EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Connor	**v**	**Chief Constable of South Yorkshire Police**

Heard at: Sheffield (by CVP) **On**: 9 - 13, 16, 17 and 19 May 2022

Before: Employment Judge A James
Ms L Anderson-Coe
Mr D Pugh

Representation

For the Claimant: In person

For the Respondent: Mr O Thorne, counsel

JUDGMENT

(1) The claim for unfair dismissal (S.94 Employment Rights Act 1996) is not upheld and is dismissed.

(2) The claims for disability discrimination (SS.15, 20 and 26 Equality Act 2010) are not upheld and are dismissed.

REASONS

The issues

1 The issues which the Tribunal had to determine are set out in Annex A. Those were further refined at the hearing, for the reasons set out below.

The proceedings

2 Acas Early Conciliation was commenced on 27 August 2020 and ended on 9 September 2020.

3 The ET1 was submitted on 8 October 2020.

4 A preliminary hearing took place on 12 November 2020 before Employment Judge Davies. Two claim forms were considered. The first was for holiday pay (1805266/2020). It was agreed that claim would be dealt with separately. The hearing took place on 3 February 2021 and written reasons were sent on 23 March 2021.

5 A further preliminary hearing took place before Employment Judge Buckley on 23 February 2021. This claim was listed for a final hearing between 27 September and 5 October 2021. The issues were identified. The claimant's direct discrimination claims were withdrawn and subsequently dismissed.

6 The October hearing had to be rearranged because the Tribunal did not have a panel to deal with the claim due to an over-crowded list. It was listed for the above dates.

The List of Issues

7 Following the 23 February 2021 hearing the Tribunal received a letter from the claimant dated 31 March 2021 arguing that the list of issues missed out a number of claims that the claimant intended to bring. That was treated by the respondent as an application to amend the claim. On 12 April 2021 the respondent's solicitor emailed the Tribunal on the respondent's behalf, objecting to most of the proposed additions. Unfortunately, the issue was not formally dealt with and this Tribunal therefore made a ruling on it, so that the parties knew the issues which were before the Tribunal. The amendment application is dealt with under four headings; remedy issues; S.15 Equality Act 2010 issues; reasonable adjustments; and harassment.

Remedy issues - alleged breach of Acas Code

8 It is accepted by the respondent that reference to a breach of the ACAS guidelines is included in the details of claim and no objection is made by the respondent to those matters being raised in relation to the unfair dismissal and discrimination claims. These matters have been added at 3.1.8 and 8.7 of the list of issues.

S.15 Equality Act 2010 issues

9 In relation to point 3a. of the 31 March 2021 letter, it is accepted by the respondent that there is an allegation in the details of claim that the claimant was falsely accused of having a police-issued mobile phone on 8 February 2019, at paragraph 15. The respondent argues that it is unclear on what basis that could be said to represent discrimination arising from disability. That point is noted. It has nevertheless been added to the list of issues at 5.1.18.

10 In relation to points 3 b. to f., the Tribunal agrees with the respondent's objection, that these are not referenced sufficiently in paragraph 16 of the details of claim. Paragraph 16 states:

> *SYP refused to recognise that my Disabilities were dramatically worsened as a direct consequence of their poor ongoing treatment and showing a total lack of Duty and Care towards me, as their employee over the last few years; and how this had an overwhelmingly detrimental effect on me mentally, as the Clinical Psychologist recognised. As noted in (Halton BC v Hollett: EAT 569/87).*

That does not contain any of the detail set out in paragraphs 3 b. to 3.f. of the amendment application.

11 Whilst it is not the claimant's fault that the application has not been dealt with formally until now, nor is that the respondent's fault. So the timing and manner of the application factor does not take the Tribunal any further forward.

12 The Tribunal refused to allow the amendment application at this stage. In the Tribunal's judgment, the balance of prejudice is firmly in favour of the respondent. We are now at a hearing, and witness evidence and documentation has been provided on the basis of the 23 February 2021 list of issues. Even at the time the claimant made the application, it was substantially out of time. The matters alleged were not set out in the Scott Schedule dated 10 December 2020, which had been prepared following the November 2020 preliminary hearing. The Tribunal accepts that there was a lengthy discussion at the hearing on 23 February 2021, in order to elucidate the issues.

13 Further, in the Tribunal's judgement, the additions do not add substantially to the claims already before us. The amended list of issues runs to 8 pages. There are already eighteen s.15 Equality Act 2010 claims, four reasonable adjustments claims, an unfair dismissal claim and five allegations of harassment. The addition of the other claims will add little in terms of the potential value of the claim. In terms of value, the main issue before the Tribunal is the dismissal. This is pleaded both as an unfair dismissal and a discriminatory dismissal. At best therefore, allowing the amendments, would potentially have resulted in a relatively small increase to the injury to feelings award, if the claims had succeeded.

14 Yet further, the existing allegations set out in the list of issues, as amended, is more than enough to deal with in the seven days available. To allow more claims at this stage, would potentially lead to an application for an adjournment to amend the pleadings, and to call further evidence/witnesses. It is not in either party's interest for that to happen, especially given that the final hearing has already been adjourned once already.

15 For all of the above reasons, the Tribunal will be deciding the issues agreed on 23 February 2021, as amended at this hearing (and subsequently amended, by consent, to add in the relevant detail set out in the claimant's further information dated 31 March 2021).

Reasonable adjustments

16 In relation to reasonable adjustments, the claimant seeks to add two claims. The first, is that the respondent refused to extend the claimant's sick pay. This has not been alleged previously. The second adjustment is that the respondent did not allow the claimant to take annual leave. Reference is made to paragraph 24 of the Details of Claim. That paragraph however refers to the respondent agreeing to pay the claimant any outstanding leave but at a reduced rate. That was one of the matters dealt with in the holiday pay claim.

17 The claimant argues that the reasonable adjustments part of that claim was due to be heard by this Tribunal. Mr Thorne says this was objected to over 12 months ago at the preliminary hearing and that it would cause considerable prejudice to the respondent to allow it now; and/or would result in an adjournment. The list of issues was subjected to extensive discussion at the February 2021 hearing. There are time limit issues too.

18 The Tribunal refuses this amendment for the same reasons as set out above. For those reasons, the Tribunal's judgment is that the balance of prejudice is firmly in favour of the respondent.

Harassment claims

19 The respondent does not object to the alleged false accusation of having a police-issued mobile phone being added to the list of harassment issues. It has been added as paragraph 7.1.6. The respondent does query how the incident could be said to relate to the claimant's disability. The claimant was told that he should consider that point, when making final submissions to the Tribunal.

20 As to paragraphs 5.b., c., e., f., and g. and 5i., the Tribunal agrees that those matters are not referenced in the paragraphs in the details of claim that the claimant refers to in the application. Again, those paragraphs set out unparticularised allegations. They are therefore new claims and the Tribunal refuses the application to amend, for all of the same reasons as set out above.

21 As to 5d., the alleged failure to pay accrued holiday pay, that does not appear to be the case on the facts. Accrued holiday pay was paid - just not at the rate of pay that the claimant was expecting. That was not pleaded previously as an act of harassment and it is difficult to see how it could be related to disability. Again therefore, for the same reasons, that amendment will not be allowed.

22 Finally, allegation 5h. states that the respondent did not investigate the claimant's case fully as per policy, tried to concoct a misleading synopsis, and failed to present all the evidence, as a result of which the first disciplinary hearing was adjourned. Reference is made to paragraph 22 of the Claim Form, which refers to there being insufficient investigation, and to the minutes of the meeting being misleading. However, reference is not made in that paragraph to there being a misleading synopsis presented, or that the respondent failed to present all the evidence. It does appear however that those matters are potentially caught by issue 7.1.4. Mr Thorne did not object to that issue being amended accordingly, although he maintains that there is a fundamental misunderstanding about that document by the claimant, as well as about DC Cooper's case summary too. Issue 7.1.4 was therefore slightly amended, by agreement.

<u>Other preliminary matters</u>

23 As to paragraph 6.3 of the issues, it appears to the Tribunal that the substantial disadvantage arising from the PCPs can be more simply and succinctly summarised as being that the claimant was, due to the combination of his disabilities, but particularly due to the disability of depression, and the cardiac issues, more susceptible to suffering heightened levels of anxiety and stress compared to police and staff without those disabilities. Mr Thorne agreed with that suggestion. Mr Connor asked to see the change in black and white before commenting further. No objection has subsequently been raised.

24 The Tribunal heard evidence from the claimant, and Gwynneth Connor, his wife. For the respondent, the Tribunal heard from Chief Superintendent Colin McFarlane (at the time, Superintendent); Assistant Chief Constable David Hartley; Detective Chief Inspector Mahmood; Detective Superintendent (then DCI) Delphine Waring; former-DC Helen Cooper; Julie Read, Payroll and Systems Manager; Detective Inspector Mark Cockayne (at the time Detective

Sergeant); Ian Self, Information Compliance Clerk in the Information Compliance Unit (ICU); DI Julie Morley; and former-DC Susan Harvey. In the findings of fact below, the officers are referred to by their current rank, rather than their former rank.

25 There was an agreed trial bundle of 2196 pages. A handful of pages were added during the hearing. A helpful chronology and cast list provided; the claimant provided an amended chronology with additional matters set out. The Tribunal received written closing submissions from both parties.

26 The hearing took place over eight days. Evidence and submissions on liability were dealt with on the first six days. It was arranged that on the seventh day, and an eighth day added by the Tribunal, the Tribunal would meet in private to reach its decision. Judgment was reserved.

Fact findings

The claimant's recruitment – 2002

27 The Respondent is the police force responsible for serving and protecting the people in the districts of Barnsley, Doncaster, Rotherham and Sheffield.

28 The claimant's employment with the respondent commenced on 2 November 2002. He was initially employed as a Business Manager in the Information Systems Department.

29 In his Police Staff roles, the claimant was subject to the Standards of Professional Behaviour for Police Staff. This includes, under the heading Discreditable Conduct:

> *Police staff behave in a manner, which does not discredit the police service or undermine public confidence in the police service*.

And under the heading 'Work and Responsibilities':

> *Police staff are diligent in the exercise of their work and responsibilities.*

30 The respondent has a misconduct policy, clause 12.3 of which provides:

> *The chair should be either a senior officer of Chief Superintendent rank or above, or a senior member of police staff, such as the Head of the Department.*

Redeployment to Coroner's Office

31 The claimant's role of Business Manager was made redundant in 2012. He was redeployed into the Sheffield Coroner's office. Sadly, his time there was not a happy one.

32 On 26 March 2013, the claimant was seen by the respondent's Occupational Health Unit (OHU). Cardiac issues and rheumatoid arthritis were reported. [299]. The claimant also reported:

> *reduced levels of psychological wellbeing, which he attributes partly to issues inside the workplace. He advised that there had been some issues with colleagues and in regard to his probationary period which he feels is still unclear.*

The report continued:

> *His future capacity for regular and effective service depends more on his negative perceptions of the workplace being addressed than on any medical factor.*

33 On 10 February 2015, the claimant was removed from the Coroner's Office and told to report to Attercliffe police station. He was told that he was subject to disciplinary action due to gross negligence. It later transpired that the claimant was facing capability proceedings, rather than disciplinary proceedings. However, he was not informed of that fact. The claimant was eventually informed in August/September 2016 that there was no case to answer and all of the accusations were dropped.

34 An OHU report was provided on 25 August 2016, confirming that the claimant 'has several significant medical issues'. The report did not clarify what those issues were at that time. The report suggested that the claimant be classed as having a disability. Reasonable adjustments were recommended, which included regular and frequent posture breaks and regular and frequent eye-breaks. It was recommended that a workstation assessment and a personal emergency evacuation plan risk assessment be carried out. The claims before the employment Tribunal do not include any allegations regarding these adjustments, which the panel assumes were implemented. Reference was made to 'increased anxiousness' as a result of the ongoing disciplinary/capability process.

35 On 3 October 2016, the claimant was redeployed into the role of Administration Support Officer, the role he held at the time of his dismissal.

36 The claimant remained aggrieved about his perceived treatment in the Coroner's Office. In October 2016 he raised a Fairness at Work (FAW) grievance. The FAW process dragged on. On 3 October 2017, the claimant was provided with the initial outcome. He was dis-satisfied with that, and appealed on 19 October 2017. His appeal was refused. Instead, the respondent offered to 'review' the decision.

37 The claimant reiterated the need for closure regarding the grievance process on 12 February 2018. The outcome of the 'review' was provided in March 2018. The claimant appealed again on 12 April 2018. The further request for an appeal was refused on 25 May 2018. The claimant appealed to the Chief Constable about that decision. Leave to submit an appeal was granted by Jo Jackson, Head of HR, on 13 July 2018. The appeal was heard on 21 August 2018. On 11 October 2018, the claimant was told the outcome.

38 The record of the outcome meeting records:

> *We agree Steven should have been offered the appeal hearing from the outset in line with statutory legislation. We have reviewed all available submissions and considered the additional submission from Steven, his diary. We are of the opinion that Steven could have submitted his grievance much earlier, which would have potentially resolved a number of his issues, including his pay and other opportunities within the organisation. We also find that Steven should have offered his diary at an earlier stage in the process in accordance with the spirit of the grievance procedure.*

39 The panel concluded however that the claimant should receive an apology, in relation to the late disclosure of the management statement of case

concerning the capability issues; and an acknowledgement that the redeployment process was not adhered to.

40 On 21 November 2018, the written recommendations from the appeal were sent to the claimant and others. Other recommendations were made too, the detail of which do not concern us.

41 On 21 January 2019, the claimant emailed Emma Hardwick complaining that recommendations from the grievance had still not been implemented. An email was subsequently sent to the claimant by Natalie Brown, Assistant Head of HR Operations on 5 February 2019 which stated:

> *It is clear from the Resolution officers finding that communication with you has not been clear and not to the standard that I would expect. This has meant you did not know if you were under a capability or disciplinary process, which in my view is not acceptable.*
>
> *Secondly, I agree with the RO findings that we have failed to manage the Force's re-deployment process by keeping in regular contact with both you and your managers as expected and detailed in the policy. It is clear that communication is a key area for improvement and I will raise this with my teams to ensure that this does not happen again.*
>
> *In addition, I can confirm that we are reviewing the re-deployment policy to ensure that the learning from this grievance is reflected and that it is fit for purpose for all of those involved.*

Evidence of inappropriate use of the respondent's internet

42 The respondent's PSD had computer monitoring software to detect any inappropriate use of computers by officers and staff. The monitoring software is fed data from other SYP systems and is an intelligence gathering system. One of the systems which feeds data into the monitoring software is SOPHOS. SOPHOS is deployed across the whole SYP computer network and monitors, restricts and captures data in relation to internet access by SYP employees.

