 of the EqA).
2. The respondent accepts that the claimant is a disabled person within the meaning of section 6 of the EqA by virtue of the impact on his daily living of a physical impairment affecting his hands and wrists. The respondent denies discrimination as alleged or at all.
3. The claimant gave evidence on his own account. Police Constable (PC) Ian Florence, Police Federation Representative gave evidence on his behalf. For the respondent, the Tribunal heard evidence from retired Police Sergeant (PS) Gary Morton; Police Inspector (PI) Jennifer Steven, Head of Operations; PS Ian Robertson, K Division; PI Kirsty O'Hare, formerly PS in Probation Governance, West Scotland; and Chief Superintendent (CS) Faroque Hussain, Divisional Commander. The Tribunal was also referred to a joint set of productions.
4. The Tribunal has set out facts as found that are essential to the Tribunal's reasons or to an understanding the important parts of the evidence. Mr Japp and Mr Healey provided the Tribunal with written submissions which they gave orally when the evidence finished. The submissions were carefully considered by the Tribunal. For ease they summarised below in the order that the Tribunal considered the issues rather than in the order presented by the representatives at the final hearing.

### The Issues

5. The Tribunal's approach was to consider the issues that it had to determine which were as follows:
- a. Direct disability discrimination (section 13 of the EqA)
- (i) The respondent accepts that the claimant has a disability: a physical impairment affecting his hands and wrists. Was the claimant treated

less favourably by the respondent because of his disability? The claimant relies on the following as less favourable treatment:

- Being told to go home and not being allowed to continue with the rest of the classroom-based Module 1 in July 2018. The claimant seeks to compare himself with PC Sharon Greenlaw a fellow probationer on Module 1 in July 2018 who was injured and could not complete the Operational Safety Training (OST) during the 11-week initial training period but was allowed to remain on the course and complete the OST afterwards.

b. Direct race discrimination (section 13 of the EqA).

(i) The claimant is of mixed race (BAME). Was he treated less favourably because of his race? The claimant relies on the following as less favourable treatment:

- Being told to go home and not being allowed to continue with the rest of the classroom-based Module 1 in July 2018. The claimant seeks to compare himself with PC Sharon Greenlaw a fellow probationer on module 1 in July 2018 who is white and was injured and could not complete the OST during the 11-week initial training period but was allowed to remain on the course and complete the OST afterwards
- Discharging the claimant. The claimant again relies on PC Greenlaw as a comparator.

c. Failure to make reasonable adjustments (section 20 of the EqA).

(i) Did the respondent apply a provision, criteria or practice (PCP)? The claimant's pleaded PCP is the respondent's "requirement that the claimant be physically fit enough to sit the OST module at the time when he was to attend all other modules of the Probationary Training. As opposed to being allowed to continue with all other modules and complete the OST at a later date." The respondent denies that this is a PCP.

- (ii) Did the PCP place the claimant at a substantial disadvantage in comparison with people who are not disabled?
- (iii) Did the respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?
- 5 (iv) What steps could have been taken to avoid the disadvantage? The claimant suggests that he should have been permitted to complete the Module 1 and Module 2 elements other than OST.
- d. Discrimination arising from disability (section 15 of the EqA).
- 10 (i) The claimant asserts that the unfavourable treatment was discharging him. The claimant was unable to complete the OST because of his disability. The respondent accepts that the discharge was unfavourable treatment arising in consequence of the claimant's disability.
- 15 (ii) Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that his having police officers who are fit physically and mentally to perform the duties of the office of police constable and being efficient and well conducted constables and on the legitimate aim of providing value to the taxpayer.
- 20 (iii) The Tribunal will decide in particular:
- was the treatment an appropriate and reasonably necessary way to achieve those aims?
  - could something less discriminatory have been done instead?
  - how should the needs of the claimant and the respondent be
- 25 balanced?
- e. Remedy
- (i) What financial loss has the discrimination caused the claimant?
- (ii) Has the claimant taken reasonable steps to replace lost earnings?

(Hi) What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded?

(iv) Should interest be awarded?

### Relevant Law

- 5 6. Direct discrimination is defined in section 13 of the EqA. The provision is satisfied if there is less favourable treatment because of a protected characteristic. There must be less favourable treatment than an actual or hypothetical comparator whose circumstances are not materially different from the claimant (section 23 of the EqA).
- 10 7. Section 15(1) of the EqA defines discrimination arising from disability. The provision requires there to be: (a) unfavourable treatment; (b) because of "something; (c) the "something" has to have arisen in consequence of the claimant's disability; and (d) which the respondent cannot show was a proportionate means of achieving a legitimate aim. Section 15(2) of the EqA
- 15 states that section 15(1) does not apply if the respondent shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability.
8. Section 20 of the EqA defines the duty to make reasonable adjustments. To succeed, there requires to be: (a) a PCP applied by the respondent which; (b)
- 20 puts the disabled person at a substantial disadvantage; (c) in relation to a relevant matter in comparison with persons who are not disabled; and (d) a failure by the respondent to take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21 of the EqA states that a failure to make reasonable adjustments is discrimination.
- 25 9. Section 23 of the EqA states that on a comparison of cases for the purposes of section 13, 14 and 19 of the EqA, there must be no material difference between the circumstances relating to each case. Section 23(2) of the EqA specifically states that the circumstances relating to a case include a person's abilities if on a comparison for the purposes of section 13 of the EqA the
- 30 protected characteristic is disability.

10. Section 136 of the EqA provides that if there are facts from which the court decides, in the absence of any other explanation, that a person contravened the provisions of the EqA the court must hold that the contravention occurred.

## Findings in Fact

### 5 Background

11. The respondent is the Chief Constable of the Police Service Scotland.
12. The training of probationer constables is a critical factor in the provision of a professional police service in Scotland capable of meeting the needs of the public. It allows probationary constables to reach a standard which allows the respondent to confidently confirm them in the office of constable.
13. Police Scotland has a National Probationer Training Programme (the Programme) comprising of four modules delivered over 104 weeks during which students are assessed in operational and academic environments.
14. The Programme's aim is to develop newly appointed probationary officers in the core knowledge, understanding, skills and attitudes and behaviours of police officers to enable them to enter the operational environment and provide a professional service to Scottish communities.
15. Module 1 is an 11-week programme at the Scottish Police College (the SPC) where there is a formal induction. The initial programme contains six units and is an intensive period of studying legislation and procedural learning with students being assessed in academic, fitness and practical competencies. During Module 1 probationers receive instructions in practical elements relating to their role including Operational Safety Training (OST), Scottish Police emergency life-saving; physical fitness and drill. In week 10 there is a final course examination. Probationers undergo two mandatory fitness tests in Module 1. All assessments are facilitated and assessed by trained staff using standardised marking criteria.
16. OST consists of a multiple-choice objective examination which students will be considered to have attained competence if marked at 62.5% or above is

achieved. There is a requirement to demonstrate practical competence in each of the safety techniques with a pass/fail criteria being applied.

