EMPLOYMENT TRIBUNALS

Claimant: **Mr. J McDonald**

Respondent: **The Commissioner of Police of the Metropolis**

Heard at: **South London Hearing Centre**

On: **13-21 July 2022**

Before: **Employment Judge McLaren**
Members: **Ms. S Evans**
Miss N Murphy

Representation

Claimant: **Miss E Sole, Counsel**

Respondent: **Mrs. K Loraine, Counsel**

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

1. **The respondent had knowledge of the claimant's disability relating to his stress and anxiety from 4 September 2019.**
2. **All matters that occurred on or before 22 February 2020 are out of time. It is not just and equitable to extend time and allow these claims to proceed**
3. **. The tribunal has no jurisdiction to determine the claims for direct discrimination under section 13 of the Equality Act, the claims for harassment in their entirety or to determine claims brought under section 15 of the Equality Act that relate to the events of 13 May, 27th of June and 28th of June 2019.**
4. **The claims under section 15 and section 20 that relate to instigating the UPP procedure on 27 November 2019, continuing that procedure between November 2019 and 30 March 2020 and not changing line management do not succeed. The respondent did not contravene sections 15 or 20/21 of the Equality Act.**

REASONS

Background

1. The claimant has been employed by the respondent since 8.9.1980. He was initially employed as a cadet and became a Police Officer in February 1982. He brings claims of direct disability discrimination, discrimination because of something arising because of disability, harassment on grounds of disability and failure to make reasonable adjustments.

2. The claims arise from an injury to the claimant's hip which occurred on 6 September 2017.While he returned to work in May 2019, he was then of sick with stress from 4 July 2019. The Unsatisfactory Performance Procedure was invoked in November 2019 and had reached stage 3 by January 2021. In March 2021 the claimant retired.

The issues

3. The issues had been agreed between the parties. Since their agreement the respondent has accepted that the claimant was disabled by reason of his anxiety and stress and that the respondent had knowledge of this from 4 September 2019.

4. The issues were as follows

JURISDICTION

1 Are any of the Claimant's claims out of time as:

(a) They occurred on or before 22 February 2020; and

(b) They do not form part of conduct extending over a period which ended after 22nd February 2020; and

(c) It is not just and equitable to extend time and allow the claim to proceed

. DISABILITY

2 It is agreed that the Claimant was, at all material times, a disabled person for the purposes of S.6 Equality Act 2010 ('EqA') due to the physical impairment of 'right hip/thigh injury'.

3 Was the Claimant, at all material times, a disabled person for the purposes of S.6 Equality Act 2010 ('EqA') due to the mental impairment of 'stress and anxiety'?

(a) From what date did the Claimant suffer from the impairment?

(b) Did the impairment have a more than trivial adverse effect on the Claimant's ability to carry out normal day to day activities?

(c) Would the impairments have had such an effect in the absence of treatment?

(d) As of the relevant date in relation to each of the claims, had the impairment lasted for 12 months? If not, was it at that time, likely to last 12 months or likely to recur?

CLAIMS

Direct Discrimination (s.13 EA)

4 It is agreed that the Respondent subjected the Claimant to the following treatment:

- DS Hadleigh on 28 June 2019 sending the Claimant an email saying that she would arrange the return of 'work related materials' due to the Claimant's sickness absence

5 Was this less favourable treatment because of either of the Claimant's disabilities? Who is the appropriate comparator? The Claimant relies on two actual comparators (DC Al Boyland and/or DS Kerry Hassle) and/or a hypothetical comparator with the same material characteristics.

Discrimination arising from disability (s15 Equality Act 2010)

6 Did the Respondent have knowledge of the relevant disability at the material time for the purposes of 15(2) EqA?

7 Did the Respondent treat the Claimant unfavourably because of something arising in consequence of either of the Claimant's disabilities?

8 The 'something arising' relied on by the Claimant

(a) The Claimant's need to work from home and/or inability to work full time from the office in relation to his condition of right hip/thigh injury;

(b) The Claimant's absence from work due to illness in relation to his stress and anxiety condition.