43 As part of her role within PSD, on 5 February 2019 Former-DC Cooper created two alerts on the monitoring software due to the word 'porn' appearing quite often in the internet use of a person working for the respondent. The alerts she set up were for the words 'sexy' and 'porn'. The alerts were intended to identify employees who had used an SYP asset and where the words 'sexy' or 'porn' had been inputted or were included in data accessed by users.

44 On 7 February 2019, concerns were identified with regard to the Claimant accessing pornographic websites whilst logged into the Respondent's computer network. An application was made to monitor his computer. The application for monitoring was granted. The claimant does not take issue with the lawfulness of the monitoring that subsequently took place.

45 A decision was made that the claimant would be suspended from duty pending an investigation. The decision was made by the Deputy Chief Constable at the time, Mark Roberts, on 7 February, following consultation with Detective Supt Barraclough, then head of PSD.

The claimant's suspension

46 On 8 February 2019, officers from the Respondent's Professional Standards Department ('PSD') attended the Claimant's place of work and approached him at his desk. The officers were DSupt Waring, former-DC Harvey, DI Cockayne and DSupt Singleton, who was the PSD Champion of Specialist Crime Services on that day.

47 Following an abrupt entry to the claimant's office, the claimant was ordered by DI Cockayne to stand away from his computer. The claimant accuses DI Cockayne of then placing his hand on his chest and '*slamming him*' against the office wall. In his statement of response for the disciplinary hearing, the claimant said that DI Cockayne 'forcibly pushed him against the wall'. During cross examination he told us that DI Cockayne 'firmly pushed him against the wall'. These appear to the Tribunal to be three different versions; although the latter two are similar.

48 The claimant's evidence on this point is firmly rebutted by DI Cockayne, former-DC Harvey and DSupt Waring. The claimant asked the Tribunal to take into account what he sees as serious inconsistencies in their evidence in relation to other matters, in order to conclude that their recollection is not correct and/or that they are lying. For example, the claimant states that the statements contradict themselves in relation to the exact whereabouts of DSupt Waring and Supt Singleton. However, the Tribunal does not consider there to be any significant inconsistencies. The evidence shows that DI Cockayne entered the office first, closely followed by former DC-Harvey, DSupt Waring and Supt Singleton.

49 DSupt Waring was adamant that had the force which the claimant alleges had been used on him had been used, she would have noted it and challenged DI Cockayne, since such action would have been entirely dis-proportionate.

50 The Tribunal finds, on the balance of probabilities, that the claimant was not pushed against the office wall by DI Cockayne. The contradictions relied on by the claimant are in, the Tribunal's judgement, insignificant. Given the unreliability of memory, it would have been more surprising if the three accounts of the officers who were present and who gave evidence to the Tribunal were exactly the same, rather than differing in minor respects as they did.

51 At the time the officers attended the claimant's office, he had a tab open on a pornographic website. A photograph of the screen was taken to document that fact.

52 The claimant was then taken to a separate office by DSupt Waring to inform him of his suspension and the disciplinary charges against him. His Welfare Support Officer Inspector Leanne Dean was present, and Supt Singleton. The claimant admitted to the allegation which was read out to him. DSupt Waring asked the claimant whether the mobile telephone in his possession had been issued by the respondent. She took the mobile telephone from him, temporarily. The claimant confirmed that he did not have a work issued device, it was his personal mobile. The Tribunal accepts that the claimant was questioned closely about his telephone. This was because the respondent's records suggested that he had been issued with a mobile telephone; and purchases had been made on it the day before. PSD assumed that the

claimant had been responsible for those. After a discussion, it was accepted that the telephone in the claimant's possession had not been issued by the respondent. It was returned to him.

53 The claimant was also served with notice of an alleged breach of the Standards of Professional Behaviour by DSupt Waring, The allegation against the claimant was that:

> *whilst at work you have utilised the South Yorkshire Police computer system to access pornographic websites.*

54 An allegation is included in the list of issues that the claimant was told that he could not speak to colleagues. No such instruction was given. The Tribunal notes the content of an email from Mike Trees to Inspector Dean and DSupt Waring on 11 February 2019, referring to a conversation with a colleague who had advised Mr Trees that he should not be contacting the claimant. DSupt Waring replied the same day to reassure Mr Trees that there appeared to have been a breakdown in communication, but that this was not something that she had suggested and that it was entirely appropriate for Mr Trees to continue to support the claimant, in his role the claimant's line manager.

The disciplinary investigation

55 Former-DC Helen Cooper, who worked within PSD, was selected as the officer in charge of the disciplinary investigation. The respondent became concerned, soon after the investigation had commenced, as to whether or not a criminal offence had been committed. This was because some of the URLs that had been identified appeared to relate to indecent images of children. An examination of the claimant's computer did not result in any evidence being recovered relating to indecent images of children. Likewise, the SOPHOS software data provided no evidence of such criminal conduct. The matter therefore proceeded as a misconduct investigation only, not a criminal investigation as well.

56 On 11 February 2019 an email was sent by former-DC Cooper to DI Cockayne regarding the claimant's use of an SYP laptop. The email stated that the claimant had the laptop from March 2018 until it was reissued on 17 August 2018 to the force solicitor. (In fact the laptop was temporarily issued to DI Cockayne in June 2018). The email also explained that the mobile number showing as the claimant's mobile telephone (and which had resulted in the claimant being asked about his mobile telephone on the day of his suspension) was the number allocated to a SIM card which the respondent thought at that stage could have been used by the claimant in the laptop.

57 The email was not deemed relevant to include in the bundle for the misconduct hearing. Broadly speaking, where PSD is running a misconduct investigation for a member of staff, the same processes are applied as would apply if the investigation was against a police officer. Although the procedures applying to police officers are statutory in nature however, the procedures applying to disciplinary proceedings against staff are non-statutory. A breach of the procedures does not render the proceedings a nullity. The expectation is that they are broadly followed - but a certain flexibility is allowed.

58 In any event, the Criminal Procedures Investigation Act does not require administrative documents between departments to be routinely disclosed. The data showed that there had been persistent access to pornographic websites

via the respondent's Internet, over a prolonged period of time. It was not thought necessary or proportionate at that stage to find out exactly which pornographic websites had been accessed from which devices. This was because the claimant had already admitted the breach by that stage. The Tribunal accepts that explanation as to why this email was not thought to be relevant.

59 The claimant's mental health seriously and rapidly deteriorated as a result of his suspension. He took an overdose on 15 February 2019 and was hospitalised.

60 A welfare update on 1 March 2019 by Inspector Dean confirmed that Mr Connor had a sick note for two weeks for anxiety and depression; and that Inspector Dean had received a text stating that the Connors only wanted limited contact and had not replied to a request for a home visit. A similar welfare update was recorded on 29 March 2019.

Welfare and investigation updates

61 The claimant complains that he was not provided with regular welfare and investigation updates. The Tribunal has seen copies of the investigation and welfare updates, and records of the four weekly suspension reviews. The Tribunal is satisfied that the latter reviews did indeed take place. The claimant was never officially informed of that fact; but nor did he ever question it.

62 There were numerous pages of records of text messages passing between the claimant (via Mrs Connor) and Inspector Dean, the WSO. They show that the WSO was in contact via text on 9, 10, 11, 12, 13, 14, 16, 18, 21, 25 and 28 February.

63 In March 2019, messages were sent by Inspector Dean on 5, 7, 14, 18 and 29 March. Regular offers to visit were made by Inspector Dean, although none of those, nor any of the numerous subsequent offers, were taken up. The message sent on 7 March acknowledged that the claimant was not at that time fit to be interviewed.

64 Further messages were sent on 4, 15, and 24 April, and on 7, 17, 21 and 31 May. Messages were sent on 6 and 28 June. In the latter message, the claimant was informed that there would be a review of his sickness at six months.

65 Messages were sent on 3, 4, 19, 22, 23, 24, 25, 26 and 27 July. The message sent on 23 July stated that it was difficult to explain a complex situation via text, but that the investigating officer needed to speak to the claimant, and asked for a date for interview in September. The 27 July message referred to pay being reduced from 15 August 2019.

66 A message sent on 21 August 2019 confirmed that a letter was going to be sent to the claimant by PSD. Further messages were sent on 2, 16 and 25 September; and on 15 and 24 October. A message sent on 11 November confirmed that former DC Cooper was preparing the investigation file in order to submit it for review.

67 Messages were sent by Inspector Dean on 2, 10 and 27 December 2019. A message was sent on 3 January 2020 which informed the claimant that a decision had been made that the allegations amounted to gross misconduct; and on 10 and 21 January, regarding the forthcoming hearing. Messages

were also sent on 24, 28 and 30 January. The 24 January message referred to the service of papers, whether or not Mrs Connor would be allowed to attend the hearing with the claimant, despite that not being the usual practice, and regarding the papers for the hearing.

68 A message sent on 6 February 2020 confirmed that Mrs Connor would be able to attend the hearing to support the claimant. Further messages were sent on 7, 12, 20 and 21 February. The message sent on 20 February 2020 referred to the claimant being able to use his leave, in order to obtain some pay, at a time when it was expected he may go on to nil pay.

69 Yet further messages were sent on 5, 25, 26, 27, 30, and 31 March 2020. Mrs Connor confirmed that they still wanted communications to be via text or by post only. Messages were also sent by Inspector Dean on 1, 17 and 30 April, and on 6, 7, 12, 13, 19, 20, 22, 27, 28, 29 and 30 May 2020. Specific reference will be made to a limited number of those text messages below, but the above demonstrates that there were regular attempts by the respondent, via the WSO, to communicate with the claimant.

The claimant's data subject access request

70 The claimant made a data subject access request (DSAR) on 26 March 2019, which amongst other things asked for:

> *[3] Any discussions about me between employees of South Yorkshire Police. To include, but not exclusive to, the Human Resources Department, Professional Standards, Specialist Crime Services, Sheffield District, Occupational Health Department, between 2012 to date regarding my employment. …*
>
> *In conducting such a search, please ensure that search terms include for my full name my initials, any shortened version of my name, employee number, job title or variation that might be used by any of the above people/departments to identify me.*

71 Reminder emails were sent by the claimant to the respondent about his DSAR on 28 May 2019, 24 June 2019, 26 July 2019 and 9 August 2019. Mr Self informed the Tribunal that there was a considerable backlog at the time the claimant made his request, and he was not able to start working on the request until 28 May 2019. Mr Self sent the proposed SAR documents to former-DC Cooper on 21 August 2019, to check whether she had any objection to them being disclosed. Former-DC Cooper did not consider the documents in any detail but responded on 16 September 2019 to the effect that, provided the documents to be disclosed through the SAR process were not documents relevant to her investigation, they could be disclosed. There was a three to four week delay between Mr Self raising the question and the answer being given, partly because DC Cooper was on leave for two weeks at the end of August; partly due to pressure of work.

72 A partial response to the claimant's SAR was sent on 3 September 2019. A further reminder was sent by the claimant on 11 September 2019. The rest of the disclosure was sent on 27 September 2019 and consisted of 1127 pages.

Severity assessment review

73 On 26 March 2019, former-DC Cooper, emailed the appropriate authority DSupt Waring to state that there was no criminal element and therefore a

review of the severity assessment may be necessary. That was carried out by DSupt Waring shortly afterwards, although the written record was not completed until sometime later.

Digital Forensic Unit report - 4 April 2019

74 On 4 April 2019 a report was sent to Former-DC Cooper by Simon Field of the Digital Forensic Unit. This confirmed the list of pornography-related search terms used by the claimant. Specific user input searches typed into the Google search engine were also identified and confirmed.

75 The report also stated that the web page https://support.google.comlchromel?p=settings_ clear_browsing_ data had also been visited, which indicated that the claimant had cleared browsing data.

Welfare updates – 26 April and 16 July 2019

76 A welfare update carried out on 26 April 2019 recorded:

> *Mr Connor has renewed his sick note for a further 4 weeks, and is under the mental heath crisis team where he is receiving medical support. There is still no engagement with WSO, all communications are through his wife and only via text. WSO will continue to make contact and if able to visit Mr Connor will provide further updates.*

As has already been noted, all offers to meet with the Connors were rejected.

77 The Welfare Update prepared by Inspector Dean on 16 July 2019 states:

> *All contact made with Mr Connor's via his wife and therefore all contact is third hand. Mrs Connor updates the WSO of his decline in his wellbeing due to lack of support via OHU. Due to Mr Connor being declared unfit for work by his GP and reporting sick, his pay is now being reviewed and he will revert to half pay. For this reason Mr Connor intends to report fit for work so that he is paid full salary. This would put him fit for interview when the WSO .. feels he is clearly not due to his mental health. DCI Waring is to seek legal advice and is to request that HR delay any decisions to reduce the pay at this stage.*

78 DSupt Waring told us, and we accept, that the reference to her seeking advice was incorrect. DSupt Waring was not able to influence the decision on pay and it was not her decision to take.

Formal severity assessment – 22 July 2019

79 On 22 July 2019 the formal written review of the severity assessment was made by DSupt Waring. DSupt Waring confirmed that, contrary to the initial concerns, there was in fact no evidence that a criminal offence had been committed. The report confirmed:

> *Although I have verbally discussed this case at monthly suspension and restrictions meetings with DI HAMMOND I have not been able to record a written rationale/update due to other higher priority operational conduct matters. However, I have today formally revised the severity assessment having reviewed DC COOPER'S file note and no longer deem that there is an indication that Mr CONNOR may have committed a criminal offence, the criminal element of special requirements has therefore been removed. However, the overall severity assessment of gross misconduct remains*

unchanged. Mr CONNOR does not require any further staff notices as the severity assessment is still reflective of the staff notice served on Mr CONNOR at the point of his suspension.

80 The panel finds as a fact that the length of time it took to formally record the severity assessment did delay the investigation by perhaps one to two months. We not that the Investigation Updates of 21 June and 16 July 2019 state:

Matter remains with AA for review. Once complete, incremental approach to SC to secure interview and move to formal proceedings

81 It is apparent therefore that former-DC Cooper was waiting for the severity assessment to be carried out, before trying to interview the claimant. There is however no evidence that the motive behind the delay was to make matters more difficult for the claimant. On the contrary, it is apparent from the severity assessment that was completed by DSupt Waring, that the delay had been down to '*other higher priority operational conduct matters'.* In any event, the claimant was on sick leave, and was not fit to be interviewed during this period. So had the claimant been written to earlier to try to arrange an interview, he would still not have been fit enough to attend.

Attempts to arrange a misconduct hearing interview

82 On 23 July 2019 DC Cooper emailed Inspector Dean to ask her to arrange a date for the misconduct interview with the claimant. On 31 July 2019 Inspector Dean provided DSupt Waring with a welfare update with regard to the Claimant. As part of this update she confirmed that whilst the claimant had not accepted any support directly, she had regular contact with Mrs Connor. She also confirmed that the claimant had not provided a proposed date for his interview, as requested.