17. Module 2 is local divisional training which is undertaken locally with emphasis on local systems and procedures.

5 18. After successful completion of Module 2 probationers commence their operational phase (Module 3) under the guidance and supervision of a tutor constable and divisional supervisor to assimilate their learning in the operational environment. During this period students maintain an evidence portfolio relating to incidents they attend, how they related to their classroom  
10 based learning and what they took from the operational experience.

19. Module 4 involves assessment and training including an oral examination; fitness tests; completion of open and distance learning packages; a summative multiple-choice assessment; preparation of an evidence validation report and confirmation examination.

15 20. The claimant is from a Scottish and Caribbean background. His mother was formerly a police officer at Thames Valley Police. The claimant applied to join Police Scotland in 2017.

#### **Appointment and initial training**

20 21. As part of the appointment process Dr Sandie Marshall, Lead Force Medical Adviser (FMA) referred the claimant to Dr David Watt, Selected Medical Practitioner to the Scottish Police Authority and Accredited Specialist in Occupational Medicine for consideration of the claimant's entitlement to be enrolled in the Police Pension Scheme. In a report dated 27 March 2018 it was noted that there was evidence that the claimant had underlying medical  
25 complaints. The most acute of which had recently been operated on surgically and it was likely in Dr Marshall's opinion that the surgical treatment would remain successful and would be preventative of reoccurrence. During the surgical investigation, it was identified that the claimant suffered from hypertension with evidence of this affecting his heart. He had been prescribed  
30 preventative treatment which was likely to be successful. It was concluded that

these medical factors were not a barrier to the claimant being recruited as a police officer.

- 5 22. On 7 June 2018 the claimant was informed that the respondent was prepared to make an offer of appointment as a probationary police constable within the Police Service of Scotland. The claimant was advised that he would be posted to the SPC on 25 June 2018 to commence Module 1. He was due to be confirmed in the rank on 24 June 2020.
- 10 23. On 22 June 2018 the claimant sustained an injury to his right wrist. He did not know how it happened. The claimant consulted Dr Kerr, General Practitioner, Regent Medical Practice who prescribed medication.
- 15 24. On 25 June 2018 the claimant completed a health declaration allied to involvement in physical activities while at the SPC. The claimant declared that he was suffering from high blood pressure and damaged wrist tendons. He confirmed that he had consulted a doctor and was taking medication to manage his blood pressure and damaged tendons. The claimant said that his doctor had advised this his ability to participate in physical activities should not be impacted.
- 20 25. PS Gary Morton was one of three first line managers for the staff at the SPC and probationary constables on Module 1 with responsibility for training, welfare and discipline. The claimant's class instructor informed PS Morton of the claimant's health declaration. PS Morton noted that the claimant's ability to participate on physical activities should not be impaired and was being managed by medication.
- 25 26. On 29 June 2018 the claimant passed fitness test number 1. He sat an evidence knowledge check on 11 July 2018.
27. While attending a class at SPC on diversity awareness a tutor expressed surprise when the claimant raised his hand to say that he was from an ethnic minority background. The claimant felt embarrassed. PS Morton was unaware of this incident or the claimant's BAME background.



28. On 12 July 2018 while standing on the parade square at the SPC for approximately 15 minutes the claimant lost sensation and power in his left hand and lower leg. He did not regain feeling for approximately 15 minutes. The claimant's class instructor was concerned and informed PS Morton.

5 29. PS Morton spoke to the claimant. The claimant advised that this had not happened before. PS Morton's concern was heightened because of the unusual symptoms and the possibility that they could be linked to the claimant's blood pressure or something more sinister. It was agreed that the claimant should try to get an appointment with his general practitioner who would have  
10 access to his medical records.

30. On 13 July 2018 the claimant consulted Dr Tham, General Practitioner Regent Medical Practice who provided a letter stating, "This is to confirm that Aidan has been having symptoms of loss of sensation and power of his left hand and lower leg. This is going to be investigated. I recommend that he is exempt from  
15 activities involving static positions as this seems to trigger the symptoms."

31. Dr Tham also provided the claimant with an Inverclyde HSCP referral for a venepuncture procedure to take place on 24 July 2018. The reason given was "hand weakness and bloods".

32. On receiving this advice, the claimant did not consider that he was fit to take  
20 part in the week-long OST programme commencing on 16 July 2018 which is a requirement for operational deployment. The claimant was not absent from work but did not participate in the OST.

33. On 18 July 2018 PS Morton made an urgent referral to Optima Health (OH), the respondent's occupational health provider. He requested that the claimant  
25 was reviewed urgency with a view to confirming whether the loss of sensation may be linked to his hypertrophy. It was also requested that his fitness for his role in Module 1 and for operational deployment was reviewed given that in both areas he would be required to stand or sit in prone positions for periods of time. In OST his body would be placed into stress positions during specific  
30 techniques likewise in the operational area and potential conflict situations.

34. The referral also mentioned that an ancillary issue was disclosed when the claimant said that he could not participate in OST at this time. The claimant said that he was still feeling pain to his right wrist which was injured before attending the SPC for which he was taking medication. His general practitioner was sending the claimant for further assessment at Inverclyde Royal Hospital for “quavering Q tendonitis”.
35. PS Morton was then informed that the claimant was experiencing pain in his right wrist and thumb and an appointment had been made at Clackmannan Health Centre on 19 July 2018. The claimant received a fitness to work note stating, “No physical duties” for four weeks”. PS Morton provided this additional information to OH on 19 July 2018 stating that this would take the claimant well into his 11-week course. PS Morton further advised that the claimant was prescribed medication for the pain and was to seek the assistance of a physiotherapist.
36. OH informed PS Morton that a consultation had been arranged for the claimant with the FMA on 24 July at 10.30am. This clashed with the claimant’s prearranged appointment at Inverclyde Hospital. Clarification was sought as to which appointments should be given preference. OH advised that as the FMA’s assessment was for fitness to work rather than clinical guidance the claimant should attend Inverclyde Hospital and that the fitness to work assessment would be rescheduled as soon as possible. The earliest possible appointment was 28 August 2018.
37. PS Morton was disappointed at the delayed assessment of the claimant’s fitness to attend OST and that any adjustments that may be required would not be available until 28 August 2018. The available medical advice was that the claimant was unable to take physical exercise because of the injury to his right hand for four weeks and it was recommended that he was exempt from activities involving static positions as this seemed to trigger the symptoms of loss of sensation and power in his left hand and lower leg. PS Morton discussed this with his line manager. Given the delay in the assessment to attend OST it was important for PS Morton to discuss with the claimant his best

welfare options for his health and wellbeing and best opportunity to complete Module 1.

38. In the meantime, PS Morton arranged for the claimant to have his uniform inspection made outside the music hall to avoid the claimant having to stand for any prolonged period.