10 What was the alleged unfavourable treatment? The Claimant alleges:

(a) The threat of disciplinary action and presentation of an ultimatum on 13th May 2019;

(b) DS Hadleigh telephoning the Claimant on 27th June 2019, being angry and shouting at the Claimant, stating that one day per week in the office was not enough and referring to the Claimant "swanning it at home" during a telephone conversation on 27th June 2019.";

(c) DS Hadleigh on 28 June 2019 sending the Claimant an email saying that she would
arrange the return of 'work related materials' due to the Claimant's sickness absence;

(d) Instigating the UPP procedure in relation to the Claimant on 27 November 2019;

(e) Continuing the UPP procedure in relation to the Claimant between November 2019 and 30 March 2020, when it was paused until 10 April 2020 and thereafter not confirming whether it had been further paused.

11 If it is found that the acts at 10(a) to 10(e) took place, was the unfavourable treatment because of "something arising" from the Claimant's disability/disabilities as identified at para 8 and 9.

12 If so, can the Respondent show that such treatment was a proportionate means of achieving a legitimate aim? The Respondent relies on the following legitimate aims:

(a) Ensuring the operational effectiveness of the TSU;

(b) Balancing the workloads of the whole TSU team fairly;

(c) Ensuring that police officers are able to provide satisfactory attendance in order to
enable her to discharge her statutory duties;

(d) Ensuring the effectiveness, efficiency and reliance of the police service at a proportionate cost.

<u>Failure to make Reasonable Adjustments (s20, 21 and s39(5) Equality Act 2010)</u>
14. Did the Respondent apply a provision, criterion or practice (PCP) to the Claimant?

15. The PCPs that the Claimant relies upon are:

a) PCP1 The requirement for 'satisfactory attendance'

b) PCP2 That the Claimant was line managed by DS Hadleigh

c) PCP3 The Occupational Sick Pay policy

16 If so, did each PCP put the Claimant at a substantial disadvantage in comparison to persons who are not disabled?

17 What was the disadvantage alleged?

(a) PCP1 the Claimant alleges that he was at greater risk of being subjected to the UPP because of his condition of stress and anxiety. Further and/or alternatively the
instigation and continuation of the UPP caused an exaggeration and increase of the
Claimant's stress and anxiety

(b) PCP2 the Claimant alleges that being line managed by DS Hadleigh resulted in very significant, increased stress and anxiety because of his condition of stress and anxiety;

(c) PCP3 the Claimant alleges that he was more likely to receive reduced pay because he was likely to be absent for a lengthy period due to his condition of stress and anxiety and the reduced pay would cause an exaggeration and increase of stress and anxiety;

18 At the time the PCPs or any of them were applied, did the Respondent know or could she reasonably have been expected to know that the Claimant was likely to be placed at the alleged disadvantage by each PCP?

19 What reasonable steps does the Claimant allege the Respondent should have taken and did not?

The Claimant states that the following adjustments should have been made:

PCP1

(a) Not taking into considerations disability-related absences, when considering whether or not attendance was “satisfactory”;

(b) Only taking into consideration disability-related absences, after recommendations
made by Occupational Health, regarding matters that would assist recovery, had been
followed-through;

(c) Only taking into consideration disability-related absences after a reasonable extension
of allowance for absences to account for the same.

PCP2

(d) Changing the Claimant’s line manager to someone other than DS Hadleigh substantially before 30th April 2020;

PCP3

(e) Continuing to pay the Claimant beyond his contractual entitlement.

20 Were such steps reasonable and if so, when did it become reasonable to take any such step?

21 Did the Respondent in fact fail to take any such reasonable step at the appropriate time?

<u>Harassment (s.26 EA)</u>

22 Did the Respondent subject the Claimant to the following treatment?

(a) The threat of disciplinary action and presentation of an ultimatum on 13th May 2019;

(b) DS Hadleigh telephoned the Claimant on 27th June 2019, was angry and shouted at the Claimant: stating that one day per week in the office was not enough and referring to the Claimant "swanning it at home".