83 DSupt Waring was concerned about the lack of progress and that the claimant might be trying to delay the progress of the investigation. DSupt Waring therefore suggested that a final letter be sent to the claimant as follows:

Within this final letter he will be informed that if he fails to engage in the interview process or fails to respond then he will be sent a list of questions which he will be required to respond to in writing. As the questions will be in place of a misconduct interview they will be detailed and specific to the gross misconduct investigation, this approach is necessary to obtain an account from Mr CONNOR despite his reluctance/refusal to engage in a misconduct interview.

84 On 7th August 2019 a letter was sent to the Claimant, allowing him a further 14 days to contact her or Inspector Dean with a proposed date for the misconduct interview. He was asked to provide medical evidence if he was not fit to attend at that time. The letter was signed by DCI Hammond and sent out the following week, due to him being on leave during the week the letter was dated. The claimant did not therefore receive this letter until 13 August. The Claimant subsequently confirmed that he was unfit to attend for interview at the time but did not provide a GP letter. After further prompting, he provided a letter from his GP on 11 September 2019, confirming he was not fit to attend an interview at that time.

85 On 17 September 2019, former-DC Cooper wrote to the Claimant and acknowledged receipt of the letter from his GP. It was noted that the Claimant was unfit to be interviewed. He was informed that the matter would progress based on the evidence available. Former-DC Cooper did however invite the claimant to provide, by 4 October 2019, any information or documentation, specific to the allegation, that he would like taking into consideration.

86 Former-DC Cooper informed us and we accept that it was not normal practice to provide substantive documentation at this stage in the disciplinary process. If there was an interview in person with police staff or police officers, some documentation might be provided, as deemed appropriate. The claimant was not however fit for interview and had already admitted the breach. It was therefore felt that the claimant had sufficient information to provide a written response without providing any further documentation. We shall consider this further when it comes to the question of fairness and the disability discrimination claims.

The claimant's written response to the allegation

87 On 4 October 2019, Mrs Connor provided a copy of the Claimant's response to the allegation along with a letter from Dr Paul Barrett, Clinical Psychologist. In his response, the claimant stated:

> *I am very sorry and deeply regret my unstable behaviour, which has left me in total shock that I could be capable of such bizarre conduct whilst at work. I would never have believed that I could be in such low mood, and have such low self-esteem, having no control of my actions, by conducting myself in such a way to cause upset for my family and the Force….*
>
> *The way I currently feel makes concentration and logical thinking very difficult. My SAR which was requested 6 months ago, only arrived late last Friday the 27th September, incomplete and not supplied in line with ICO guidelines. This has distressed me further as I am solely reliant on this, as I have no access to information or documents. Therefore, I am sorry but I am unable to provide you with any relevant documents by the deadline you have set and would kindly ask if I may be afforded more time to provide them.*
>
> *Trusting you will grant an extension. In terms of any lines of Investigation, whilst you await my documents, I would ask that you look at how Rheumatoid Arthritis and a Pituitary Macroadenoma, compounded with severe Depression brought on by work related stress and anxiety, and how this would affect someone's mind and behaviour. I also attach a letter from Dr Paul Barrett, Clinical Psychologist, which confirms my mental state.*

88 Dr Barrett's letter stated:

> *We have met for 8 sessions for assessment and therapy where Mr Connor has detailed the circumstances around the decline in his mental health, namely difficulties in his working environment and work-related stress over the past 6 years.*
>
> *Such issues resulted in Mr Connor losing his sense of purpose and value at work, culminating in him becoming more withdrawn, losing motivation and energy, and pride in his appearance and work. Whilst Mr Connor does*

not deny the misconduct allegations he is facing, he reports that prior to the current allegations he had an unblemished 30 year career with the police force, and that he has never engaged in, or felt the urge to engage in behaviours like this before.

He is hoping that his concerns about the issues he was facing at work will be acknowledged and for others to understand that his behaviours were indicative of the significant stress and hopelessness he was feeling at the time, than a persistent pattern of behaviour, and that these issues will be taken into account as part of the investigation. (sic)

89 Former-DC Cooper replied on 15 October 2019 to the claimant's request for more time to provide supporting documentation relating to the Fairness at Work process he referenced within his response. She confirmed that there would be no extension of time to allow him to do so, because the investigation was focused solely on the allegation that the claimant had accessed pornographic websites at work; not on the Fairness at Work issue which was seen as a separate matter. It was her understanding that documents relating to the FAW investigation would go to the question of mitigation, not whether there was a case to answer in the first place.

90 In the letter of 15 October 2019, former-DC Cooper confirmed:

If this matter progresses to a meeting or hearing, you will have the opportunity to provide any mitigation you feel relevant at the appropriate stage in the process. You may wish to seek advice from a Union representative if you have not already done so.

91 Former-DC Cooper decided that it was not necessary for the force to obtain any medical report. The letter from Dr Barrett was available. It was put before the panel.

Decision on whether there was a case to answer

92 The investigation was concluded on 20 November 2019, and sent to the appropriate authority. Former-DC Cooper concluded that there was a case to answer, as the evidence indicated that the claimant had been accessing pornographic websites on the respondent's network for a period of almost 2 years (i.e. between 15 May 2017 to 8 February 2019).

93 Detective Chief Inspector Mahmood was by this time the appropriate authority, and Head of PSD. Having considered former-DC Cooper's report, she completed the severity assessment on 17 December 2019. DCI Mahmood concluded that since the allegations amounted to potential gross misconduct, the case should go to a misconduct hearing (at which dismissal would be a potential outcome). The file was passed to DI Morley on 23 December 2019, to progress it to a misconduct hearing.

Invitation to misconduct hearing

94 DI Morley arranged a hearing date of 26 March 2020, which unfortunately, due to other ongoing cases, was the earliest available date. On 13 January 2020 PSD wrote to the claimant, inviting him to a Gross Misconduct Hearing on 26 March 2020. The letter confirmed:

The misconduct case detailing the allegations will be sent out to you 30 working days prior to the hearing and you will have the opportunity to provide a written response, as well as attending in person. This response

may be provided within 14 working days of the served papers. You can be accompanied at the Hearing by a Trade Union or a work colleague.

95 The policy required the papers to be formally served on the claimant. DI Morley tried to arrange a time when the papers could be served personally, via Inspector Dean. Mrs Connor objected to that. We accept DI Morley's evidence that during her 14 years working within PSD, the claimant's is the only case she is aware of, where papers have been served by post, rather than personally. Normally they are served on the person's trade union/Police Federation representative; and if not, on the individual personally. Eventually, by agreement with Mrs Connor, the documents for the hearing were sent by special delivery on 13 February 2020. The papers that were sent included DCI Mahmood's severity assessment.

96 As already noted, misconduct proceedings against Police Staff generally mirror the statutory procedures which are applicable to serving police officers. There is a distinction in those procedures between used and unused material. Relevant 'used' material would be expected to form part of the documentation provided to a person facing a disciplinary hearing. Relevant non-sensitive unused material would also be provided. Sensitive unused material however would not normally be referred to. That could include material which refers to covert police tactics.

Move to nil pay and the holiday pay issue

97 As part of her regular contact with Mr and Mrs, Inspector Dean sent a text to them on 20 February 2020, confirming that a letter may arrive notifying the claimant that nil pay would be commencing shortly. She informed them that as the claimant had some leave that he was allowed to take, he might consider taking that as it would show him back to work but paid. Alternatively, leave could be carried forward to the next year, but only within the allowance within the regulations (which was 5 days). The claimant appeared to believe that he could not take advantage of that, unless his doctor signed him fit for work, which was unlikely. That was a misunderstanding on his part. Eventually however the claimant claimed and was paid for accrued holiday pay, based on the calculation which applies on termination of employment. This is set out in the Section 3.18 of the 2012 version of the South Yorkshire Police Staff Council Handbook which says:

Payment will be based on 1/365 of annual salary for each days leave (sic). Any payment will be subject to the usual statutory deduction.

98 The Leeds Employment Tribunal decided in claim number 1805266/2020, that the provisions of paragraph 3.18 of the 2013 local handbook are incorporated into the claimant's contract of employment. Further, they apply to the calculation of leave both on termination of employment, and for any payment in lieu of accrued leave during employment.

99 We consider ourselves bound by that decision; in any event it would not be proportionate to re-decide the issue as part of this hearing. Further, Ms Read confirmed and the Tribunal accepts that this section of the handbook is used to calculate the pay due to a member of staff who asks to be paid for untaken leave during their employment, as well as when they leave their employment. For example, if a member of staff had not been able to take 12 days leave

during the leave year, they will be allowed to carry five days over. The other seven days they could then be paid in lieu for, using the above calculation.

100 The calculation used when making the payment of annual leave to the claimant on 15th April 2020, was:

29,064.00/365 days in the year / 7.40 Average hours = £10.7605 x 288.00 Hours = £3,099.02 Gross

101 We understand that the calculation itself has not been challenged by the claimant. On 16 April 2020, a recorded delivery letter was received from HR regarding holiday pay, the date of the letter being 31 March 2020.

Formal response to the disciplinary allegation by the claimant

102 On 4 March 2020, the claimant's response and documents were hand-delivered to PSD. In his response, the claimant admitted the allegation. He confirmed he was relying on Dr Barrett's report. He referred to the effect of his time at the Coroner's office and the drawn-out FAW process on his health. Although he expressed his shock at the level of usage shown by the Digital Forensic Report, he did not dispute the accuracy if it.

103 A text message was sent by Inspector Dean to Mrs Connor on 12 March 2020. Mrs Connor replied the same day. The record states:

12/03/2020 16.10 LD

How are you both?

If you have any concerns about 26th then let me know and I will try my best to help/answer Just wanted to see if you needed anything Leanne

12/03/2020 16.36 GC

Hello Leanne Not in the best place mentally, either of us. This not been helped with me contracting a kidney infection on Sunday, which is both very painful and debilitating. I can't think of anything, but should that change I'll ask. Regards Gwynneth

The Covid-19 pandemic

104 On 17 March 2020, there were emails between DI Morley and Kathy Barnes of HR, querying whether the hearing would go ahead, because of the impending lockdown. The first national lockdown due to Covid-19 had commenced on 23 March 2020. In an email dated 24 Mach 2020, Detective Supt Mahmood stated to DI Morley:

I've spoken to Col [CSupt McFarlane] and he is happy to go ahead by phone conference as long as we don't give Mr Connor a reason to declare that it was an unfair process.

105 A decision was subsequently made that day to proceed with the hearing via a telephone conference call.

Change in composition of panel

106 The claimant had been informed in February 2020 that the members of the panel would be CSupt (then Supt) McFarlane, Jo Buckley and Kathy Barnes. The papers served on the panel on 20 March 2020, confirm the panel would consist of CSupt McFarlane, Jo Buckley and Teresa Griffiths – a change to one of the panel members. The Tribunal has not found any record of those

papers being served on the claimant. It appears that the claimant was not therefore formally told of the change in composition of the panel, before the hearing took place.

Statement of facts and antecedents

107 The statement of facts was sent to DI Morley on 22 March 2020, and forwarded to the panel and Inspector Dean on 24 March 2020. The statement is essentially a summary of the case that is read out by the appropriate authority at the outset of any misconduct meeting or hearing. The Tribunal accepts that it is broadly similar to the severity assessment dated 17 December 2020 which had already been received by the claimant.

108 An antecedent report is a brief report prepared by the line manager of the person subject to the disciplinary process, and covers the headings personal and domestic circumstances, previous employment, police service, sickness absence, commendations, performance of duties and observations. Both that report, and the statement of facts from the appropriate authority are usually given to the individual at the start of the in-person hearing, and time given to consider them.

Claimant informed of telephone hearing – 25 March 2020

109 The claimant was informed by Inspector Dean by text on 25 March 2020 that the hearing would be going ahead by telephone. The follow-up text reads:

> *Hi – I tried to call and explain the process for tomorrow arrangements are being made to remotely conduct the hearing. Once I have the details, I will update you, you will be able to dial into a conference call from home - I was calling to check that you have this facility. A landline or mobile – if I can have the number please. Once set up, I will send details of the call and PIN Please feel free to ring me Leanne*

110 Mrs Connor responded to say how extremely hurt and disappointed her and the claimant were that any form of contact had been left to less than 24 hours before the hearing. In follow up texts, Inspector Dean continued to request contact telephone numbers.

111 Further text messages followed on 25 and 26 March 2020. On 26 March 2020, Mrs Connor asked whether the hearing would be recorded digitally and whether they would be sent a copy. The question was not answered specifically by Inspector Dean, but she did explain that DI Morley would be running the hearing, and that her mobile number could be provided to Mr and Mrs Connor. Inspector Dean stressed that DI Morley would really like to speak to them. They were urged to '*please accept her offer as Stephen should have his questions answered before the hearing'*. The offer was not taken up.

Misconduct hearing – 26 March 2020

112 The misconduct hearing took place by telephone on 26 March 2020. The claimant was not told that the hearing would be recorded; but nor did the claimant ask about that. It is standard practice to record such meetings, without exception, which the disciplinary policy confirms.

113 The hearing was chaired by Chief Superintendent McFarlane. At the time he was a Superintendent, not a Chief Superintendent as suggested by clause 12.3 of the Misconduct Policy.

114 The statement of facts and antecedents was read out at the commencement of the hearing. The claimant was told that those could be emailed to him but the claimant told the hearing that he did not have access to any emails. A copy of the statement of facts and antecedent report was subsequently sent to the claimant by post and received on 2 April 2020.

115 Former-DC Cooper confirmed and we accept that the unused material which was not provided initially, was sensitive unused material, because it related to covert tactics. It was deemed not to be in the public interest to routinely provide such information, which might flag up to potential criminal suspects, covert police tactics such as forensic examination of devices, use of informants, and/or monitoring of computer hardware/emails.

116 The claimant argued that the data showed that he had accessed sites when he was recorded as having been on sickness absence; and there was a period of 22 days when he was not at work but was shown to have accessed pornographic websites. The claimant was asked if he had a police laptop. He answered: 'No'. He was asked whether he had ever had one and he answered: 'No sir, I have never been issued with one Sir. I don't have a police mobile phone either'.

117 At the conclusion of the hearing, it was decided that further investigation was necessary. Former-DC Cooper was tasked by DCI Mahmood to undertake the enquiries directed by Chief Superintendent McFarlane.

118 Part of the challenge raised by the claimant for the first time on 26 March 2020 was in relation to the alleged extent and frequency of access to pornographic sites. He argued that the top five sites he had accessed did not appear to correlate with the browse-time by use of data. Further, the claimant had identified 56 dates where the data suggested that he accessed websites on days when he was absent from work with sickness or on leave and could not have accessed the sites on those days.