39. On 26 July 2018 PS Morton met with the claimant and assured him that his job was not on the line. In PS Morton's view the option of recuperating at home pending the FMA's assessment was the best option as it would allow the wrist injury to mend and the claimant would be able to return for OST when appropriate OH advice was received. After discussion the claimant agreed to self-certify as sick absent from 26 July 2018 due to medical issues disclosed in the referral to OH. The claimant intended to visit his general practitioner within seven days with a view to obtaining a note to cover him up to 28 August 2018. As PS Morton was going on annual leave the claimant was advised that his colleague DS Jill Campbell would be the claimant's contact in his absence.

40. PS Morton updated OH on the developments. He anticipated that the claimant would be authorised to return to SPC to undertake Module 1 (back course).

#### **The comparator**

41. PC Sharon Greenlaw is white. On 25 June 2018 she attended SPC to commence Module 1. On 4 July 2018 while off duty PC Greenlaw participated in a circuit class sustaining an injury to her lower leg. On 9 July 2018 she was unable to undertake physical duty and informed the class instructor. PC Greenlaw attended an osteopath privately on 14 July 2018 where she was given exercises and stretching. She participated in OST on 16 July 2018 but was seen limping. PS Morton was informed. PC Greenlaw disclosed that she had attended an osteopath. PC Morton made a referral to OH who referred PC Greenlaw to IPRS Health on 27 July 2018. PC Greenlaw was given three physiotherapy appointments and placed on restricted duties. On 30 July 2018 PC Greenlaw was declared fit for duty and to complete the OST and final assessment. She was placed on the next available week-long OST which commenced on 17 September 2018 which she completed.

**Claimant's absence from July 2018 to 14 December 2019**

42. DS Campbell contacted the claimant on 30 July 2018. She was informed that the claimant had seen his general practitioner and had received a fitness note covering his sick absence until 10 September 2018. The claimant was awaiting the results from his blood test and his right wrist was still swollen. He arranged for a physiotherapy appointment the following week.
43. PS Campbell recorded contacting the claimant on 13 August 2018. The claimant had had physiotherapy on his right wrist. He reported that he had experienced a loss of feeling in his right side and that he was to see his general practitioner again.
44. On 20 August 2018 DS Campbell recorded that she had contacted the claimant who had seen his general practitioner about a possible diagnosis for the loss of feeling down his left side. He may be suffering from Thoracic Outlet Syndrome. He had an x-ray and had an MRI was arranged for 14 September 2018 which was subsequently rescheduled for 8 October 2018.
45. On 28 August 2018 PS Morton had returned from leave. He contacted the claimant who had had his face-to-face meeting with the FMA. The claimant confirmed that all relevant medical issues had been passed to the FMA. Consideration was being given for an MRI scan of his right wrist injury. In relation to his left side OH was waiting further medical investigations as the claimant was scheduled to have an MRI scan for his left-hand side It was agreed that PS Morton would continue to contact the claimant on a weekly basis and an attendance support interview would be arranged.
46. OH provided a medical assessment dated 28 August 2018. (August 2018 OH Report) The claimant remained unfit to carry out normal duties. He was unable to undertake light/alternative duties. The medical opinion was that the claimant remained unfit to return to work until he had been fully investigated and properly diagnosed.
47. The claimant and PS Morton continued to have weekly welfare contact. The claimant provided updates which included appointments for physiotherapy,

ultrasound, MRI scan on his right wrist (late September 2018) and MRI scan on his left side.

5 48. Following a discuss between the claimant and PS Morton on 24 October 2018 PI Jennifer Steven, Operational Training West visited the clamant at home on 29 October 2018. The claimant said that he was awaiting MRI scans to identify the underlying cause of both medical issues. He had an appointment with his consultant on 30 October 2018 to discuss the issue with his right wrist. The claimant and PI Steven agreed that rather than weekly contact the claimant would provide an update following his appointments. The claimant  
10 subsequently confirmed by email that he was scheduled to have an MRI scan on his left-hand side (10 December 2018) and had been referred for an MRI scan on his right hand.

15 49. By 11 December 2018 the claimant confirmed that he had an MRI scan on 10 December 2018 and was still waiting for a MRI scan for his right wrist. Other medical investigation was taking place on his left-side. There was discussion about a new intake of probationers on 25 March 2019 which the claimant was hopeful of joining. PI Steven advised that following diagnosis of the current conditions the claimant would be referred to OH/the FMA for assessment of capabilities and fitness going forward.

20 50. On 3 January 2019 the claimant informed PI Steven that the consultant dealing with his right hand was also taking on the continued investigations into the condition that the claimant was experiencing on his left hand.

25 51. The claimant emailed PI Steven on 7 February 2019 to confirm that he had osteoarthritis in his right thumb/wrist. After a steroid injection it was feeling better. He was commencing physiotherapy. He had an MRI scan on 6 February 2019 for the loss of sensation in the left hand/wrist and was awaiting the result.

30 52. On 12 March 2019 the claimant advised PI Steven that in addition to the osteoarthritis there may also be an issue with a trapped nerve. He an appointment on 19 March 2019 to get the results of the MRI scan for the left hand side issue.

53. The claimant and PI Steven spoke on 22 March 2019. The claimant was being referred to Rheumatology for further investigation. He was still awaiting results from the MRI scan to the left-hand side of the body. The required 8 to 12 weeks of physiotherapy. The claimant was frustrated about the lack of progress with his treatment and was proposing to submit a complaint to IRI regarding his treatment.
54. On receiving a further fit note PI Steven contacted the claimant on 7 May 2019. The claimant was undergoing further tests. He contacted PI Steven on 14 May 2019 to say that he had a Rheumatology appointment the following day.
55. Further contact was made on 11 June 2019 and 3 July 2019 when the claimant provided a further fit note. He was attending a private specialist and undergoing further treatment to see if this would assist in relieving pain and regaining full range of mobility in the wrists.
56. PI Steven and PI Glass visited the claimant at home on 2 August 2019. The claimant was having private consultations with a sports consultant. He had no real functionality in his hands. He could form a fist but had no weight bearing ability. He had hospital appointment arranged for 6 August 2019. There was discussion about a visit to the FMA for a status update.
57. On 8 August 2019 PI Glass telephoned the claimant to confirm that there had been discussion with HR about seeking a further appointment with the FMA. The claimant said that he was having tests and that he was awaiting a test on his intestine that could take six to eight weeks. PI Glass advised the claimant the following day that an OH referral would be made.
58. On 2 September 2019 the claimant was assessed by OH following which a report was issued recording that the claimant was temporarily unfit for the following activities: running/im pactful dynamic activities; control and restraint; response driving; advance driving; moving and handling; and public contact face to face (2 September 2019 OH Report). The claimant was referred to IPRS Health to assess his functional capabilities to undertake the Police Scotland training programme and role. The 2 September 2019 OH Report confirmed that the claimant could undertake general administration work and computer work

in an office environment so long as he could pace himself and such work was available.