23 If so, was this unwanted treatment related to the Claimant's condition of right hip/thigh injury?

24 If so, did the conduct have the purpose or reasonably have the effect of violating his dignity or of creating an intimidating, degrading, humiliating or offensive environment for him?

REMEDY

25 Is the Claimant entitled to receive compensation and if so, in what sum and what interest should be awarded? The Claimant avers that compensation should include damages for loss of salary, injury to feelings and personal injury.

26 Is the Claimant entitled to a declaration that the Respondent treated him unlawfully?

27 What, if any, recommendations should be made by the Tribunal?

Findings of Fact

5. We heard evidence today from the claimant on his own behalf. Michael Kitchin, who had worked with the claimant, did not attend as the respondent had no cross-examination questions for him and we considered his written statement only. We also heard from three witnesses for the respondent, Kirsten Hadleigh, Detective Sergeant in TSU, this Emma White, Detective Inspector in TSU, and Neil Basu, Assistant Commissioner. We were provided with a written statement from Robert McDonald, Detective Inspector in TSU, as it was agreed he would not attend. His evidence addressed ill health retirement. We were provided with a bundle of 1371 pages.

6. The findings of fact set out below were reached by the tribunal, on a balance of probabilities, having considered all the evidence given by witnesses during the hearing, including the documents referred to by them, and considering the tribunal's assessment of the witness evidence.

7. Only findings of fact relevant to the issues, and those necessary for the tribunal to determine, been referred to in this judgement. It is not necessary, and neither would it be proportionate, to determine each and every fact in dispute. If the Tribunal has not referred to every document it has read and/or was taken to in the findings below, that does not mean it was not considered if it was referred to in the witness statements/evidence.

The claimant's role

8. In the 12 years prior to his leaving the respondent's employment, the claimant worked within the technical support unit ("TSU") as a technical surveillance officer, otherwise known as a "tracker". He specialised in technical surveillance and mobile tracking of organised crime suspects and vehicles. His usual role within the TSU mostly involved mobile vehicle surveillance.

9. It was agreed that his role was undertaken by two officers in a vehicle, one officer driving and the other being responsible for operating the technical tracking equipment and communications. It was agreed that this work could involve 10 to 12 hours sitting in a car.

The respondent's policies

10. The bundle contained a large section of applicable regulations and policies. We were referred to some parts of these. The sickness absence process was set out starting at page 178 to page 230. In brief it provided that a line manager played an important role in managing sickness about the people within their team. It set out steps to be taken when somebody was off sick. In the first 28 days of absence there should be weekly calls and a visit before the 29th day. This meeting was important and was about support, giving the individual the opportunity to speak. After that a case conference should be held at 40 days of absence and after 40 days a formal review should happen every three months.

11. We were also directed to page 206 of the bundle which set out that it was the manager's responsibility to maintain contact with the individual while off sick but in exceptional circumstances, such as where there has been a breakdown in the relationship with an individual manager, High Touch Welfare Contact support from occupational health could be requested. The absence management policy also noted the most common cause of sickness absence in the UK was stress. This was stated as something the respondent took very seriously, and the policy advised managers to consider how to reduce and manage stress in their team.

12. The role of the second line manager was set out because they also contribute to the overall management of sickness. Their specific key responsibilities included satisfying themselves that first-line managers had discharged their responsibilities correctly, and considering appropriate interventions, for example mediation, in cases where working relationships had broken down.

13. The respondent has a separate Conduct and Behaviour – Satisfactory Attendance and Performance Policy. This applied where an individual met the definition of unsatisfactory attendance, that is the inability or failure of a police officer to perform the duties of the role or rank he/she is currently undertaking a satisfactory standard or level. The respondent accepted that individual officers regarded the UPP policy as a disciplinary policy. It is this the claimant is describing when he talks about a disciplinary policy.

14. We were referred in particular to page 246-247 of the policy. Under the heading unsatisfactory attendance, it specifies there where absences are due to genuine illness the issue is one of capability. In these cases, managers should take a sympathetic and

considerate approach. The primary aim of the procedures is said to be to improve attendance, and, in all cases, appropriate supportive action is to be taken before formal action is taken under the performance regulations. It specifies there is no single formula for determining the point at which concern about attendance should lead to UPP action being invoked, each case should be considered on its own merits. A later version of the policy suggested trigger points, and this was at page 315.