119 The claimant argues that the transcript of the hearing was misleading. The recording of the hearing is sent to a typist in PSD. Another staff colleague in PSD will then listen to the recording, and check it against the draft written record. The draft was then checked by former-DC Cooper who was able to correct some of the gaps due to her knowledge of some of the technical words eg SOPHOS, and because she was present at the hearing. It is not the respondent's practice for the transcript to be further checked by responsible for progressing the disciplinary process, DI Morley.

<u>Further investigation following the misconduct hearing</u>

120 Additional enquiries were duly made. An updated statement of facts was prepared, and the final version was sent to the claimant and presented at the hearing. The further report confirms at paragraph 4.4, that on the days when the claimant was not at work, the claimant accessed the SYP network using a laptop. Further investigation showed that the claimant had been issued with a laptop on a temporary basis in March 2018, to enable him to work at home after his wife suffered a serious fracture of her leg. There was clear evidence that inappropriate sites were accessed. It was also confirmed that the claimant swiped into the workplace on one of the days it was recorded he was on sickness absence; it was assumed that the sickness absence records were

not entirely accurate in that regard. Pornographic sites were accessed by the claimant on that day.

121 The further report dated 6 May 2020, concluded that of the 316 days when the claimant was logged onto the SYP desktop between 5 July 2017 and 8 February 2019, he had browsed inappropriate sites on 299 of days (94.6%).

122 Once a date for the reconvened hearing had been identified, DI Morley wrote to the claimant on 14 May 2020 to notify him of the proposed date for that hearing of 22 May 2020. Enclosed with the letter was the additional investigation report and revised transcript of the hearing. The claimant received a recorded delivery letter from PSD, dated 14 May 2020, on 19 May 2020, with a date for the reconvened hearing of 22 May 2020, and an additional bundle – the further report from DC Cooper. Since Mrs Connor was not available to support the claimant at that hearing, it was rearranged to 29 May 2020.

Rearranged misconduct hearing – 29 May 2020

123 The claimant was informed by Inspector Dean on 22 May that the hearing had been re-scheduled to 29 May. He was also told that DI Morley would send a letter to confirm that. Inspector Dean sent a further text on 27 May, asking if the Connors had received dial-in details. Mrs Connor replied that they had not received anything. Inspector Dean made further enquiries, and texted later to confirm that there had been a misunderstanding on her part. Inspector Dean had just been asked to inform the Connors of the further hearing date; it had not been intended that a formal confirmation letter would be sent. A letter was subsequently sent, but was not received until the afternoon of the adjourned hearing.

124 The hearing duly took place on 29 May 2020, although the start time was put back from 10am to 11am to accommodate Mr and Mrs Connor. At the adjourned hearing, the claimant was questioned about the further investigation report. The claimant continued to query some aspects of the data, such as the number of hits, but continued to admit to the broad allegation. He suggested that the sheer volume of the data may have been a result of pop-ups and/or browser hacking. He told the panel that he still remained in total shock that he had been capable of such bizarre conduct whilst at work. He said that his actions were the result of the turmoil and deepening depression he was fighting at the time and that the frustration that he had felt for some considerable time had overwhelmed him. He argued that he was exhibiting a compulsive behaviour that totally engulfed him. He argued that he was effective in his role, and referred to positive performance development review which showed he was meeting or exceeding expectations.

125 In relation to the laptop issue, he stated that he genuinely believed he had not had a laptop, and accused PSD of withholding evidence, by not including the email of 11 February 2019, which confirmed he had use of a laptop, in the original bundle disclosed to him.

126 The claimant told this Tribunal that he was still shocked about the data that had been provided, and found it hard to believe that he had spent so much time at work looking at such sites. However, he also told us that he could not remember the number or types of sites he looked at. He accepted that the internet access reports must relate to him, he was not able to say differently.

The claimant's dismissal – 29 May 2020

127 At the conclusion of the adjourned hearing, the claimant was told that he was to be dismissed without notice. The panel noted that the conduct was admitted, and therefore made a finding of gross misconduct. The real issue for the panel was the question of sanction. The panel considered whether or not to issue a final written warning to the claimant. Consideration was given to his record of service, and the mitigation and explanation offered. The fact that the claimant had been asked if he had been issued with a laptop and that he replied no in the first hearing, was taken into account, as was his statement that he could not previously remember this. The panel also considered the medical advice offered but that this was provided and obtained after the suspension. The panel noted that the claimant's access to pornographic websites was routine and on a virtual daily basis, committed whilst both at his place of work and at home, on work issued devices. For those reasons the panel did not consider a final written warning to be an appropriate sanction.

128 In deciding whether dismissal should be with or without notice, the panel took into account the level of offending, its persistency, and the apparent inconsistency in the claimant's account regarding the laptop. They also took into account the apparent inconsistency between the claimant saying he was efficient in his job, but then quoting medical advice as evidence of his poor mental state and not being able to control his actions and behaviour. They noted the claimant's argument that he felt compelled to watch pornography, but also noted that he had not sought help for that prior to being suspended. The panel concluded that Mr Connor's mental state did not justify the admitted behaviour, and dismissal with notice was not therefore appropriate. The claimant was therefore dismissed without notice.

129 A recorded delivery letter confirming the claimant's dismissal was received by him on 2 June 2020. A recording of the reconvened misconduct hearing was sent to the claimant on 5 June 2020.

The claimant's appeal

130 The claimant submitted an appeal on 19 June 2020. The time allowed for him to submit the appeal had been extended, following a request by the Unison Branch Secretary Emma Schofield. An email was sent on 26 June regarding an appeal on 2 July. That date was rearranged to 14 July 2020 due to Ms Schofield being unavailable on 2 July.

131 The claimant's statement of appeal was prepared with the assistance of Ms Schofield. The claimant continued to admit the allegation and to express remorse for his actions. He argued however that the respondent had failed to establish which policy he had allegedly broken.

132 The claimant put forward two principal elements in mitigation, the first being his health, and the second being the alleged actions of PSD. He continued to question the sheer volume of the alleged browsing of pornographic websites. At paragraph 18 he stated:

> *At no point does PSD allow for, nor does it acknowledge pop-ups, pop-unders or browser hijacking etc., which could easily be responsible for some of the high data usage.*

133 The claimant accused PSD of withholding documents from him, including the email of 11 February 2019 confirming he had been issued with a laptop; and of creating a 'fictional synopsis designed to [mis]lead the panel'. Further alleged attempts to mislead the panel were the suggestion in DCI Mahmood's updated assessment for the panel, referring to the breach occurring for over two and a half years. He took issue with the transcripts which he argued contained '*misleading misquotes, omissions and some manipulated text which concerns me greatly'*.

134 The claimant concluded:

> *To exhibit such behaviour in any workplace is more than likely to be exposed. Considering my employer was a Police force, the risk of detection must be assumed to be at the highest level. So clearly, I was not giving any conscious and reasoned thought to what I was doing, therefore my actions were not those of a reasonable mind. I did not act in the way PSD maintain with malign intent. I was very ill throughout that timeline, acting in the way I did was not a true reflection of myself and I still find it extremely hard to come to terms with what I did. I am truly very sorry and regret what I have done.*

The appeal hearing – 14 July 2020

135 The appeal hearing took place on 14 July 2020 by telephone/Skype. The claimant attended by telephone. Assistant Chief Constable David Hartley chaired the appeal hearing. He was joined on the Panel by Erika Redfearn from the Office of the Police and Crime Commissioner (OPCC). Originally, Assistant Chief Constable Lauren Poultney was going to hear the appeal but that was changed following a request from the claimant. The claimant was supported at the appeal by Ms Schofield, and by Mrs Connor. At the conclusion of the hearing the claimant was told that the appeal decision would be provided within three working days, i.e. by 17 July 2020. That proved to be unachievable.

136 The appeal outcome is dated 21 July 2020. The claimant's appeal was rejected. Although DI Morley was told by the PA to ACC Hartley that the outcome letter had been posted out on 22 July 2020, the letter was not received by the claimant or Ms Schofield. Ms Schofield contacted DI Morley on 27 July 2020 to say she had still not received the outcome of the claimant's appeal. A copy was provided the following day. Ms Schofield did not provide a copy to the claimant as she did not think it was appropriate for her to share the letter. Ms Schofield did not however communicate that to the respondent.

137 The claimant complained to DI Morley that he had not received the outcome in an email dated 31 July 2020. Once DI Morley was aware of that, she immediately arranged for a copy to be sent to the claimant. The outcome letter was eventually received by the claimant on 3 August 2020.

138 Each of the claimant's points of appeal were dealt with. The panel concluded that despite the arguments of the claimant to the contrary, he was responsible for sustained, inappropriate behaviour and that regardless of the motivation, he repeatedly engaged in discreditable conduct which directly contradicted the values that are important to the respondent organisation. It was confirmed that the medical evidence had been properly considered. The view of the panel was that:

none of the medical references or evidence supplied suggests that SYP were culpable for your own misconduct, nor was any medical evidence provided to mitigate the nature of the gross misconduct such as to determine the sanction applied as disproportionate.

139 As for the suggestion that PSD misled the panel with the inclusion of specific data, and for the references to 'indistinguishable' matters in the typed transcripts which the claimant felt should not have been omitted, the panel concluded:

On the first point, it is my opinion that committing such an act on a frequent basis is discreditable and thus constitutes gross misconduct. The data shows an excess of access to inappropriate websites and you have admitted to the misconduct. Even if the laptop left your possession in June 2018, the evidence of repeated access before this point is overwhelming. On the second point, we received the annotated transcripts and have been unable to determine anything that would make a material difference to your appeal. As such, we believe this has no bearing on the outcome.

The disability issue

140 The respondent accepts that the physical impairments relied on by the claimant amount to a disability during the relevant period. These are: rheumatoid arthritis, pituitary macroadenoma, gout, cardiac issues (hypertension, left ventricular hypertrophy and mitral valve regurgitation), COPD and Raynaud's disease. No further facts need to be found in relation to those matters save that the Tribunal notes that the letter from Dr de Costa, consultant in diabetes and Endocrinology, dated 22 February 2018, confirms that in relation to the diagnosis of pituitary macroadenoma, 'symptomatically he has nothing to offer' at that time.

141 As for the impairment of depression, this is disputed by the respondent (although the respondent accepts that the claimant did have the mental impairment of depression from around the time of his suspension on 8 February 2019).

142 In answers to questions from the panel during the hearing, the claimant stated that he went to see his GP about depression in 2001, 2005, 2010 and 2011. There is then no further mention of depression in the GP notes until February 2019, after the claimant's suspension. The reference in the notes we were referred is to 'recurrent depression'. The claimant told us that he was reluctant to go to his GP from 2011 onwards, because he was concerned about the stigma of suffering from depression. The Tribunal notes however that such concerns did not stop the claimant, on his own evidence, of seeing his GP on four occasions about depression between 2001 and 2011.

143 The 2013 Occupational Health report refers to '*reduced levels of psychological wellbeing',* but does not suggest that amounted to depression. The 2016 OH report refers to '*several significant medical issues'*, but does not say what those are. However, the reasonable adjustments suggested appear to relate to physical, not mental impairments. No adjustments were suggested which appear to relate to any mental impairment.

144 The 2016 report did refer to '*increased anxiousness*' as a result of the ongoing disciplinary/capability process but there was no suggestion at that stage that

this was impacting on any other aspects of the claimant's life; or that his work was being adversely affected.

145 The claimant accepted in cross examination that he was able to carry out his duties effectively, up to the date of his suspension. Indeed, during the disciplinary hearing and appeal, he placed some weight on that.

146 On 11 February 2019 Mike Trees, Business Manager, emailed Leanne Dean about the claimant. He gave information about the pituitary macroadenoma and the claimant's rheumatoid arthritis. There was no mention however of any adverse mental health impairments being brought to his attention by the claimant, which might or were affecting his work.

147 Dr Barrett's report, relied on by the clamant in response to the allegations of misconduct, refers to the claimant reporting work related stress. That is consistent with the 2013 and 2016 OH reports; but it is not evidence of the claimant suffering from depression at that time.

Relevant Law

Unfair dismissal

148 The legal issues in an unfair dismissal case are derived from section 98 of the Employment Rights Act 1996. Section 98(1) provides that it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g. conduct, or capability or for some other substantial reason.

149 Section 98(4) provides:

> *… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case*.

150 The reasonableness of the dismissal must be considered in accordance with s.98(4). Tribunals have been given guidance by the EAT in *British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303*. There are three stages in a conduct dismissal:

150.1 did the respondent genuinely believe the claimant was guilty of the alleged misconduct?

150.2 did they hold that belief on reasonable grounds?

150.3 did they carry out a proper and adequate investigation?

151 Whereas the burden of proving the reason for dismissal lies on the respondent, the second and third stages of *Burchell* are neutral as to burden of proof and the onus is not on the respondent (*Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693*).

152 In deciding whether it was reasonable for the respondent to dismiss the claimant for that reason, case law has determined that the question is whether the dismissal was within the so-called 'band [or range] of reasonable

responses ('the range'). 'The range' does not equate to a perversity test. See *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, [1983] ICR 17 at 24-25*; *Foley v Post Office [2000] ICR 1283 at 1292D – 1293C*, per Mummery LJ, with whom Nourse and Rix LJJ agreed.) The Employment Tribunal must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. Instead, the Tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which '*a reasonable employer might have adopted*'. An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process (*West Midlands Co-operative Society Ltd v Tipton* [1986] 1 AC 536)) and not on whether in fact the employee has suffered an injustice. (The logical conclusion of which is that a Tribunal might consider that the dismissal was unjust, but was nevertheless 'fair'.

153 The range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from their employment for a conduct reason. The objective standards of a reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed, including the investigation (*Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA*).

154 In reaching their decision, tribunals must also take into account the Acas Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render them liable to any proceedings.

Disability discrimination

Burden of proof

155 Under s136, if there are facts from which a Tribunal could decide, in the absence of any other explanation, that person A has contravened the provision concerned, the Tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.

156 Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The Tribunal can consider the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

157 The Court of Appeal in Madarassy, a case brought under the Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. LJ Mummery stated at paragraph 56:

Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'

158 Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR 870 at para 32:

They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

Disability (section 6)

159 A person has a disability if she has a mental or physical impairment; which is long term (i.e. has lasted 12 months or more or is likely to do so); and has a substantial adverse effect on her ability to carry out normal day to day activities (S.6 and Schedule 1 Equality Act 2010). The term 'normal day to day activities' includes the ability to participate in professional working life.

Discrimination arising from disability (section 15)

160 Section 15 Equality Act 2010 reads:

(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.

161 In a disability discrimination claim under section 15, an employment tribunal must make findings in relation to the following:

161.1 The contravention of section 39 of the Equality Act relied on – in this case either section 39(2)(c) – dismissal; or (d) - detriment.