59. IPRS Health assessed the claimant on 11 September 2019. The initial assessment report recorded that the claimant had difficulty with weight bearing through hands to push upper lift to grip without pain (the September 2019 IRPS Report). It was recommended that the claimant would be able to do desk-based work He was unable to do front line operational duties. The treatment plan was approved with three treatments.
60. The claimant had a telephone consultation with OH on 30 September 2019. It was noted that he was still temporarily unfit for the following activities: prolonged walking/standing, running/impact dynamic activity; control and restraint; basic driving; moving and handling; and public contact face to face. The claimant was however considered fit to do public telephone contact, internal contact, face to face, internal telephone contact, DSE duties and general office duties. Consent was sought to write to the claimant's general practitioner for a report on his treatment and investigations so far.
61. IPRS Health provided a musculoskeletal follow up report on 10 October 2019 based on examination and information provided by the claimant (the October 2019 IPRS Report). The claimant had difficulty lifting; putting weight or pressure through hands and there was no control or restraint. The claimant was discharged and an OH referral was recommended.
62. PI Julie MacDonald met the claimant at Greenock Police Station on 6 November 2019. The claimant reported that his condition remained the same and that he would not receive any diagnosis from his consultant as he was no longer seeing him. The claimant asked about his options. The performance management was explained to him. He asked what would happen if he resigned. Matters were left for the claimant to consider his position.

#### **Claimant's return to work on modified duties from 15 December 2019**

63. The claimant report fit for duty (on a modified capacity) on 15 December 2019. He was assigned to a role with the Body Armour Replacement Project. His

duties involved working with the fitter measuring officers. His line manager was PI Papakyriakou. The claimant was on annual leave until 20 January 2020. He worked five days with the project team and was then absent from 27 to 30 January 2020 due to sickness and diarrhoea. The claimant had already been granted special leave on 29 January 2020 to attend a hospital appointment.

64. On 30 January 2020 the claimant contacted HR as he felt unable to maintain full time hours in the post due to excessive tiredness/fatigue. Following consultation, it was agreed that the claimant would work 9am to 3pm.

65. On 7 February 2020 PI Papakyriakou expressed concerns regarding the claimant's ability to move onto the next phase of the project at a different hub which would be of far greater intensity with more officers being dealt with daily increasing the administration. The claimant finished working with the project team on 14 February 2020.

66. On 13 February 2020 the claimant was assessed by FMA Dr Marshall who reported that the claimant would be fit to undertake the following work activities: prolonged walking/standing, running impactful dynamic activity, telephone contact, DSE duties and general office duties (the February 2020 OH Report). The claimant was unfit to undertake control and restraint. The February OH Report concluded:

"In summary, PC Donnachie continues with symptoms of pain at the base of both thumbs and intermittent dense numbness with the left hand. The functional impact is that he feels weaker and cannot reliably weight bear on his hands. He cannot be considered fit for OST. As there is no clear cause for his symptoms it is not possible to predict the diagnosis. As the symptoms have not resolved with time it may be that they will continue. PC Donnachie's depressive illness does not appear to be a barrier to work.

- PC Donnachie cannot be considered medically fit to undertake OST.
- PC Donnachie is medically fit to continue to work in a non-operational capacity.



There may be one area of investigation that remains unexplored. I have urged PC Donnachie to check with his GP whether the extensive specialist investigations included investigation of the neck.

I have not arranged to review PC Donnachie as there is unlikely to be anything to add unless circumstances change when I would ask you to re-refer him to us.”

67. On 17 February 2020 the claimant reported to PI Glass at Paisley Police Office where he undertook a role collating outstanding productions in relation to sudden deaths.

68. The claimant had annual leave on 26 February 2020.

69. On 3 March 2020 the claimant reported unfit for duty due to digestive disorder - sickness and diarrhoea. He reported fit for duty on 5 March 2020 when he went on annual leave until 13 March 2020.

70. On 17 March 2020 the claimant reported unfit for duty. The absence was recorded as “Covid 19 precautionary self-solation”. The claimant was on annual leave between 26 March 2020 until 30 March 2020 inclusive. PS Robertson spoke to the claimant on 31 March 2020.

71. The claimant reported unfit for work on 3 April 2020. The absence was recorded as “Covid 19 precautionary self-isolation.” PS Singh Kaila made contact and noted that the claimant was shielding because of his cardiac condition on the advice of NHS and his general practitioner. On 6 May 2020 following changes in Scottish Government guidance the claimant’s absence was changed to “shielding from Covid” which ended on 26 June 2020.

72. On 11 June 2020 Chief Inspector (CI) Claire Campbell, Force Training compiled a report supported by CS Nichola Burns recommending that an extension be applied to the claimant’s probationary period to allow all medical evidence to be gathered and expert opinion sought about whether the claimant was likely to regain the level of physical fitness required to undertake training, complete his probationary period and be confirmed in the rank of constable.

The extension was applied for six months giving the claimant a revised confirmation date of 24 December 2020.

- 5 73. On 29 June 2020 the claimant reported to the Paisley Police Office. He undertook the task of telephoning licensed premises in the Division to confirm whether they would be operating their outdoor space from 6 July 2020 or opening internally from 15 July 2020. He was to speak to premises management confirming whether they were aware of social distancing measures and other guidance communicated by the Scottish Government. The claimant performed his role with three other officers and reported to PS Robertson. 2
- 10
- 15 74. On 1 July 2020 the claimant reported unfit for duty. PS Robertson telephoned the claimant and was advised that the claimant had contacted his general practitioner stating that he was feeling overwhelmed regarding his present working situation. The claimant had grown increasingly anxious about the situation and it had come to a head that morning. The claimant was given a four-week medical certificate and a prescription. The claimant was asked if any work allocated to him on his return in the past week had increased his anxiety. The claimant advised it had not. He was actually enjoying the task of work allocated to him. It was the uncertainty of what was happening to him that had led to this anxiety.
- 20
- 25 75. On 9 July 2020 PS Robertson submitted a referral to OH referring to February 2020 OH Report. He asked whether in the FMA's opinion the claimant's condition would ever allow him to undertake OST and be deployment operationally. The response was, "Hi there, unless this function has improved in any way the advice in the report from 13 February remains appropriate."
- 30 76. On 13 August 2020 PS Robertson spoke to the claimant on the telephone and noted that he was continuing with mental health assessment undertaken by Crown House Mental Health Team in Greenock. The claimant was also contemplating taking a holiday in Portugal to visit family which might be beneficial to his mental health.