15. This table suggested that where there was long-term absence of more than 29 days informal action should be considered every two months, then moving to UPP should be considered at three monthly intervals.

16. The UPP process has three stages. At stages one and two the policy specifies the purpose of the meeting is to discuss concerns and manage expectations around attendance and suggest any support that could help. Following those meetings, the individual must be issued with a written improvement notice specifying the validity period of the notice for which any agreed action plan must be adhered to, and the review period during which improvement is expected to be made. The matter progresses to stage II if there is insufficient improvement at stage I. Both stages carry the right to appeal.

17. At stage III if the line manager considers that the attendance is not sufficiently improved the history of the case must be presented to the directorate of professional standards and possible outcomes could include dismissal. Attendance at stage I and II meetings are said to be compulsory. The policy also provided that if an individual objected to their first line manager chairing this hearing, because of personality clashes for example, they could appeal against this.

<u>The claimant's hip injury and home-based working</u>

18. Unfortunately, the claimant sustained an injury to his hip/right thigh area on 6 September 2017. This occurred at work during a routine fitness test. He underwent a full hip replacement on 1 May 2018 and returned to work on restricted duties on 18 September 2018. The claimant's recovery was not as straightforward as had been hoped. His then line manager referred him to occupational health for a consultation which took place on 15 February 2019.

19. The report from this consultation was at pages 454 – 459 bundle. It recorded that the claimant had been meaningfully employed on a full-time basis in an office manager role from home. A further recuperative period of up to 12 weeks was recommended. The report stated that if the claimant was unable to progress, then there would need to be a referral back to occupational health for consideration for adjusted duties duty status, that is long-term adjustments. It also suggested that when the claimant was able to start travelling to work, he could perhaps stage it, slowly, increasing until he was able to attend work as required. The projected end of the recuperative period was 10 May 2019.We find that there was some concern about the claimant's ability to return from the hip injury at the end of May 2019.

20. The claimant had an agreed adjustment for him to work from home as the tracking team's office manager ("OM") for a period of time. This was not a permanent full-time role. The tasks performed by the OM were performed on a weekly rota basis

by each member of the team for seven days in a row. The OM role was responsible for redeployment of the tracking team staff each day and provided support, advice and scrutiny of intrusive surveillance tracking application reports made by other police departments. Other tasks including assisting in the maintenance and repair of the tracking team's vehicle fleet, radio and technical equipment and completion of internal correspondence and performance reports. There was also general advisory work based on surveillance knowledge.

21. In May 2019 DS Hadleigh became the claimant's line manager. She was given some handover by the claimant's then line manager and we accept that she was told that the claimant had been working in this temporary position since September 2018, but the service could not sustain him working from home indefinitely as this placed additional workload on other members of the team and the support desk. This view reflects the OH referral the prior manager had made when he stated in that referral that the recuperative duties could not be an open ended arrangement. "*They were meant to facilitate a return to work after all"*. We also note that in this referral, it records that the claimant very much wanted to return to work to his usual duties, this supports our later finding that this is what he reflected to DS Hadleigh when they met.

22. DS Hadleigh was also told that the home working arrangement was due to end in May. She was not told that the homeworking was an occupational health recommendation, and did not any time see the occupational health report which had set out the proposal and recommendation.

23. Going into the first meeting with the claimant DS Hadleigh was keen to retain the claimant on the tracking team as he was one of the most experienced trackers and she believed he was excellent at his job. However, she was clear that this could not be done on the basis of the claimant remaining non operational and working from home long term.