161.2 The contravention relied on by the employee must amount to unfavourable treatment.

161.3 It must be "something arising in consequence of disability"; for example, disability related sickness absence.

161.4 The unfavourable treatment must be because of something arising in consequence of disability.

161.5 If unfavourable treatment is shown to arise for that reason, the tribunal must consider the issue of justification, that is whether the employer can show the treatment was "a proportionate means of achieving a legitimate aim".

161.6 In addition, the employee must show that the employer knew, or could reasonably have been expected to know, that the employee or applicant had the disability relied on.

Knowledge that the something arising led to the unfavourable treatment is not however required.

See the decisions of the EAT in *T-Systems Ltd v Lewis UKEAT0042/15* and *Pnaiser v NHS England [2016] IRLR 170 (EAT)*.

162 According to Harvey's encyclopaedia of Employment Law [Division L.3.A(4)(d), at paragraph 377.01]: 'As stated expressly in the EAT judgment in *City of York Council v Grosset* ***UKEAT/0015/16*** *(1 November 2016, unreported)*, the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the ET was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the ET. The Court of Appeal in *Grosset* (***[2018] EWCA Civ 1105, [2018] IRLR 746***) upheld this reasoning, underlining that 'the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment'.

Reasonable adjustments (sections 20 and 21)

163 Section 39(5) of the Equality Act 2010 imposes a duty on an employer to make reasonable adjustments.

164 Section 20 provides that where a provision, criterion or practice (a PCP) applied by or on behalf of an employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to have to take in order to avoid the disadvantage. The same duty arises where the substantial disadvantage arises from a failure to provide an auxiliary aid or a physical feature of premises.

165 Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated in recognition of their special needs.

166 In *Environment Agency v Rowan 2008 ICR 218* and *General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4,* the EAT gave general guidance on the approach to be taken in the reasonable adjustment claims. A tribunal must first identify:

(1) the PCP applied by or on behalf of the employer;

(2) the identity of non-disabled comparators; and

(3) the nature and extent of the substantial disadvantage suffered by the claimant in comparison with those comparators.

Once these matters have been identified then the Tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The question is whether the PCP 'bites harder' on the claimant (Griffiths v Secretary of State for work and Pensions [2017] ICR 150 at #58. There just needs to be a prospect of the step alleviating the substantial disadvantage; there does not need to be not a 'good' or a 'real prospect' - *Leeds Teaching Hospital NHS Trust v Foster [2011] UKEAT/0552/10 at #17.*

167 A PCP must be more than a one-off act. In *Ishola v Transport for London* [2020] IRLR 368, Simler J held:

> *The words 'provision, criterion or practice' are not terms of art, but are ordinary English words. They are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words 'act' or 'decision' in addition or instead. As a matter of ordinary language, it was difficult to see what the word 'practice' added to the words if all one-off decisions and acts necessarily qualify as PCPs*.

168 The test of reasonableness imports an objective standard. The Statutory Code of Practice on Employment 2011 published by the Equalities and Human Rights Commission contains guidance in Chapter 6 on the duty to make reasonable adjustments. Paragraph 6.28 sets out some of the factors which might be considered in determining whether it is reasonable for an employer to have to take a particular step in order to comply with the duty to make reasonable adjustments. These include whether taking the step would be effective in preventing the substantial disadvantage, the practicability of the step, the cost to the employer and the extent of the employer's financial and other resources.

169 As for knowledge, for the S.20 EQuA duty to apply, an employer must have actual or constructive knowledge both of the disability and of the disadvantage which is said to arise from it (EQuA para 20, Schedule 8).

170 During their employment, a claimant does not need to suggest any adjustments, for the duty to arise – see *Royal Bank of Scotland plc v Ashton [2011] ICR 632*. However, when it comes to the tribunal proceedings, a tribunal will only consider the reasonable adjustments that have been suggested by the claimant and which form part of an agreed list of issues - *Newcastle City Council v Spires UKEAT/0334/10*.

Harassment (section 26)

171 Section 26 Equality Act 2010 reads:

> *26 Harassment*
>
> *(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.*
> *(2) A also harasses B if—*
> *(a) A engages in unwanted conduct of a sexual nature, and*
> *(b) the conduct has the purpose or effect referred to in subsection (1)(b).*
>
> *(3) ……*

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

172 A harassment case therefore involves five questions. First, did the conduct took place at all. Second, was the conduct unwanted? Third, was the conduct related to sex? Fourth, did the person responsible for the conduct have the proscribed purpose. Fifth, if not, did the conduct have the proscribed effect, taking into account (a) the perception of B; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

173 In Richmond Pharmacology v Dhaliwal [2009] IRLR 336 in which Underhill J (as he then was) said at paragraph 15:

> *A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That, as Mr Majumdar rightly submitted to us, creates an objective standard. However, he suggested that, that being so, the phrase 'having regard to … the perception of that other person' was liable to cause confusion and to lead tribunals to apply a 'subjective' test by the back door. We do not believe that there is a real difficulty here. The proscribed consequences are, of their nature, concerned with the feelings of the putative victim: that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a 'subjective' element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt*

174 We also refer to Land Registry v Grant [2011] ICR 1390) in which the head note records:

> *When assessing the effect of a remark, the context in which it is given is always highly material. A humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.*

175 The relevant time-limit is at section 123(1) Equality Act 2010. The Tribunal has jurisdiction if the claim is presented within three months of the act of which complaint is made. By subsection (3), conduct extending over a period is to be treated as done at the end of the period. If the claim is presented outside the primary limitation period, i.e. the relevant three months, the Tribunal may still have jurisdiction if the claim was brought within such other period as the Employment Tribunal thinks just and equitable.

Judicial comments about the reliability of memory

176 The importance of contemporaneous documentation to judicial fact finding was considered by Leggatt J in the case of ***Gestmin v Credit Suisse UK & Another*** [2013] EWHC 3560 (Comm) which has become a touchstone for the correct approach to evidential analysis. The relevant passages, set out below, observe the fallibility of human memory, and the concomitant importance of contemporaneous documentation when any 'tribunal of fact' including ETs are called upon to assess what did, or did not, occur many years earlier.

> Evidence based on recollection
>
> **15.** An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.
>
> **16.** While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.
>
> **17.** Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

177 ***Gestmin*** was recently considered by the Court of Appeal in ***Kogan v Martin*** [2019] EWCA Civ 1645 at para. 88. The Court emphasised that ***Gestmin*** was not seeking to lay down any golden rule permitting the Court to ignore other sources of evidence but it reaffirmed the important observations made in ***Gestmin***.

178 The Court of Appeal made the following observations:

(1) Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. That studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time;

(2) The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party to the proceedings;

(3) Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to give a good impression in a public forum, can be significant motivating factor;

(4) Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, (as in the present claim) when a long time has already elapsed since the relevant events;

(5) In the light of these considerations, the best approach for the 'tribunal of fact' to adopt in a factually disputed case, is to hard focus on the contemporaneous documentation. Particular caution is required where the evidence relied on is hearsay evidence. The C had the opportunity to call supporting witness evidence but has determined not to do so; and

(6) It is not that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

Conclusions

179 Bearing in mind the above legal principles, and the facts found, we turn to the issues before us in order to reach conclusions in relation to each one of them, as necessary.

180 In reaching our conclusions, we have considered the burden of proof under the Equality Act 2010. In all instances however, we have been able to reach clear conclusions as to the reason for the treatment, and have concluded that the burden of proof has not shifted at any stage.

181 Our conclusions on each of the issues are as follows.

Unfair dismissal

(2.1) What was the reason or principal reason for dismissal?

182 The Tribunal concludes that the reason for the claimant's dismissal relates to his conduct, namely, the accessing of pornographic websites using SYP equipment, much of it during working hours over a period of nearly two years.

(2.2) If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, the following:

Reasonable grounds for that belief?

183 The Tribunal concludes that the respondent did have reasonable grounds for its belief that the misconduct had occurred. The claimant admitted the misconduct. The data demonstrated that the claimant accessed pornographic websites on 299 days out of 316, on a work computer or a work laptop. The claimant did query the sheer volume of the data. For example, the suggestion that the number of hits on one site was 35,000. That may well have been because of pop-ups, or browser hijacking. If that was the case however, that was because of the claimant's misconduct in accessing pornographic websites in the first place. It was not down to the conduct of anyone else.

184 The claimant told the Tribunal that he was surprised by the sheer volume, but he simply could not remember which sites he had accessed or when. He told us he was not able to deny it. Although the Tribunal accepts there is some room for argument about what the data means in terms of actual time spent on specific sites, it is abundantly clear that the claimant accessed pornographic web-sites on a persistent basis over an extended period of time.

185 The claimant says in his closing submissions that the evidence was 'totally refuted' by him. The Tribunal finds the claimant's assertion in that respect surprising, in light of the fact that he admitted the breach from day one. He only queried the data at the first hearing and as a result, further investigation was carried out. Whilst we acknowledge that the claimant may have reason to question some of that data, particularly in relation to the question of hits, as noted above, the respondent was entitled to believe, on the basis of all of the information before it, including the claimant's clear admissions of guilt, that he had committed gross misconduct.

186 The claimant makes much of the alleged failure to provide to him the email of 11 February 2019, confirming that he had been provided with a work laptop for a period of time in 2018. In the Tribunal's judgement however, the suggestion that by not providing the claimant with that email, the respondent was somehow trying to entrap the claimant, is fanciful. The email was not provided, because it was not considered relevant to the issues before the disciplinary hearing panel. Due to the claimant's admission, it was not proportionate to find out which device the claimant had accessed pornographic websites from via the respondent's internet. This only became an issue when the claimant made it one, at the first misconduct hearing.

187 From what Chief Superintendent McFarlane told us, the possibility that the claimant had lied to the first hearing about not having a laptop, was a factor in the decision, but only one of a number of factors. In any event, it was a matter of judgement for the panel whether the claimant had lied at the 26 March

hearing, or had simply mis-remembered. There were reasonable grounds for their belief that the claimant had lied. Further, even if the panel had taken a different view on that point, the claimant would still, in the Tribunal's judgement, have been dismissed

188 The Tribunal's conclusion in that respect is reinforced by the view taken by the appeal panel. The Tribunal notes that the appeal panel took a different view to the misconduct hearing panel, in relation to the laptop issue. The appeal panel members were prepared to accept that the claimant had not lied to the hearing on 26 March 2020 about the laptop but had mis-remembered. The panel still however found that, given the other factors, and in particular, that the claimant admitted having viewed pornographic websites on work equipment provided to him by the respondent over an extended period of time, that his actions amounted to gross misconduct. Again, the Tribunal concludes that the appeal panel had reasonable grounds for that belief. Further, although strictly speaking this relates to whether or not the dismissal was within the range of reasonable responses (the range), the Tribunal concludes that the appeal panel's conclusion that dismissal was an appropriate sanction, was within the range.

189 As for the question of medical evidence, the Tribunal concludes that the misconduct hearing panel had reasonable grounds for its belief that Dr Barrett's report did not provide a justification for the claimant's actions, even if it provided some explanation, and to a certain extent, some mitigation. Further, as the panel noted, the claimant was on the one hand arguing that he was an effective employee, and had been given positive appraisals, but on the other hand, he was in such a poor mental state, that he could not help looking at pornographic websites. It was reasonable for the panel to conclude that there was a contradiction between those two assertions.

190 According to ACC Hartley, the appeal panel analysed the matters slightly differently. In ACC Hartley's view, Dr Barrett's letter provided some explanation for the claimant's actions, but not mitigation. Whilst ACC Hartley and CSupt McFarlane appear to be using the terms slightly differently, the Tribunal concludes that the appeal panel's belief was a reasonable one, within the range, and one which they were entitled to come to.

Reasonable investigation

191 The Tribunal notes under this heading, we are concerned not only with the initial investigation, but the whole of the disciplinary process, up to the claimant's dismissal. The first point to note is that the claimant was not provided with any of the documentation which was in the respondent's possession, at the time that he was asked to provide a written response to the allegations, if he so wished, at the end of September 2019. The Tribunal is not entirely sure why relevant documentation could not have been provided at that time, although we note that it is not generally standard practice to do so. We further note that had the claimant been interviewed, some documentation would have been provided. In any event however, the Tribunal is satisfied that even if the claimant had been provided with all of the documentation at that stage and given the opportunity to consider it, the respondent would still have found that there was a case to answer, since the claimant had admitted the allegations. Further, by the time the claimant attended the first disciplinary

hearing on 26 March 2020, he had been provided with the relevant documentation.

192 The claimant complains that the respondent did not obtain its own medical report. The Tribunal does not consider that that was a necessary step which the respondent should have taken, in the circumstances of this case. There was some limited medical evidence, from a supporting professional, namely Dr Barrett, that the claimant's mental health may provide some explanation and/or some mitigation for his actions. It was not however, expert evidence, proving a clear link between a mental health disability, and the claimant's misconduct. The circumstances are in the Tribunal's judgement different to a situation where an employer is considering dismissing someone because of long-term ill health. There, the usual practice and expectation would be that the respondent would obtain an OH report before dismissing. That was not however this case.

193 The claimant also questions the accuracy of the transcripts of the 26 March and 29 May 2020 hearings. The Tribunal agrees with ACC Hartley that the differences that existed were minor and had no material impact. Further, there is in the Tribunal's judgment, no material evidence to support the claimant's belief that the inaccuracies that did exist were produced deliberately, in order to paint the claimant in a worse light. ACC Hartley and others were questioned by the claimant about the mistake in the transcript, where instead of referring to the claimant's 'line manager', the transcript referred to the claimant's 'wife'.

194 The Tribunal accept that this mistake upset Mr and Mrs Connor. However, it had no material influence on the outcome of the disciplinary hearing, or subsequent appeal. The Tribunal takes the same view in relation to the section of the transcript dealing with the laptop issue. As explained above, the appeal panel did not conclude that the claimant had lied about the issue, he had simply mis-remembered; but they still found that the claimant had committed gross misconduct and that dismissal was an appropriate sanction.

Did the respondent otherwise act in a procedurally fair manner?

195 The claimant argues that the hearing was unfair because it required the disciplinary panel to be chaired by a Chief Superintendent, rather than a Superintendent. The claimant does not seek to argue that would make the hearing a nullity, which is in any event an argument that the Tribunal would have rejected. The claimant did not object at the time. Had the claimant insisted on the panel being chaired by a Chief Superintendent rather than a Superintendent, it would no doubt have taken longer to arrange. In the Tribunal's judgement, this minor diversion from the strict wording of the policy was justified in the circumstances, given the length of time it had taken for the disciplinary hearing to be organised. It certainly does not of itself make the dismissal unfair. Even if we were wrong on that, the independent review of the disciplinary hearing's decision by the appeal panel, chaired by ACC Hartley, would have remedied any such unfairness.