**Regulation 9 of the Police Service of Scotland Regulations 2013**

77. On 14 August 2020 PS Kirsty O'Hare prepared a report summarising the claimant's absences and medical interventions with a view to OS Burns considering options under regulation 9 of the Police Service of Scotland Regulations 2013: recommending to the respondent that the claimant's services are dispensed with because he is not fit physically or mentally to perform the duties of the office of police constable or is not likely to become an efficient or well conducted constable or that his probationary period is further extended to allow for a potential improvement in his health. The report was sent to CS Burns who reviewed the documentation and confirmed that consideration should be given to a recommendation for the claimant's discharge and that a hearing to afford the claimant an opportunity to make representations would take place on 16 October 2020.
78. On 4 September 2020 PS Robertson recorded that the claimant had managed a holiday in Portugal and that he anticipated being furnished with a further medical certificate from 7 September 2020.
79. On 10 September 2020 CI Cameron agreed with the claimant to attend his home the following day with PS Robertson to deliver the package of documents relating to the regulation 9 hearing. The claimant was told that PS Robertson would continue as his first line manager for absence contacts until the regulation 9 hearing.
80. The claimant consulted with Police Federation Representative PC Florence who raised a concern with CS Burns about her handling of the regulation 9 hearing. DC Florence explained that he was concerned that as Head of Training she would have too much knowledge of the claimant's case to be fully impartial about it. He was also concerned that the "summary of evidence" for the consideration of discharge" form had been completed by her and that she had already predetermined the outcome.
81. CS Burns had not predetermined the issue. PS O'Hare had made a mistake when completing the documentation. To allay the claimant's concerns CS Burns steps aside. She emailed colleagues to asking if they were available to

conduct the regulation 9 hearing. CS Faroque Hussain who had no previous involvement replied volunteering to do so. CS Hussain is a SAME Senior Officer.

- 5 82. The regulation 9 hearing was rescheduled for 30 October 2020. In preparation CS Hussain read all the documentation provided to him and met with PS O'Hare and PI Coburn. He explored with them whether Module 1 could be more tailored so that the claimant with his current fitness could complete the other elements without being able to undertake OST. CS Hussain was informed that the coursework was intertwined and OST could not be stripped out. The most  
10 important point was whether the claimant would be able to complete the OST.
83. CS Hussain knew that he had the option to recommend a further extension to the claimant's probationary period. As it had already been extended any further extension required to be approved by an Assistant Chief Constable who would require a reason why such a further extension should be granted.
- 15 84. The claimant was accompanied and represented by PC Florence at the regulation 9 hearing. After introductions PS O'Hare read her report word for word. PC Florence distributed a written submission to which he spoke.
- 20 85. In mitigation, PC Florence referred to a fellow colleague who attended Module 1 with the claimant and was also unable to undertake OST but was allowed to remain at the SPC. Although unnamed this was reference to PC Greenlaw. PC Florence also said that it was clear relatively quickly that a diagnosis was not going to be forthcoming. The claimant's supervisors were blinkered and did not consider his conditions as a disability. The claimant could have undertaken class work and some physical activities. The claimant was abandoned. It had  
25 been suggested that resigning might be the best option which affected his moral. He was not trained on police systems and was only once told about up and coming training events. The stress had affected his mental health. PC Florence said that the claimant was not requesting that standards be lowered. The claimant had not undergone any physical examination since September  
30 2019 and it was not known if he could pass the OST.

86. CS Hussain then asked questions during which the claimant accepted that there had been no change in his condition since examination by OH on 13 February 2020. The claimant said that he was looking to go privately for a diagnosis in the future. CS Hussain asked if there was anything that those present wishes to say. He noted PC Florence's submission that the claimant felt abandoned and suffered stress and anxiety.
87. CS Hussain considered all the evidence. He decided to recommend to the respondent that the claimant be discharged in terms of regulation 9 of the Police Service of Scotland Regulations 2013 in that he is not physically fit to perform the duties of the office of Constable. CS Hussain considered that the claimant had not completed his OST and there was no indication of when he would be able to do so. The claimant accepted that he was unfit to complete the OST. There was no "glimmer of hope" in relation a diagnosis or prognosis for a potential improvement in his health.
88. Having considered CS Hussain's recommendations in all the circumstances surrounding the claimant's proposed discharge the respondent decided that the claimant should be discharged from the police service in Scotland in terms of regulation 9 with immediate effect. This was confirmed to the claimant on 6 November 2020.
89. The claimant was unemployed from 11 November 2020 until 10 December 2020. He receives income of £280 per week. Since September 2021 the claimant attends the Royal Conservatoire of Scotland where he studies Film.

#### **Observations on witnesses and conflicting evidence**

90. The Tribunal considered that all the witnesses gave their evidence in a straightforward and credible manner. There was little conflicting evidence in relation to the issues that the Tribunal had to determined. To the extent that there was a dispute the Tribunal made findings based on the contemporaneous documentation and reports which the parties had not previously challenged.

91. None of the witnesses criticised the claimant. To the contrary the Tribunal considered that this was an unusual case in the respondent's witnesses were very sympathetic to the claimant and his situation which was not of his doing.
92. The Tribunal felt that PS Morton was sympathetic to the claimant and was upset at the claimant's recollection of their discussion on 26 July 2018. The claimant's evidence was that PS Morton told him to self-certify and remove himself from SPC. PS Morton's evidence was that he had a conversation with the claimant during which welfare options were discussed based on the delayed FMA assessment and existing medical advice. PS Morton said that he considered that it would be in the best interests of the claimant's health if he went off sick to recover pending the OH report and the claimant agreed with this.
93. In the Tribunal's view the claimant was giving evidence about a discussion that happened three years ago when he was undoubtable concerned about his conditions and the reasons for them. While that discussion was vivid in the claimant's mind it was recalled through the prism of subsequent events. The Tribunal felt that PS Morton had no animosity towards the claimant To the contrary PS Morton wanted to the claimant to succeed at the SPC and the claimant's welfare was his responsibility. PS Morton was frustrated by the delay in the FMA assessment. He had experience of advising probationers about the options available to them when injury, ill health or other issues arise while at the SPC. It was in the Tribunal's view highly plausible that PS Morton considered that it was in the claimant's best interest physically and mentally to back course once he had been assessed by the FMA. While PS Morton said what he considered to be in the best interest of the claimant's health the Tribunal did not accept from the contemporary notes of that discussion that PS Morton told the claimant what he was to do. The decision was for the claimant and he agreed to the option.
94. There was conflicting evidence about whether PS Morton told the claimant that, "he would not get the full Tulliallan experience". PS Morton said that he did not recollect of saying that as it was not terminology that he used. The Tribunal considered that there was no reason for the claimant to make up the comment.

Equally PS Morton had no reason to deny making the comment especially as at the time he believed that once the claimant had recuperated, he would return to the SPC and back course. The Tribunal considered give that PS Morton was not the only instructor involved with the claimant that it was likely that the comment was made but not by PS Morton.

95. In relation to PS Morton's knowledge of the claimant's ethnicity there was no evidence to suggest that PS Morton was directly involved in diversity classes or had been informed of the incident about which claimant gave evidence. The Tribunal accepted that details of officers' ethnicity were disclosed in personnel records, but the Tribunal accepted PS Morton's evidence that he had no reason to look for this information.

96. The Tribunal heard evidence from the witnesses about the Programme and OST. The Tribunal was satisfied that OST is a key component of Module 1 and is intended to be undertaken while at SPC and before starting Module 2. The reality is that is not always possible for example through injury, ill health or pregnancy. There is leeway for OST to be completed after Module 1 and Module 2. It is however a requirement for OST to be completed before Module 3 when probationers are deployed operationally (public facing on the streets).