Sustainability of homeworking

24. The witnesses were asked about homeworking and if there was any reason it could not have ben extended. This was presented as a failure to consider all; options. DS Hadleigh and DI White both gave evidence that continuing to allow the claimant to work from home indefinitely or permanently was unsustainable. They both gave evidence that the role was not a full-time one and did not take 40 hours a week. While the claimant had been doing the role from home as part of his recuperative duties, he had also been taking time out of the working day to attend physiotherapy. DI White was very clear that she did not consider the office manager role to be a full headcount role and the hours the job would take would not justify creating such a position. It was agreed between the parties that, for example, the claimant could not access the Obelisk system from home and had to rely on the OS T to do this for him. There was therefore some limitation on carrying out the full duties of an OM as a full-time homework. We accept DS Hadleigh's evidence on this point which we have found was supported by her predecessor in the role.

25. There was a dispute between the parties as to the number of trackers within the team and the respondent generally. The claimant told us that in his direct team there were eight trackers which included the Sgt who ran the unit. There were then an

additional 4 – 6 part-time within the TSU and within the respondent generally there were 15 to 20 trained trackers. The claimant's evidence was that on most days the unit had to look for additional trackers outside the team of eight. It was common for there to be two operations simultaneously and the timing of these, one being very early morning perhaps the other being over night meant that it was a regular occurrence that trackers outside the unit of eight had to be located. The claimant did not accept that having a role of office manager permanently assigned to an individual who did not attend on tracking operations was unsustainable.

26. DS Hadleigh told us that there were eight trackers within the team, not including the sergeant in charge. That in 2019 to 2020 there were an additional 22 people who could be called on but, a number of these had not kept up their training and there were only some four or six who generally responded to requests for help. She could speak to the picture only from the point she took over in May 2019. The claimant's knowledge predates that.

27. We considered the written statement of Michael Kitchen that the claimant working from home after his injury did not create any problems that he could see. DS Hadleigh accepted that there was nothing in writing that she could point to that showed that the claimant being office manager working from home was causing any difficulties. She told us that she was aware of this from conversations in her team and that this was the case. DS Hadleigh did not agree with Mr Kitchen's evidence. While DI White accepted that, prior to DS Hadleigh's appointment, her predecessor did not raise concerns about operational difficulties within the team because of the claimant's homeworking, DI White also did not accept Mr Kitchen's view.

28. We find that, as a matter of common sense, in any unit where one individual is unable to perform their full duties this is likely to place a strain on that unit and it will be much harder to backfill operational gaps by having to go outside the core unit. We find that it was reasonable for DS Hadleigh and DI White to have concluded as at May 2019 that the claimant continuing to work from home was placing the unit under operational difficulties. Whatever the claimant thought was the case, he was not on site or in the same position to judge matters as they were. We prefer the evidence of DS Hadleigh and DI White on this point over that of the claimant and Mr Kitchen. We find that DS Hadleigh reasonably believed that it was not operationally sustainable to continue with the claimant working entirely from home.

First meeting with DS Hadleigh

29. A meeting was arranged between the claimant and DS Hadleigh, and they met at a local coffee shop on 13 May 2019. It was common ground that the conversation addressed the topic of the claimant returning to full duties. DI White expected this conversation to be an introduction and a conversation exploring all the options. She was asked whether that included continuing in the office manager role for a while longer, and agreed that it could have done and that this perhaps should have been discussed. DS Hadleigh accepted that she did not include as an option extending the claimant's current home working arrangements. She did not believe the office manager role was a full-time one or that it would be reasonable to offer this as an adjusted duty.

30. The accounts given by the two individuals present at this meeting differ in their

tone, in whether the way in which the options were presented amounted to an ultimatum, whether the claimant was threatened with disciplinary action as opposed to being supportively informed of the UPP as a potential outcome, whether he was told that his previous line manager was angry with him , whether DS Hadleigh made the comment that it would be a shame for his career to end this way and whether it was an immediate return to work.

31. .The claimant's recollection is that DS Hadleigh told him that his previous line manager was angry that the claimant did not return to full duties and had taken the circumstances of the claimant's absence personally. The claimant's recollection is that DS Hadleigh also explained that management were considering taking disciplinary action against him under the unsatisfactory performance process and that they will initiate this if it did not take up one of the three options that she and management had determined. These were either the claimant could immediately return to full operative duties in the tracking team, immediately return to full duties in another capacity or department, or retire. The claimant recalls that she went on to tell him that it would be a terrible shame if his career were to end in this way. The claimant believes that he was told he had to return to full-time duties immediately. No explanation was given to the claimant as to why this was the case.