196 The Tribunal further concludes that holding the hearing by telephone was not unfair in the early stages of the pandemic. It took the Employment Tribunal two to three months before it was able to routinely offer remote hearings by video. Given the length of time the proceedings had taken up to that point, a

matter about which the claimant complains, it was a reasonable way to proceed.

197 The last minute change in the panel did not disadvantage the claimant. We have no doubt that the result would still have been the same.

198 Finally, in relation to the appropriate authority's statement of case not being provided until after the first disciplinary hearing, we accept the respondent's submission that it was based on the severity assessment, which the claimant had seen. He should not therefore have been taken by surprise by its contents. As for the antecedents, there was nothing in there that was adverse to the claimant. These documents would normally have been provided at the start of an in-person hearing. It was due to the highly unusual circumstances of the pandemic that the the usual practice was not followed. In any event, the claimant had a copy of those documents well before the adjourned disciplinary hearing at the end of May 2020.

Was the dismissal within the range of reasonable responses?

199 The Tribunal refers to the conclusions above. The Tribunal concludes that dismissal was within the range, bearing in mind all that has been said above.

200 The claimant has tried to argue that because the respondent did not have a policy, making it clear that viewing pornography at work using work equipment was a disciplinary offence, it could not have been clear to him that by doing so, he was leaving himself open to disciplinary action including dismissal. In the Tribunal's judgement, this appears to be an attempt by the claimant to deflect blame for his own misconduct. In the Tribunal's judgement, an employer does not need a policy outlawing pornography at work, before disciplining employees for doing so. That such actions could lead to disciplinary action would in the Tribunal's judgement be obvious to all reasonable workers. Further, the misconduct which led to the disciplinary process was clearly caught by the standards of behaviour relied on by the respondent, as set out in the findings of fact above, which the claimant was found to have breached.

201 The Tribunal further notes the claimant's own comment in the response sent to the allegations on 4 October 2019, namely:

> *I am very sorry and deeply regret my unstable behaviour, which has left me in total shock that I could be capable of such bizarre conduct whilst at work. I would never have believed that I could be in such low mood, and have such low self-esteem, having no control of my actions, by conducting myself in such a way to cause upset for my family and the Force….*

There is no suggestion in that paragraph that the claimant was not aware that his actions amounted to misconduct.

202 The Tribunal also notes the evidence of CSupt McFarlane that he and the other members of the disciplinary hearing panel did not take the decision to dismiss the claimant lightly. However, they had to consider what the public would think if they were aware that an employee had viewed pornographic websites on 299 days out of 316, and remained in the respondent's employment following a disciplinary process. One only has to consider the recent furore caused by a Conservative MP viewing pornography in the

House of Commons on a limited number of occasions, to imagine what the public might think of that.

203 Finally, the claimant has tried to argue that the respondent should have monitored internet use more closely. If it had done so, the claimant argues, the respondent would have identified the pattern of behaviour he displayed over such a lengthy period much earlier. Again, the Tribunal considers that that is a further attempt by the claimant to blame the respondent for his own persistent misconduct. The respondent has admitted, during this hearing, that its monitoring of the Internet could well have been better, and has implemented improvements as a result. The fact that the monitoring could have been more effective, neither excuses the claimant's behaviour nor make his dismissal unfair.

Remedy for unfair dismissal

204 These issues would only have become relevant if the claimant had succeeded in his unfair dismissal claim, which he has not. It is not therefore necessary to reach any conclusions in relation to them.

Disability

(*4.1) Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about. In particular:*

(4.1.1) Did he have a physical or mental impairment: depression, rheumatoid arthritis, pituitary macroadenoma, gout, cardiac issues (hypertension, left ventricular hypertrophy and mitral valve regurgitation), COPD and Raynaud's disease

205 As noted above, the respondent accepts that the physical impairments amounted to a disability during the relevant period.

206 As for depression, the Tribunal concludes that from the date of the claimant's suspension on 8 February 2019, he was suffering from depression. The Tribunal does not conclude however that the claimant was suffering from a disability in relation to depression, before that date.

207 In arriving at that conclusion, the Tribunal notes that there was no discussion between the claimant and his GP between 2011 and 2019. The explanation given by the claimant for him failing to consult his GP during that period is not accepted by the Tribunal, i.e. the concern about stigma. That is inconsistent with him having consulted his GP on four previous occasions between 2001 and 2011 about depression. On the basis of the limited information before us, and our findings of fact above, we conclude that the claimant was not suffering from the mental impairment of depression between 2011 and 2019. We accept that he was suffering some work-related stress and anxiety, but that does not amount to depression, which is the mental impairment relied on by the claimant, during that period.

(4.1.2) Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

208 Yet further, the Tribunal concludes that even if the claimant was suffering from depression during that period, it did not have a substantial adverse effect on him. We rely in particular on the contents of the OH reports referred to above, and the claimant's assertion that he was able to carry out his work efficiently and effectively, during his employment with the respondent.

(4.1.3) If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

209 This issue is not applicable since the claimant was not receiving any treatment for depression during the period 2011 to 2019.

(4.1.4) Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

210 The Tribunal concludes that even if the claimant was suffering from depression during the period 2011 to 2019, it did not have a substantial adverse effect on him. We rely in particular on the contents of the OH reports referred to above, and the claimant's assertion that he was able to carry out his work efficiently and effectively, during his employment with the respondent. It is accepted that the depression which he was again formally diagnosed with from February 2019 onwards, did have a substantial adverse effect from 8 February 2019.

(4.1.5) Were the effects of the impairment long-term?

(4.1.5.1) Did they last at least 12 months, or were they likely to last at least 12 months?

(4.1.5.2) If not, were they likely to recur?

211 Although the claimant did, on his account, consult his GP about depression on four occasions between 2001 and 2011, we do not have any reliable evidence as to the effect of the depression during that period. Given that the claimant did not consult his GP about depression between 2011 and 2019, we conclude that depression was not likely to recur during that period and nor did it do so.

212 From 8 February 2019, we conclude that the effects of the impairment were long term. The claimant still suffers from depression.

Discrimination arising from disability (Equality Act 2010 section 15)

(5.1) Alleged unfavourable treatment

213 In relation to the matters below, the first task for the Tribunal is to decide whether or not the alleged treatment actually happened.

(5.1.1) Subjecting the claimant to a disciplinary procedure.

214 The claimant was subjected to a disciplinary procedure.

(5.1.2) Dismissing him.

215 The claimant was dismissed.

(5.1.3) DS Cockayne assaulting him by pushing against a wall on 8 February 2019;

216 We refer to our findings of fact. We have found that this did not happen.

(5.1.4) Deliberately prolonging the investigation despite his admission of the conduct.

217 Whilst the disciplinary process did take a long time, the Tribunal concludes that was not because of any deliberate prolonging of the process by any of the respondent's officers. For example, the Tribunal has found as a fact that

the process was delayed by a month or two, as a result of DSupt Waring having to prioritise other matters due to pressure of work, which delayed the formal severity assessment. It did not result from an intention to prolong the matter. Further, at least part of the delay resulted from the claimant being unfit for interview, and attempts being made to arrange an interview, and then providing him with an opportunity to respond in writing if he so wished.

218 Once the investigation report was finished, that was considered relatively quickly and a revised severity assessment produced. Early in January 2020, the disciplinary hearing was arranged. The first date available was 26 March 2020, due to the number of other disciplinary cases being dealt with by PSD at that time. Again, none of this was down to any deliberate intention by the respondent to delay the process.

(5.1.5) Using the claimant's exemplary work record against him as a reason to overlook his disabilities.

219 The Tribunal concludes that this allegation is not made out on the facts. The claimant's exemplary work record was considered because the claimant asked the respondent to do so. The respondent concluded that his exemplary work record was inconsistent with his argument that he was so ill that he could not stop watching pornography at work. That was a reasonable conclusion for both the disciplinary and appeal panels to come to.

(5.1.6) Deliberately prolonging the suspension, failing to review the suspension and/or failing to communicate any alleged review in order to isolate the claimant.

220 The Tribunal's conclusions in relation to the alleged deliberate prolonging of the suspension, are the same as set out in relation to 5.1.3 above, regarding the disciplinary process. Further, the Tribunal has found as a fact that the suspensions were reviewed.

221 It is true that the reviews of the suspension were not communicated to the claimant, but the Tribunal concludes this was not because of any intention by the respondent to isolate the claimant. The Tribunal also notes the extensive efforts made by Inspector Dean as the appointed WSO, to engage with Mr and Mrs Connor. All of those attempts were rebuffed. They were entitled to do so. But having done so, it is not surprising that they were not kept as up-to-date with the progress of the investigation as they might otherwise have been. This allegation is not made out on the facts.

(5.1.7) Ignoring the claimant's requests to investigate his disabilities and co-morbidities and the effect they had on him and/or to take account of this as a mitigating factor

222 As for the claimant's physical disabilities, there was no material evidence before the disciplinary or appeal panel to suggest any link between those physical disabilities and the admitted misconduct. The Tribunal notes for example the report of Dr de Costa that the claimant was not, in February 2018, suffering any symptoms from the pituitary macroadenoma. Dr de Costa did provide a list of possible side effects, but that was not evidence that any of those were affecting the claimant at that time.

223 The respondent did consider Dr Barrett's letter and the mitigation put forward. Neither the disciplinary nor the appeal panels found the letter compelling, in

light of the claimant's admitted misconduct, the period over which it occurred, and that the claimant was, on his own case, able to carry out his duties efficiently and effectively during the same period.

224 This allegation is not made out on the facts.

(5.1.8) Failing to provide a response to the claimant's SAR in line with directives.

225 This allegation is made out, and that it took six months to provide a response, not the one month, expected by section 54 Data Protection Act 1998.

(5.1.9) Ignoring repeat SARs for 6 months.

226 Although the Tribunal does not consider that the requests were deliberately ignored, a response was not provided for six months, as set out in 5.1.8 above.

(5.1.10) PSD investigating officers knowingly withheld key evidence, namely, (1) the investigating officer's knowledge that the claimant had a work issued laptop;

227 This allegation is not made out on the facts. The respondent did not knowingly withhold key evidence. The 11 February 2019 email was not provided because it was not considered relevant at that time. PSD did not consider it proportionate to drill down into the detail, and establish exactly which piece of equipment had been used on each separate occasion when pornographic websites had been viewed by the claimant. That was a reasonable view to take, given that the claimant had from day one admitted the misconduct alleged. When the claimant queried some of the dates when he was alleged to have viewed pornographic websites, that email became relevant, and further enquiries were undertaken, to establish when the laptop was in the claimant's possession. Those enquiries demonstrated that when the claimant was working from home he used the laptop to access pornographic websites.

(2) withholding emails proving the claimant did not have an SYP issued mobile phone;

228 This allegation is not made out on the facts. The email about the phone was not key evidence. The claimant was, quite understandably, closely questioned about the mobile phone in his possession, on the day of his suspension, because PSD was under a duty to secure and preserve evidence. Had the mobile phone been a work issued one, relevant evidence may have existed on it. DSupt Waring handed the mobile phone back to the claimant on being satisfied that it was indeed his mobile phone and not a work issued one. That should have been the end of the issue, had the claimant not kept referring back to it, despite it having no material relevance to the disciplinary allegations against him. In any event, this issue has noting to do with any of the 'something 'arisings' below.

(3) not disclosing that the laptop was being used by DS Cockayne from 1 June 2018 to 17 August 2018;

229 This allegation is made out, in that this fact was not disclosed to the claimant.

(4) not disclosing that the claimant had used numerous computers in different sites rather than only using the computer in his office; (5) the Appropriate Authority's Case Summary and Antecedents.

230 (4) & (5) Both of these allegations are made out on the facts, in that the factual matters referred to in (4) were not disclosed to the claimant; and the appropriate authorities case summary and antecedents were not disclosed to the claimant, at least not until after the first disciplinary hearing.

(5.1.11) PSD investigating officers lying in their submissions, namely (1) DC Harvey (i) regarding the claimant adjusting his zip and (ii) regarding D Supt Singleton not entering the office;

231 The Tribunal concludes that former DC Harvey did not lie about these matters. What is set out in her statements is her honest recollection of what happened, and is corroborated by the contents of her PNB.

5.1.11 (2) T/D Supt Mahmood (i) stating that the claimant was suspended from 2010, (ii) that she had reviewed all the relevant material in the case, (iii) that she had analysed and evaluated the evidence, (iv) the dates of issue of the laptop, (v) asserting that the claimant's accessing of pornographic sites was deliberate, (vi) that he had accessed pornographic sites for over 2.5 years, (vii) That he only accessed sites on duty time, (viii) the claimant was a top user between 9 February 2018 and 8 February 2019, (ix) PSD had no knowledge of the claimant using a laptop prior to the adjournment of the first hearing, (x) the claimant was on sick leave since the day of his suspension, (xi) the claimant was served with full disclosure of the bundles, (xii) a letter was sent to the claimant on 14 May by recorded delivery, (xiii) a letter had been sent to the claimant on 27 May when it had not even been posted out on 28 May, (xiv) that the claimant claimed he had never had a laptop when he stated that he had never been issued with one, and (xv) that the claimant had used the laptop for five months;

232 (i) – (iii) The Tribunal concludes that DSupt Mahmood did not lie about these matters. She made a genuine error in relation to the suspension date, but did review the relevant material, and did analyse and evaluate the evidence. The fact that she subsequently made minor errors which were not material, was down to human error; (iv) the dates provided by T/D Supt Mahmood were not strictly correct but reflected some of the documents she considered. In any event, none of this was material since the only time the laptop was used to view pornographic web-sites was during the period 20 March 2018 to 1 June 2018. There has never been any suggestion that the laptop was used to access pornographic sites after it was allocated elsewhere; (v) this was not a 'lie', the claimant's viewing of pornographic web-sites was deliberate – it was not accidental; in any event, this was DCI Mahmood's honest opinion; (vi) The reference to 2.5 years was an error, not a lie, which had no material influence on the outcome of the disciplinary process – whether the claimant viewed pornographic websites for 21 or 30 months would have made no difference to the outcome. It was still gross misconduct, and the panel was not in any event misled by the error. The claimant was not dismissed for viewing sites over a period of two and a half years; (vii) this was an error not a lie; in any event, the viewing of sites was mainly during periods when the claimant was at work; (viii) this is not a lie, it is DCI Mahmood's view on the evidence presented – the figure came from DC Cooper's report which in turn was based on the digital forensic report; the claimant had the opportunity to challenge the dates and did; (ix) this is a minor inaccuracy, not a lie; (x) again, the Tribunal concludes this was not a lie, it was a minor error. The claimant was not on sick leave for the first week or so but this made no

material difference to the outcome or the issues before the disciplinary hearing; (xi) the claimant was served with what, in DCI Mahmood's view, was full disclosure; this was not a lie; (xii) the letter was dated 14 May, although since it was not received on 19 May, it would have been posted out after 14 May; this is a minor error, of no practical significance, it is not a lie; (xiii) is a minor error, of no consequence, not a lie; (xiv) this is not a lie, it is DCI Mahmood's view on the basis of the transcript; and/or a matter of semantics; (xv) as above, this is not a lie, and was of no consequence. This was fully explored at the adjourned hearing on 29 May.