### **Submissions for the Claimant**

97. The claimant invited the Tribunal to find and declare that he was discriminated against by the respondent and to award compensation for injury to feelings and loss of earnings as a result of being dismissed from the Police Service of Scotland as a consequence of that discrimination.

98. In the written submissions the claimant conflated the claims under section 13 and section 15 of the EqA. Given that the Tribunal considered and asked different questions in relation to these claims the submissions are set out separately.

### **Direct discrimination (section 13 of the EqA)**

99. The claimant relies on two protected characteristics: race and disability. The claimant says that he was treated less favourably because of his protected

characteristics as he was prevented from recommencing his training which led to his discharge.

100. In respect of both protected characteristics the claimant relies on PC Greenlaw as a comparator. The Tribunal was referred to section 23 of the EqA. The claimant said that there was not any difference between him and PC Greenlaw save that at the time (on or around mid -July 2018) he awaited an OH appointment as did PC Greenlaw but unlike her the claimant did not get an immediate prognosis. At the time the claimant left the SPC the respondent did not know that the claimant's prognosis would be unknown and that PC Greenlaw's treatment would work. At its highest she would be able to return at the end of Module 1 to complete it but that was not known around 26 July 2018. That was not a material difference. See *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11. The claimant and PC Greenlaw were treated differently as she was allowed to remain at SPC and complete the OST at a later date. As a result of that decision the claimant was set on a path from which he would never recover. The claimant did not receive any training from the respondent after he left the SPC. Despite regular contact with the respondent, it was not considered how the claimant might be moved forward with his training. The respondent took the view "no prognosis" no progress on the probationer course.
101. In relation to the protected characteristic of race the claimant also compares himself to PC Greenlaw. She is white and was injured in July 2018 and could not complete the OST. She was allowed to stay and complete the other aspects of Module 1 whereas the claimant was removed.
102. *Madarassy v Normura International Pic* [2007] ICR 867 and *Efobi v Royal Mail Group Limited* [2019] 750 requires there to be something more than the protected characteristic. PS Morton had a detailed recollection why PC Greenlaw was treated in the way that he did but could not recall saying to the claimant that he "would not get the full Tulliallan experience". Why would the claimant make this up? PS Morton also said that he was unaware of the claimant's ethnicity although the claimant has self-identified as BAME during diversity classes in Module 1 and had done so on the personnel records.



103. The difference in treatment could well have been because of the claimant ethnicity. The claimant did not raise this previously as it had not occurred to him that the respondent would discriminate on the grounds of his race.

**Failure to make reasonable adjustments (section 20 of the Eq A)**

5 104. The claimant submitted that the relevant POP upon which he relied was the requirement to undertake OST at the same time as all other aspects of the police probationer training and that he be declared fit to carry out this part of the training before completing other aspects of the training.

10 105. He argues that this PCP placed him at a substantial disadvantage as he was unable to comply with that requirement because of his disability and this placed him at increased risk of discharge from probation under regulation 9.

15 106. The evidence of PS Morton, PS O'Hare and CS Hussain was that other officers had completed all of their Module 1 and elements if not all of Module 2 before OST was completed. That opportunity was not afforded to the claimant by and after October 2019 when he was in a position to carry out everything but OST.

20 107. By January 2020 the decision had been taken not to afford the claimant any training at all despite the claimant returning to work in January 2020. The claimant's mental health deteriorated between July 2018 and July 2020 principally due to the respondent not considering his return to Module 1 or allowing him to train in any way.

**Discrimination arising from disability (section 15 of the Eq A)**

108. The unfavourable treatment relied upon under this claim was his discharge from the Police service.

25 109. The claimant submits that this was not a proportionate means of achieving a legitimate aim because this is not how the respondent treats other officers who may be "disabled" temporarily or permanently but who may or may not have completed their probationary training.

**Submissions for the Respondent**

110. The respondent submitted that an application of the law to the reasonable facts of this case means that the claims must fail. The Tribunal was asked to dismiss the claims of the claimant.

5 **Direct discrimination (section 13 of the EqA)**

111. The respondent says that the claimant's complaints fail due to the lack of "because of" and the need to generate a comparator with the meaning of section 23 of the EqA.

10 112. The claimant relies on PC Greenlaw as a comparator. She is in a different situation because:

- a. The claimant had an underlying medical condition.
- b. The claimant had a pre-existing wrist condition that was getting worse.
- c. The claimant had disclosed that he was suffering from unusual  
15 symptoms down his left-hand side.
- d. The claimant's general practitioner had told him to avoid static positions.
- e. The claimant did not have a treatment plan in place - he was waiting for an OH appointment on 28 August 2018.
- f. PS Morton had a genuine concern that the claimant's condition  
20 could be serious.

113. In relation to PS Morton's conversation with the claimant on 26 July 2018 the claimant's situation was materially different to PC Greenlaw. The claimant's treatment was not less favourable treatment on the ground of  
25 disability.

114. The reason for the treatment was PS Morton's understandable and legitimate concerns about the constellation of symptoms being suffered by the claimant and recommended that the claimant take sick absence to

recover, see OH and return when fit to do so. That is not a discriminatory reason.

5 115. In relation to the race discrimination claim the claimant is inviting the Tribunal to draw an inference from the alleged incident where a tutor thought the claimant was joking that he was from a BAME background.

116. No details were particularised in the claimant's pleaded case. PS Moton was unaware of this alleged incident when he spoke to the claimant on 26 July 2018. He also did not know of the claimant's BAME background.

10 117. There is no evidence linking this incident to any of the events that follow. To the extent that this is the "more" that the claimant relies upon it is insufficient to shift the burden of proof to the respondent. The race discrimination claim should be dismissed.

15 118. The claimant also relies on the involvement of CS Hussain as evidence that the claimant was discriminated on the grounds of race and the respondent wanted to cover that up by appointing a BAME officer to chair the regulation 9 hearing. There was no evidence that CS Burns' decision to sign the discharge papers had anything to do with the claimant's race or to link the incident with the trainer to CS Burns. The claimant has not discharged the burden of proof and the race discrimination claim should be dismissed.

20 **Failure to make reasonable adjustments (section 20 of the EqA)**

25 119. The claimant's pleaded PCP was the requirement for the claimant to be physically fit enough to sit the OST at the time when he was to attend all other modules of the Programme. The respondent denied that the respondent applied this PCP to the claimant or other police officers and referred to the evidence before the Tribunal.

120. Even if the respondent had permitted the claimant to return to the SPC to complete the other aspects of his training that would not have overcome the substantial disadvantage of being discharged. OST was a minimum requirement to being deployed.

121. While the claimant was unable to give a return-to-work indication any adjustments would have been futile. It would have been pointless to have the claimant undertake training when there was no reasonable prospect of him returning to full fitness in the future.