32. The claimant describes his reaction as being one of complete shock. He could not comprehend how he could be facing disciplinary proceedings when he was working full-time, albeit from home. The claimant was so concerned during the meeting that he felt he had no choice but to agree to attempt a return to full duties as he did not wish to retire, or take the risk of disciplinary proceedings after an unblemished career of more than 37 years service. He left the meeting agreeing that DS Hadleigh would make a further request for occupational health to assess to him with a view to going back into the workplace.

33. Some days after the meeting on 16 May the claimant spoke to a Federation representative and subsequently made a note about his feelings and what he recalled had been said on 13 May. This was at page 470 of the bundle. This records the claimant was told that management were considering disciplinary action against him for unsatisfactory performance and his prior line manager is very angry and has taken the situation personally. It records the claimant feeling very sad and let down and picked on for no reason. Everything at work had been done via and approved by occupational health and his note records that the claimant could not believe what was happening to him and that he felt terrible.

34. DS Hadleigh's recollection is that she explained that because of the nature of the role it was not sustainable for the claimant to continue to work from home. She therefore advised him that he would need to begin to return to the office with the eventual aim of returning him to operational duties. On her account she was talking about the claimant starting to return to full duties and to move away from working from home. The change was imminent but not immediate. She did not say it was an immediate return to full duties.

35. DS Hadleigh confirmed that she asked whether retirement would be a route he was interested in. Both agreed the claimant was not and so DS Hadleigh did not take this any further with him. She confirmed that she did speak to the claimant about

another alternative option which would be considering a different role, such as a desk-based role on the TSU support desk, which she recalls the claimant saying would kill him.

36. DS Hadleigh confirms that she did, before the meeting concluded, tell the claimant that if he could not attend the office and no alternative was found, the unsatisfactory performance procedure might become necessary. She did this because she thought it was important to make the claimant aware it was a possibility, and he was not caught unawares should the process need to be instigated. DS Hadleigh says that she did not threaten disciplinary action, that is UPP, and did not tell him that it would result in that, but simply that it could. She denies that she said that he would face career ending proceedings if he did not either retire or return to full duties.

37. In her evidence before us DS Hadleigh emphasised that she had not presented anything as an ultimatum. This was a very difficult conversation because the claimant's recovery from his hip injury had not progressed as he had hoped. In the conversation about finding a way forward DS Hadleigh believes that she was open and collaborative. While her contact log of this conversation sets it out as if there were only three options, she told us that does not give an appropriate sense of the way the conversation took place.

38. As the claimant acknowledges, the follow-up email from DS Hadleigh, which is a page 460 of the bundle, which was sent on the day of the meeting, sounded far less threatening than he had perceived her to be in the meeting. The bundle contained an exchange of emails between the claimant and DS Hadleigh (page 472-475) in which arrangements are made for the claimant to be referred to occupational health to talk about what happens next, an ability assessment or not, and when/ whether the claimant could drive and any paperwork that she needed to complete.

39. The tone of these is friendly and professional and does not suggest that the claimant had reacted in the way he said he did to the conversation on 13 May.

40. In determining what was said at the meeting from the different accounts we have consider these points. The note made by the claimant a few days after the meeting does not record this comment about career ending . We note that DS Hadleigh did make this comment at a later stage in the process, that is on 10 January 2020. Nonetheless, on the balance of probabilities, we find that she did not refer to it being a shame if his career ended that way in this meeting, because we consider the claimant would have recorded that in his note made closer to the turn of events had that been said.

41. As the claimant did not return to full duties immediately but went through a staged process, we find that it was unlikely DS Hadleigh did tell the claimant that it was an immediate return to full duties. We find that the immediacy within this meeting was the claimant to decide about the option he wished to choose.