(5.1.11 (3)) DI Morley (i) stating that the hearing bundle had to be served on a claimant in person, (ii) that the formal letter informing the claimant of the hearing to be held on Friday 29 May was posted 27 May recorded delivery, (iii) that SYP/PSD must provide all information gathered when they did not, and (iv) disregarding the damaging inaccuracies and flagrant misquotes in the transcripts;

233 (i) We refer to our findings of fact, confirming that this was the first time during 14 years of service within PSD, that DI Morley is aware of documents being served by post - this is not a lie; (ii) the letter was dated 27 May, DI Morley assumed it had been posted then - this is not a lie; (iii) this was a slightly inaccurate statement, in that PSD must provide all relevant information, this was not a lie; (iv) the inaccuracies were not damaging or flagrant and did not result from anybody lying.

(5.1.11 (4)) DC Cooper (i) stating he was suspended from his role in the coroner's office in 2016, (ii) that DS Cockayne's statement corroborates DC Harvey's statement, (iii) that the claimant first logged onto inappropriate sites on 8 May, (iv) that Sophos is configured to block sexually explicit sites, (v) that the top user by category data refers to sites accessed by the claimant when it does not, (vi) that the claimant was the top user between 9 February 2018 and 8 February 2019, (vii) that the claimant's alleged behaviour 'suggests a persistent pattern of behaviour unlike what Dr Barrett Clinical Psychologist remarks', (viii) that all Internet usage was monitored, (ix) that PSD had no indication at that time Mr Connor was in hospital, (x) that the claimant was in possession of a laptop between March and August 2018, (xi) the claimant was aware of the standard operating procedure for remote use of mobile equipment, (xii) the claimant lied about the use of the laptop when he did not, (xiii) quotes the force policy on the use of the Internet, without confirming that the policy is not emphasised in any detail to staff.

234 In the light of all that has been said above in relation to the allegations of lying against three other officers, all the Tribunal considers it necessary to say about the allegations against former-DC Cooper is that whilst there may have been a few minor errors of no real consequence, and which had no material impact on the outcome of the disciplinary process, former-DC Cooper did not at any stage lie, whether as alleged above, or at all. It is a shame that, the relevant paragraphs quoted above from the *Gestmin* case having been brought to the claimant's attention, he nevertheless persisted in pursuing these unfounded allegations of dishonesty.

(5.1.12) PSD investigating officers trying to create a false impression of the claimant.

235 The Tribunal concludes that they did not. They put the evidence before the panel as they saw it. That evidence demonstrated that the claimant accessed pornographic websites on 299 days out of 316.

(5.1.13) Deliberately failing to confirm the date, time and format of the disciplinary hearing until less than 24 hours before the hearing. (The claimant had been notified of the date in advance, but the claimant says that matters were unclear because of coronavirus and confirmation was not received until less than 24 hours before the hearing). [NB this is pleaded in the alternative as a failure to make reasonable adjustments if the Tribunal finds that the claimant was treated no differently than others would have been in similar circumstances]

236 The Tribunal concludes that the respondent and in particular DI Morley did not deliberately fail to confirm the date, time and format of the disciplinary hearing in less than 24 hours before the hearing. A decision to go ahead with a telephone hearing was not made until a few days before. That was not surprising in the unprecedented circumstances of the pandemic. Inspector Dean had encouraged the claimant and Mrs Connor to contact DI Morley but they had declined to do so. Had they done so, clarification could have been provided at an earlier stage. The claimant might, understandably, have been hoping that the hearing would not go ahead; but he was never given any indication that it would not.

(5.1.14) PSD investigating officers producing a deliberately misleading transcript after refusing to confirm if the hearing was to be recorded.

237 This fails on the facts. The transcript was not deliberately misleading, there were minor errors of no material significance, which the claimant had the opportunity to correct. There was no refusal to confirm if the hearing would be recorded, it was an oversight.

(5.1.15) Predetermining the sanction.

238 The sanction was not pre-determined, and there is no reasonable basis for saying it was. The claimant relies on his holiday pay being calculated on the basis of a clause which applies on termination of employment. That clause is applied to all employees, where a payment in lieu of holiday is made during their employment. This is a case of the claimant putting 2 and 2 together to get 5.

(5.1.16) Not informing the claimant of the outcome of the appeal for 18 days in breach of the respondent's policy.

239 This did happen as alleged.

(5.1.17) Backdating letters with deadlines which decreased the amount of time available for the claimant to comply.

240 The Tribunal concludes that no letters were back-dated. The respondent's software automatically dates letters with the date when they are printed out. There was often a delay in the letter being sent out, after they had been printed. This was unfortunate, but there was no back-dating.

(5.1.18) Falsely accusing the claimant of having a force issued mobile phone on 8 February 2019

241 The respondent did not falsely accuse the claimant of having a force issued mobile telephone. He was robustly questioned about the mobile telephone in his possession on the day of his suspension because of the need to secure and preserve evidence. On the basis of that robust discussion, it was accepted that the mobile telephone belonged to the claimant and it was returned to him.

(5.2) Did the following things arise in consequence of the claimant's disability(s)?

(5.2.1) The claimant's conduct for which he was disciplined and dismissed.

242 This could not have arisen in consequence of the claimant's disability of depression, because the Tribunal has concluded that the claimant did not have that disability until 8 February 2019, after his suspension. In any event, a careful analysis of Dr Barrett's letter shows that it was written by a medical professional, to try to assist him in relation to the disciplinary allegations which he faced, and provide some justification/mitigation for his actions. It is not expert evidence.

243 Dr Barrett suggested that '*the behaviours underlying the misconduct allegations appeared to reflect apparent compulsive behaviours linked to the high levels of stress he was feeling at the time*' (our emphasis). That 'suggestion' does not amount to reliable expert evidence on which the Tribunal could conclude, on the balance of probabilities, that there was indeed a causative link between any depressive symptoms, and the misconduct allegations. Further, Dr Barrett said the claimant was '*hoping that his concerns about the issues he was facing at work will be acknowledged and …. that his behaviours were indicative of the significant stress and hopelessness he was feeling at the time, [not] a persistent pattern of behaviour*'. It is perfectly understandable why the claimant would hope that, but that was rejected by the disciplinary and appeal panels and the Tribunal concludes that they were entitled to do so.

(5.2.2) The claimant is not steady on his feet when he stands up suddenly.

244 This is not relevant in light of the finding that the claimant was not pushed by DI Cockayne.

(5.2.3) The symptoms of depression set out in the impact statement including feeling isolated, agitated, confusion/forgetfulness and 'brain-fog' and the inability to deal with day to day activities without panicking. The depression is linked to/exacerbated by the other impairments

245 The Tribunal accepts that these are potential symptoms of depression, which the Tribunal has concluded was a disability from 8 February 2019 onwards. However, the Tribunal cannot see a causative link with any of the alleged detrimental treatment which we have found actually occurred (5.1.1, 5.1.2, 5.1.8, 5.1.9, 5.1.10(3), (4) and (5), 5.1.16).

(5.2.4) The claimant had a lot of sickness absences.

246 This is accepted, in that in 2013 the claimant had 187 days absence, and 136 days in 2016. In 2017 the claimant had 14 days sickness absence, but only 3 days in 2018 and 3 in January 2019 (recorded incorrectly as 4 days).

(5.2.5) He could not perform his duties as effectively, for example he was slower at certain tasks.

247 This is not made out on the facts. On the contrary, the PDR's show that the claimant was viewed as an effective and competent employee.

(5.3) Was the unfavourable treatment because of any of those things?

(5.3.1) The claimant says that 5.1.1, 5.1.2 and 5.1.7 were because of the conduct for which he was disciplined, because the respondent failed to take account of the mitigating factor of the impact of his disabilities on his conduct.

248 This claim necessarily fails because the Tribunal has concluded that the claimant did not have the disability of depression at the time. In any event, we have rejected that the something arising as set out at 5.2.1 above arose from any of the disabilities.

(5.3.2) The claimant says that 5.1.5, 5.1.8, 5.1.10, 5.1.11, 5.1.12, 5.1.14 and 5.1.15 were because the respondent wanted to build a case up against him and/or to get rid of him and/or wanted to prevent him from properly defending himself because it wanted to dismiss him for the conduct for which he was disciplined (which arose out his disability) and/or wanted to get rid of him because of 5.2.4 and/or 5.2.5.

249 The Tribunal has found that 5.1.8, and 5.1.10 (in part) did happen, but concludes that they had nothing to do with something arising, 5.2.4 i.e. the sickness absence. 5.2.5 is not made out.

(5.3.3) The claimant says that 5.1.11, 5.1.13 and 5.1.17 were because of the symptoms of his depression because the respondent knew that these actions would confuse him and reduce his ability to defend himself.

250 Those matters failed on the facts and therefore no conclusion needs to be reached in this issue.

(5.3.4) The claimant says that he was assaulted (5.1.3) because he 'wobbled' when he stood up.

251 Again, this fails on the facts.

(5.3.5) The claimant says that 5.1.4, 5.1.6, 5.1.13, 5.1.16 and 5.1.17 were because of the symptoms of his depression because the respondent deliberately took these actions because of the adverse effect they would have on him as a result of those symptoms and, in addition, in relation to 5.1.6, in the hope that this would push him out of the respondent's organisation.

252 All but 5.1.16 fail on the facts. Sending the appeal letter late had nothing to do with any of the something arisings we have found made out on the facts.

(5.4) Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

(5.4.1) To ensure the respondent's standards of behaviour were maintained and enforce and/or

(5.4.2) To protect public confidence in the organisation.

253 The Tribunal concludes that these were legitimate aims.

(5.5) The Tribunal will decide in particular:

(5.5.1) was the treatment an appropriate and reasonably necessary way to achieve those aims;

254 Given our conclusions on the disability issue, it is not proportionate to consider this issue at length. Even if the Tribunal had found that the institution of the disciplinary proceedings, and claimant's eventual dismissal were because of all or any of the somethings arising because of disability relied on above, it would have been proportionate to dismiss the claimant, in reliance on the above legitimate aims. The only lesser penalty would have been a final written warning, or dismissal with notice, which the Tribunal consider would not have been appropriate sanctions in the circumstances. Dismissal without notice was appropriate and necessary to maintain public confidence. Again, the Tribunal notes the recent furore caused by an MP having been found to have watched porn on a limited number of occasions, in the House of Commons.

(5.5.2) could something less discriminatory have been done instead?

255 No, see above.

(5.5.3) how should the needs of the claimant and the respondent be balanced?

256 See above.

(5.6) Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

257 Finally, even if we had concluded that there had been unfavourable treatment because of something arising, and that was not proportionate, the Tribunal was not aware that the claimant had the disability of depression until after his suspension, and to the extent that any of the something arisings are related to that disability, the claimant did not have knowledge. This is particularly pertinent in relation to the institution of disciplinary proceedings and consequent dismissal.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

(6.1) Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

258 The Tribunal concludes that the respondent did know that the claimant had a disability arising from the physical impairments, at least from 2016 onwards and therefore well before the matters to which these claims relate. As to the mental impairment of depression, the Tribunal concludes that the respondent was on notice of that from 16 February 2019 onwards.

(6.2) A "PCP" is a provision, criterion or practice. The claimant asserts that the following are all practices in the sense that this is how similar cases are generally treated or how a similar case would be treated if it occurred again. Did the respondent have the following PCPs:

(6.2.1) Suspending employees subject to disciplinary proceedings of the type faced by the claimant.

259 The Tribunal accepts that this was a PCP.

(6.2.2) In the context of this type of disciplinary proceedings, specifying a date for a response to be provided by an employee within a relatively short period.

260 The Tribunal accepts that this was a PCP; the respondent asked for a response within a relatively short period of the letter being sent inviting him to

interview or, in default of that, to provide a response. The Tribunal is satisfied that if similar circumstances arose again, the same practice would be applied.

(6.3.3) If a similar situation arose in the future (the onset of an unprecedented global pandemic during a disciplinary process) the respondent would not confirm that a disciplinary meeting would go ahead on a particular date, or the format of that meeting any earlier than just before meeting was due to take place. It would not provide the access codes until less than an hour before the meeting was due to take place.

261 The Tribunal concludes that this was not a PCP. It sets out what happened in the unique circumstances of the Covid 19 pandemic in March 2020. The claimant knew of the hearing date over two months in advance; it was changed to a telephone hearing at the last-minute because of the imposition of a national lockdown.

(6.2.4) Not informing employees subject to similar disciplinary proceedings that hearings are to be recorded

262 This was not a PCP. The policy makes clear that disciplinary proceedings and interviews are recorded. That is routine practice within the police service and would usually be obvious, at a hearing which a person attended. The practice is to remind people that is happening. In the unique circumstances of the claimant's disciplinary hearing, that was overlooked.

(6.3) Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant was, due to the combination of his disabilities and in particular due to the disability of depression, and the cardiac issues, more susceptible to suffering heightened levels of anxiety and stress compared to police and staff without those disabilities

263 The Tribunal concludes that the claimant was at a substantial disadvantage, in relation to the two matters above which it has concluded were PCPs, 6.2.1 and 6.2.2.

(6.4) Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

264 The Tribunal concludes the respondent did know of the disadvantage, from 16 February onwards.

(6.5) What steps could have been taken to avoid the disadvantage? And (6.6), Was it reasonable for the respondent to have to take those steps? The claimant suggests:

(6.5.1) Not suspending the claimant – his internet access could have been suspended as an alternative.

265 This was before the respondent had knowledge of the substantial disadvantage in this claim and therefore does not succeed. In any event, it would not have been practicable to allow the claimant to attend work, but deny access to the Internet. Yet further, in light of the evidence of persistent and prolonged viewing of pornographic websites, which was admitted, suspension was a proportionate and reasonable response.

(6.5.2) Allowing extra time to submit a response

266 The Tribunal assumes that this is a reference to the request for a response in September 2019. The claimant was invited to provide a written response if he so wished; it was not compulsory; and this was offered in a situation where the claimant was not fit for interview, had admitted the offence from day one, and the process had been ongoing for months. The respondent was right to consider that any issues relating to the FAW would be relevant to mitigation, if anything, not to whether there was a case to answer. In those circumstances, allowing more time was not a reasonable step.