5 122. Allowing the claimant to do other aspects of the training would have placed the claimant in potential harm; elements of the class-room training were often intertwined with the practical elements that the claimant could not safely complete.

**Discrimination arising from disability (section 15 of the EqA)**

10 123. The claimant was discharged because he was unable to complete the OST. That was something arising because of his disability. The respondent accepts that he treated the claimant unfavourably because of this. The issue was whether this was a proportionate means of achieving a legitimate aim.

15 124. The respondent relies on the legitimate aim of having police officers who are fit physically and mentally to perform the duties of the office of police constable and being efficient and well conducted constables and on the legitimate aim of providing value to the taxpayer.

20 125. CS Hussain gave evidence about having a police force who were able to respond to the issues facing the public as and when required. That might involve restraining or arresting people who were assaultive. It is an important part of the role that a police constable can meet these standards and perform these tasks.

25 126. In determining whether discharge was proportionate the Tribunal should bear in mind that the claimant had only completed a fraction of his training and his probation had already been extended. In October 2020 the claimant's medical position was that he was not fit to undertake OST and might never be fit. The claimant could not provide any update or indication when the position might change. The situation could not continue indefinitely. Invoking the statutory power under regulation 9 was a  
30 proportionate means of ensuring police constables who are confirmed meet

the standards. It met the aim of providing value to the tax payer because the situation could not continue indefinitely.

127. The respondent denied that it refused to let the claimant train because of his inability to complete the OST. This was not something to which the respondent treated the claimant.

### **Remedy**

128. There was no specific evidence on losses. The claimant is now pursuing his passion of film making. Any award to injury to feeling should be in the lower Vento band.

## **10 The Tribunal's Discussion and Deliberations**

### **Direct discrimination (section 13 of the EqA)**

129. For this claim to succeed the claimant must satisfy the Tribunal that because of his protected characteristics he was treated less favourably than the respondent treats or would treat others.

130. The Tribunal first considered the direct disability discrimination claim. The respondent concedes that at the relevant time the claimant was a disabled person under the EqA. He had a physical impairment affecting his hands and wrists.

131. The claimant says that in July 2018 he was told to go home and was not allowed to continue with the rest of the classroom-based elements of Module 1. The Tribunal found that in PS Morton's view the option of recuperating at home pending the FMA's assessment was the best option as it would allow the wrist injury to mend and the claimant would be able to return for OST when appropriate OH advice was received. The claimant agreed to self-certify as sick absent from 26 July 2018 due to medical Issues disclosed in the referral to OH.

132. The claimant relies on PC Greenlaw as a comparator. The Tribunal considered whether there were no material differences between the claimant and PC Greenlaw. In the Tribunal's view the claimant and PC Greenlaw were not in the same position in all material respects. There was

no evidence before the Tribunal of PC Greenlaw having any underlying or pre-existing medical conditions before attending the SPC. Her injury happened when off duty but attending the SPC for Module 1. While her injury was no doubt painful and she could not complete the OST in the week commencing 16 July 2018 there was no evidence to suggest that there was a genuine concern that her condition was serious. She started OST but was removed as she was physically unable to complete it. OH did not refer her for assessment by the FMA. She was referred to IPRS Health. By 27 July 2018 IPRS Health put in place a treatment plan (three physiotherapy appointments) and place her on restricted duties. There was no evidence of her condition deteriorating.

133. A hypothetical comparator would in the Tribunal's view be a probationary police constable who had a pre-existing/underlying medical condition which recurred during Module 1; that was potentially serious; prevented them from completing the OST during Module 1; and they self-certified to recuperate pending an assessment by the FMA.

134. The Tribunal applied the reason why test for the claimant leaving the SPC and not continuing with the classroom-based elements of Module 1 in July 2018. The Tribunal was in no doubt that PS Morton and indeed the claimant had genuine concerns about the seriousness of the claimant's conditions which were not improving. The medical evidence available was that the claimant was to avoid static positions and was not fit for OST. He was undergoing medical tests and the FMA assessment was not until 28 August 2018. The hypothetical comparator would in the Tribunal's view have been advised of the options available including a recommendation about the best option for their well-being and ability to back train. The Tribunal did not consider on the evidence before it that the claimant was able to advance how he was treated less favourably on the grounds of his disability.

135. The Tribunal did not consider that there was evidence that he was prevented from recommencing his training. While there was discussion with PS Steven about a new intake of probationers in March 2019 the claimant was absent from work until December 2019 when he returned on restricted duties for a

limited period. The reason for his discharge was that he was unfit to participate in OST not that he had not completed Module 1.

136. Turning to the direct race discrimination claim, the claimant again relies on PC Greenlaw as his comparator. The less favourable treatment was being told to go home and not being allowed to continue with the rest of the classroom-based probationer training in July 2018; and being discharged in October 2020.

137. The Tribunal did not consider that PC Greenlaw was an appropriate comparator as there were material differences in relation to the potential seriousness of the reasons for not being able to complete the OST during module 1. In September 2018 PC Greenlaw completed OST. So far as the Tribunal was aware, she did not attend a regulation 9 hearing.

138. In any event on the evidence before the Tribunal the reason why the claimant left the SPC and did not continue with the classroom-based elements of Module 1 was because there was no improvement; he had an underlying and pre-existing conditions; he had self-certified to recuperate before his assessment by the FMA. PS Morton did not know about the incident at the diversity training or the claimant's BAME background.

139. There was no evidence before the Tribunal that CS Hussain's involvement at the regulation 9 hearing or the claimant's subsequent discharge was because of the claimant's race. From its findings the Tribunal was satisfied that the reason why the claimant was discharged was because the claimant had not completed the OST and there was no indication when he would be able to do so. The respondent has a wide discretion to discharge a probationer constable in circumstances where they are unfit to carry out the role or are unlikely to become an efficient or well conducted constable.

140. The Tribunal concluded that the claimant was not directly discriminated on the grounds of race.

**Failure to make reasonable adjustments (section 20 of the EqA)**

141. The Tribunal considered whether it was appropriate to consider the section 15 or section 20 claim first. Although there is no longer a specific provision making a requirement to consider the reasonable adjustments duty first where there is a link between the reasonable adjustment required and a claim of discrimination arising from disability, any failure to comply with the reasonable adjustments duty must be considered as part of the balancing exercise in considering questions of justification. However, it is unlikely that disadvantage which could be prevented by a reasonable adjustment could be justified. The Tribunal therefore decided it appropriate to consider the reasonable adjustment duty first
142. The Tribunal started by considering the PCP applied by the respondent. The claimant's pleaded PCP is the respondent's "requirement that the claimant be physically fit enough to sit the OST module at the time when he was to attend all other modules of the probationary training. As opposed to being allowed to continue with all other modules and complete the OST at a later date."
143. The respondent denied that he applied this PCP to the claimant or other police officers and referred to the evidence before the Tribunal. The Tribunal considered its findings. PS Morton discussed the options with the claimant. He self-certified on 26 July 2018 and then had a fit note covering sick absence until 10 September 2018. The claimant was medically unfit for work until 15 December 2019 when he reported fit for duty (on a modified capacity). In July 2018 PS Morton anticipated the claimant returning to SPC for a back course. Around December 2018 there was discussion about Module 1 training at the SPC in March 2019, but the claimant remained sick absent from work. Although the claimant was fit for modified duties in 2020, he was shielding from March 2020 until late June 2020 and was then absent due for mental health from reasons from early July 2020. CS Hussain also considered the possibility of the claimant completing Module 1 without OST in October 2020. There was evidence about other probationary police constables in different circumstances undertaking Module 1 and possibly



Module 2 before completing OST. The Tribunal considered that while the preference was for OST to be completed during Module 1 this was not a POP as there was evidence of OST being completed after Module 1 and Module 2.

5 144. It seemed to the Tribunal that even if the respondent had allowed the claimant to complete the classroom elements of Module 1 and Module 2 when he returned to work on restricted duties in December 2020 the claimant remained unable to complete the OST in February 2020 and that remained the position when his probationary period was extended in June  
10 2020.

145. The Tribunal then asked if the requirement to complete OST before Module 3 placed the claimant at a substantial disadvantage in comparison with people who are not disabled?

146. The Tribunal considered the identity of the non-disabled comparator. The  
15 comparator identified by the claimant was PC Greenlaw who did not have a disability. However, from the evidence before the Tribunal she was not sick absent during Module 1 and afterwards. She was on restricted duties and unable to complete OST when it was scheduled in Module 1 but did so shortly afterwards. The Tribunal considered that the non-disabled  
20 comparator should be a non-disabled probationary constable who was sick absent during Module 1 and afterwards and was unable to complete OST.

147. The Tribunal considered that the POP that the OST was completed before  
Module 3 placed the claimant at a substantial disadvantage as he was  
unable to complete the OST by June 2020 when his probationary period had  
25 been extended and he required to attend a regulation 9 hearing. The respondent was aware of this substantial disadvantage.

148. The Tribunal then asked what step was reasonable for the respondent to  
have taken to avoid the particular disadvantage. In so doing, the Tribunal  
had in mind the EHRC's Code of Practice at paragraph 6.23 when it states  
30 that what is a reasonable step will depend on all the circumstances of each individual case and paragraph 6.28 which sets out examples of matters that may be taken into account when deciding what is a reasonable step for an

employer to have to take and these include: whether taking any particular steps would be effective in preventing the substantial disadvantage and the type and size of the employer. The Tribunal noted, at paragraph 6.29 that it is stated that ultimately the test of reasonableness of any step an employer may have to take is an objective one and will depend on the circumstances of the case. The Tribunal was mindful that reasonable adjustments are concerned with practical outcomes rather than procedures.

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149. The Tribunal referred to its findings. In June 2020 the respondent had already extended the claimant's probationary period for six months. At the regulation 9 hearing CS Hussain asked the claimant about his current medical condition the claimant accepted that there had been no change in his condition since examination by the FMA on 13 February 2020. The claimant remained unfit to complete the OST and there was no prognosis when (if at all) that he would be in a position to so do.

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150. The Tribunal considered that the focus was not on whether further extending the claimant's probationary period would advantage him generally but whether that was a reasonable step for the respondent to have taken to avoid the claimant being discharged. While to be reasonable the step does not need to be completely effective it does need to have some effect in removing or reducing the disadvantage.

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151. The Tribunal's view was that the respondent had been managing the claimant's absence and had already extend his probationary period to see if there was possibility of him being able to complete the OST. The Tribunal concluded that while the respondent could have extended the claimant probation there was no evidence in October 2020 that if the probationary period was further extended the claimant health would improve and he would be able to complete the OST. The Tribunal considered that when weighing up what was a reasonable step in this case, there was uncertainty that any further extension to the probationary period would have been an efficacious practical benefit in terms of alleviating the substantial disadvantage. The Tribunal concluded that it was not a reasonable adjustment.

**Discrimination arising from disability (section 15 of the EqA)**

- 5 152. The respondent helpfully conceded that the claimant had been treated unfavourably (discharged) for a reason arising in consequence of his disability (being unable to complete the OST). The focus for the Tribunal was then on the question whether the respondent could objectively justify the treatment.
- 10 153. The respondent relies on the legitimate aim of having police officers who are fit physically and mentally to perform the duties of the office of police constable and being efficient and well conducted constables and on the legitimate aim of providing value to the taxpayer.
- 15 154. The Tribunal considered that there was evidence from CS Hussain about the respondent's need to have a police force who were able to respond to issues facing the public which might include restraining or arresting people who were assaultive and the important performing these tasks of this in the role of a police constable. CS Hussain also gave evidence about the aim of providing value to the taxpayer.
- 20 155. The Tribunal then considered the discriminatory effect of the measure on the claimant. The claimant was unable to complete the OST that was required; was subject to a regulation 9 hearing and ultimately discharged.
- 25 156. The Tribunal accepted that claimant's ability to complete the OST was incompatible with the respondent's aim. The Tribunal considered that it was appropriate for the respondent to explore any supportive measures and making the claimant aware of the consequences of him not completing the OST no matter how genuine the reasons for that.
157. The Tribunal considered whether the respondent could have used a less discriminatory means to achieve the same objective.
158. The Tribunal acknowledged that the respondent's decision to discharge the claimant had a discriminatory effect on him. The Tribunal considered whether the respondent could have extended the probationary period. CS Hussain

would have need to make a recommendation to an Assistant Chief Constable with reasons why it was appropriate to do so. The Tribunal considered whether the claimant having a further extension to his probationary period to undertake other parts of Module 1 or Module 2 would achieve the respondents legitimate aim. In the Tribunal's view the claimants absence history showed that while he could complete other aspects of Module 1 and Module 2 he could not complete OST. Without doing that he could not proceed to Module 3. There was no change in the claimants medical condition, and it was not possible to predict when that might happen if at all. The Tribunal did not consider that further extending the claimants probationary period would have achieved the respondents legitimate aim. The Tribunal noted that the claimant was aware in December 2019 of the option to resigned and reapply to join the police force if his condition changed. That remained the position until the discharge took effect The claimant did not pursue this option.

159. The Tribunal considered that the claimant's discharge was proportionate means of ensuring police constables who are confirmed meet the standards. In October 2020 the claimant's medical position was that he was not fit to undertake OST and might never be fit. He could not provide any update or indication when the position might change. The situation could not continue indefinitely, and the discharge also provided value to the taxpayer. Accordingly, the Tribunal concluded that there had been no breach of section 15 of the EqA.

### Remedy

160. Having reached the conclusions that it did the Tribunal did not go onto consider remedy. The Tribunal dismissed the claims.

Employment Judge: S Maclean  
Date of Judgment: 25 January 2022  
Entered in register: 28 January 2022  
and copied to parties