(6.5.3) Giving the claimant written confirmation in good time before the hearings

267 The claimant was informed on 13 January 2020 that there would be a disciplinary hearing on 26 March 2020. That was in good time. As for the appeal hearing, the claimant was sent a letter which was dated 14 May, which he received on 19 May, in relation to a hearing on 22 May. That was rearranged to 29 May, which the claimant was aware of following a text from inspector Dean on 22 May. He did not receive written notification of that prior to the hearing taking place, because of a misunderstanding between inspector Dean and DI Morley. Given that the claimant knew when the meeting would be taking place, and it was rearranged to fit in with his union representative, written confirmation was not a reasonable step, pursuant to s.20 Equality Act 2010. The claimant knew when the hearing would be taking place, as did his union representative.

(6.5.3) Telling the claimant in advance that meetings were to be recorded

268 This claim fails on the facts. The Tribunal does not consider that the claimant suffered any disadvantage in relation to this matter. The claimant was sent the transcripts and had a chance to correct them which he did. That should have been obvious to the claimant, and it was in the policy. He had asked for confirmation from inspector Dean whether the hearing would be recorded and Inspector Dean had offered to provide him with DI Morley's mobile number, so that he could speak to her. That offer was not taken up. Further, Mr and Mrs Connor could have asked on the day of the hearing. It appears to have slipped their mind, just as it appears to have been over-looked by the members of the disciplinary panel.

(6.7) Did the respondent fail to take those steps?

269 In light of the Tribunals above conclusions, it is not necessary to reach any conclusions on this specific issue.

Harassment related to disability (Equality Act 2010 section 26)

(7.1) Did the respondent do the following things:

(7.1.1) DS Cockayne assaulted him

270 This claim fails as a result of our fact findings.

(7.1.2) Unnecessarily suspended the claimant and telling him not to contact any other member of the respondent despite there not being a policy to support this when it knew that his depression already made him feel isolated

271 The Tribunal considers that the claimant's suspension was reasonable and proportionate; it was not unnecessary. Further, the Claimant was not told not to contact other members of staff. An officer appears to have misunderstood

that, but that was corrected by DI Morley as soon as it was brought to her attention.

(7.1.3) Failed to supply the SAR within the guidelines and ignored his repeated requests in the knowledge that this would exacerbate his symptoms of depression

272 The Tribunal accepts and indeed has found that the SAR was not provided within one month, although this was not because of knowledge that this would exacerbate the claimant's symptoms of depression. This issue therefore fails. In any event it was not related to disability – see below.

(7.1.4) Investigating officers conducted an insufficient investigation and included unused, uncorroborated, unjustified and misleading documents (including a misleading synopsis/statement of case presented to the 26 March hearing) whilst omitting other key evidence (see 5.1.10) deliberately to confuse him and mislead him in the knowledge that this would exacerbate his symptoms of depression

273 This claim has not been made out on the facts.

(7.1.5) The hearing panel used defamatory language in justifying their decision by stating that he lacked personal responsibility for not seeking help, yet criticising Dr Barrett's professional diagnosis

274 Again, this allegation is not made out on the facts. The language used was reasonable and measured, in all the circumstances.

(7.1.6) Falsely accusing the claimant of having a force issued mobile phone on 8 February 2019

275 This claim fails on the facts.

(7.2) If so, was that unwanted conduct?

276 In relation to the only allegation that is made out on the facts, 7.1.3, it is accepted that the delay was unwanted.

(7.3) Did it relate to disability?

277 The delay in sending the SAR material had nothing to do with disability. It was due to the volume of SARs the respondent had to deal with at that time.

(7.4) Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

278 It is not necessary to reach any conclusion in relation to this issue in the light of the above.

(7.5) If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

279 It is not necessary to reach any conclusion in relation to this issue in the light of the above.

Employment Judge A James
North East Region

Dated 23 May 2022

ANNEX A – LIST OF ISSUES

List of Issues

1. **Time limits**

1.1 Given the date the claim form was presented and the dates of early conciliation, the respondents states that any complaint about something that happened before 28 May 2020, which did not form part of claim number 1805266/2020, may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
1.2.2 If not, was there conduct extending over a period?
1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. **Unfair dismissal**

2.1 What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

2.2 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

2.2.1 there were reasonable grounds for that belief;
2.2.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
2.2.3 the respondent otherwise acted in a procedurally fair manner;

2.2.4 dismissal was within the range of reasonable responses.

3. **Remedy for unfair dismissal**

3.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.1.1 What financial losses has the dismissal caused the claimant?
3.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
3.1.3 If not, for what period of loss should the claimant be compensated?
3.1.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
3.1.5 If so, should the claimant's compensation be reduced? By how much?
3.1.6 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
3.1.7 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
3.1.8 Did the respondent breach the ACAS code of practice on disciplinary hearings and if so how; if so, should the claimant's compensation be increased, and if so by how much (up to a maximum of 25%)?

3.2 What basic award is payable to the claimant, if any?

3.3 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. **Disability**

4.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

4.1.1 Did he have a physical or mental impairment: depression, rheumatoid arthritis, pituitary macroadenoma, gout, cardiac issues (hypertension, left ventricular hypertrophy and mitral valve regurgitation), COPD and Raynaud's disease?
4.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?
4.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

4.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?
4.1.5 Were the effects of the impairment long-term? The Tribunal will decide:
4.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
4.1.5.2 if not, were they likely to recur?

5. **Discrimination arising from disability (Equality Act 2010 section 15)**

5.1 Did the respondent treat the claimant unfavourably by:

5.1.1 Subjecting the claimant to a disciplinary procedure.
5.1.2 Dismissing him.
5.1.3 DS Cockayne assaulting him by pushing against a wall on 8 February 2019;
5.1.4 Deliberately prolonging the investigation despite his admission of the conduct.
5.1.5 Using the claimant's exemplary work record against him as a reason to overlook his disabilities.
5.1.6 Deliberately prolonging the suspension, failing to review the suspension and/or failing to communicate any alleged review in order to isolate the claimant.
5.1.7 Ignoring the claimant's requests to investigate his disabilities and co-morbidities and the effect they had on him and/or to take account of this as a mitigating factor.
5.1.8 Failing to provide a response to the claimant's SAR in line with directives.
5.1.9 Ignoring repeat SARs for 6 months.
5.1.10 PSD investigating officers knowingly withheld key evidence, namely, (1) the investigating officer's knowledge that the claimant had a work issued laptop; (2) withholding emails proving the claimant did not have an SYP issued mobile phone; (3) not disclosing that the laptop was being used by DS Cockayne from 1 June 2018 to 17 August 2018; (4) not disclosing that the claimant had used numerous computers in different sites rather than only using the computer in his office; (5) the Appropriate Authority's Case Summary and Antecedents.
5.1.11 PSD investigating officers lying in their submissions, namely (1) DC Harvey (i) regarding the claimant adjusting his zip and (ii) regarding D Supt Singleton not entering the office; (2) T/D Supt Mahmood(i) stating that the claimant was suspended from 2010, (ii) that she had reviewed all the relevant material in the case, (iii) that she had analysed and evaluated the evidence, (iv) the dates of issue of the laptop, (v) asserting that the claimant's accessing of pornographic sites was deliberate, (vi) that he had accessed pornographic sites for over 2.5 years, (vii) That he only accessed sites on duty time, (viii) the claimant was

a top user between 9 February 2018 and 8 February 2019, (ix) PSD had no knowledge of the claimant using a laptop prior to the adjournment of the first hearing, (x) the claimant was on sick leave since the day of his suspension, (xi) the claimant was served with full disclosure of the bundles, (xii) a letter was sent to the claimant on 14 May by recorded delivery, (xiii) a letter had been sent to the claimant on 27 May when it had not even been posted out on 28 May, (xiv) that the claimant claimed he had never had a laptop when he stated that he had never been issued with one, and (xv) that the claimant had used the laptop for five months; (3) DCI Morley (i) stating that the hearing bundle had to be served on a claimant in person, (ii) that the formal letter informing the claimant of the hearing to be held on Friday 29 May was posted 27 May recorded delivery, (iii) that SYP/PSD must provide all information gathered when they did not, and (iv) disregarding the damaging inaccuracies and flagrant misquotes in the transcripts; (4) DC Cooper (i) stating he was suspended from his role in the coroner's office in 2016, (ii) that DS Cockayne's statement corroborates DC Harvey's statement, (iii) that the claimant first logged onto inappropriate sites on 8 May, (iv) that Sophos is configured to block sexually explicit sites, (v) that the top user by category data refers to sites accessed by the claimant when it does not, (vi) that the claimant was the top user between 9 February 2018 and 8 February 2019, (vii) that the claimant's alleged behaviour 'suggests a persistent pattern of behaviour unlike what Dr Barrett Clinical Psychologist remarks', (viii) that all Internet usage was monitored, (ix) that PSD had no indication at that time Mr Connor was in hospital, (x) that the claimant was in possession of a laptop between March and August 2018, (xi) the claimant was aware of the standard operating procedure for remote use of mobile equipment, (xii) the claimant lied about the use of the laptop when he did not, (xiii) quotes the force policy on the use of the Internet, without confirming that the policy is not emphasised in any detail to staff.

5.1.12 PSD investigating officers trying to create a false impression of the claimant.

5.1.13 Deliberately failing to confirm the date, time and format of the disciplinary hearing until less than 24 hours before the hearing. (The claimant had been notified of the date in advance, but the claimant says that matters were unclear because of coronavirus and confirmation was not received until less than 24 hours before the hearing). [NB this is pleaded in the alternative as a failure to make reasonable adjustments if the Tribunal finds that the claimant was treated no differently than others would have been in similar circumstances]

5.1.14 PSD investigating officers producing a deliberately misleading transcript after refusing to confirm if the hearing was to be recorded.
5.1.15 Predetermining the sanction.
5.1.16 Not informing the claimant of the outcome of the appeal for 18 days in breach of the respondent's policy.
5.1.17 Backdating letters with deadlines which decreased the amount of time available for the claimant to comply.
5.1.18 Falsely accusing the claimant of having a force issued mobile phone on 8 February 2019.

5.2 Did the following things arise in consequence of the claimant's disability(s):

5.2.1 The claimant's conduct for which he was disciplined and dismissed.
5.2.2 The claimant is not steady on his feet when he stands up suddenly.
5.2.3 The symptoms of depression set out in the impact statement including feeling isolated, agitated, confusion/forgetfulness and 'brain-fog' and the inability to deal with day to day activities without panicking. The depression is linked to/exacerbated by the other impairments.
5.2.4 The claimant had a lot of sickness absences.
5.2.5 He could not perform his duties as effectively, for example he was slower at certain tasks.

5.3 Was the unfavourable treatment because of any of those things?
5.3.1 The claimant says that 5.1.1, 5.1.2 and 5.1.7 were because of the conduct for which he was disciplined, because the respondent failed to take account of the mitigating factor of the impact of his disabilities on his conduct.
5.3.2 The claimant says that 5.1.5, 5.1.8, 5.1.10, 5.1.11, 5.1.12, 5.1.14 and 5.1.15 were because the respondent wanted to build a case up against him and/or to get rid of him and/or wanted to prevent him from properly defending himself because it wanted to dismiss him for the conduct for which he was disciplined (which arose out his disability) and/or wanted to get rid of him because of 5.2.4 and/or 5.2.5.
5.3.3 The claimant says that 5.1.11, 5.1.13 and 5.1.17 were because of the symptoms of his depression because the respondent knew that these actions would confuse him and reduce his ability to defend himself.
5.3.4 The claimant says that he was assaulted (5.1.3) because he 'wobbled' when he stood up.
5.3.5 The claimant says that 5.1.4, 5.1.6, 5.1.13, 5.1.16 and 5.1.17 were because of the symptoms of his depression because the respondent deliberately took these actions because of the adverse effect they would have on him as a

result of those symptoms and, in addition, in relation to 5.1.6, in the hope that this would push him out of the respondent's organisation.

5.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

5.4.1 To ensure the respondent's standards of behaviour were maintained and enforce and/or
5.4.2 To protect public confidence in the organisation.

5.5 The Tribunal will decide in particular:

5.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.5.2 could something less discriminatory have been done instead;

5.5.3 how should the needs of the claimant and the respondent be balanced?

5.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

6. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

6.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

6.2 A "PCP" is a provision, criterion or practice. The claimant asserts that the following are all practices in the sense that this is how similar cases are generally treated or how a similar case would be treated if it occurred again. Did the respondent have the following PCPs:

6.2.1 Suspending employees subject to disciplinary proceedings of the type faced by the claimant.
6.2.2 In the context of this type of disciplinary proceedings, specifying a date for a response to be provided by an employee within a relatively short period.
6.2.3 If a similar situation arose in the future (the onset of an unprecedented global pandemic during a disciplinary process) the respondent would not confirm that a disciplinary meeting would go ahead on a particular date, or the format of that meeting any earlier than just before

meeting was due to take place. It would not provide the access codes until less than an hour before the meeting was due to take place.

6.2.4 Not informing employees subject to similar disciplinary proceedings that hearings are to be recorded.

6.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

6.3.1 The claimant was, due to the combination of his disabilities and in particular due to the disability of depression, and the cardiac issues, more susceptible to suffering heightened levels of anxiety and stress compared to police and staff without those disabilities.

6.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

6.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

6.5.1 Not suspending the claimant – his internet access could have been suspended as an alternative.

6.5.2 Allowing extra time to submit a response.

6.5.3 Giving the claimant written confirmation in good time before the hearings.

6.5.4 Telling the claimant in advance that meetings were to be recorded.

6.6 Was it reasonable for the respondent to have to take those steps?

6.7 Did the respondent fail to take those steps?

7. **Harassment related to disability (Equality Act 2010 section 26)**

7.1 Did the respondent do the following things:

7.1.1 DS Cockayne assaulted him

7.1.2 Unnecessarily suspended the claimant and telling him not to contact any other member of the respondent despite there not being a policy to support this when it knew that his depression already made him feel isolated.

7.1.3 Failed to supply the SAR within the guidelines and ignored his repeated requests in the knowledge that this would exacerbate his symptoms of depression.

7.1.4 Investigating officers conducted an insufficient investigation and included unused, uncorroborated, unjustified and misleading documents (including a misleading synopsis/statement of case presented to the 26

March hearing) whilst omitting other key evidence (see 5.1.10) deliberately to confuse him and mislead him in the knowledge that this would exacerbate his symptoms of depression.

7.1.5 The hearing panel used defamatory language in justifying their decision by stating that he lacked personal responsibility for not seeking help, yet criticising Dr Barrett's professional diagnosis.

7.1.6 Falsely accusing the claimant of having a force issued mobile phone on 8 February 2019.

7.2 If so, was that unwanted conduct?

7.3 Did it relate to disability?

7.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

7.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

8. **Remedy for discrimination**

8.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

8.2 What financial losses has the discrimination caused the claimant?

8.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

8.4 If not, for what period of loss should the claimant be compensated?

8.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

8.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

8.7 Did the respondent breach the ACAS code of practice on disciplinary hearings and if so how; if so, should the claimant's compensation be increased, and if so by how much (up to a maximum of 25%)?