42. We find, however, that on the balance of probabilities DS Hadleigh did say that the previous line manager was angry. The occupational health referral this manager had made had identified a level of concern about the claimant having any additional recuperative duties and this supports our finding. We note that in the email at page 462

of the bundle sent by the claimant in February 2019, he is concerned that his line manager is becoming unhelpful and obstructive, causing him to worry about his conduct towards the claimant's recovery. We find that this is in line with the manager having expressed anger about the situation to DS Hadleigh. It also seems to us unlikely that the claimant would have made up a comment about his former line manager. We also find it likely that the phrase disciplinary action was used rather than the full name of the process as that is how this process is understood with in the respondent.

43. While we do not dispute that the claimant found this meeting with DS Hadleigh a difficult one, and he was saddened by what he heard, nonetheless, we prefer DS Hadleigh's account of this meeting as to its tone. Her subsequent actions are, as the claimant acknowledged in his evidence before us, far less threatening. There is nothing in the exchange of emails that took place after the meeting the coffee shop suggest there are any problems. We find the steps that DS Hadleigh took after this meeting are in line with a supportive manager attempting to get an individual back to work. On the balance of probabilities, we find that DS Hadleigh was simply setting out the three options as she saw it, but they were not set out as an ultimatum. The reference to the disciplinary policy was made but, we find this was not made as a threat but simply to ensure, in a supportive manner, that the claimant was fully aware of the potential process.

44. We find that this conversation, while upsetting for the claimant, was not either an ultimatum or a threat. It was instead management setting out how to facilitate the claimant's preferred choice of returning to work as a tracker.

<u>The working arrangements put in place</u>

45. The occupational health referral took place and, in a report, dated 11 June (page 476 – 478) set out that management met with the claimant on 13 May to discuss his full return to work and the claimant had expressed that he wanted to return to full duties as soon as possible. The report records the words of the referral and therefore reflects DS Hadleigh's recollection of the meeting, that the claimant had told her he was well enough to be collected in a vehicle to attend the office and undertake other duties such as delivering short presentations one day a week. The report records the words of the referral again by setting out that this arrangement would be reviewed on 14 June with a view to increasing to 2 days per week for a month, and so on, until he was able to return to full duties. We find that this was how DS Hadleigh considered the situation should move forward.

46. Under the heading "working abilities" the report noted that the claimant was currently performing work in an amended role, and it recommended that he continue to work from home in the current role, attending the office one day a week. On the day he attends work the report noted it would be supportive if he had the flexibility to travel outside the rush-hour, working for four or five hours in the office and the rest at home until an occupational health Doctor had performed a further assessment for consideration for adjusted duties .This was set out as the next step because there was no indication as to exactly when the claimant would be able to progress to full duties.

47. We find that DS Hadleigh's enthusiasm for the claimant to return was at a

quicker pace than occupational health recommended. In this context we were taken to an email from DS Hadleigh 10 June at page 475 of the bundle which referred to having told the claimant the previous week that she needed to ensure that he was starting to return to the office at least a day a week and we find that the reasons for operational efficiency she was very keen for the claimant to be in the office. It was only when he was in the office that he could operate the Obelisk system and catch up with appropriate paperwork.

48. We also find, however, that DS Hadleigh accepted the occupational health recommendation and worked within that. It was agreed that the claimant would attend the office one day a week, travelling outside the rush-hour in transport that would be arranged for him. His working day would be some four or five hours in the office and would include the travel time. DS Hadleigh was not expecting him to work from home or do any additional work on days when he came into the office.

June 2019 return to work

49. The claimant was due to be in the office on 26 June. On 21 June DS Hadleigh reviewed the claimant's tasks on the Obelisk office computer system and noted that he had 44 tasks assigned to him, some of which were from enquiries which had been closed for a number of months. She therefore emailed the claimant (page 483) to say that she had looked through the Obelisk system and that there were 44 tasks assigned to him which was not manageable. She asked the claimant to work his way through the tasks, oldest first, and get rid of those that he could. She explained that they needed to get on top of this because once a move was made to a new computer system, they needed to transfer only new matters not closed ones. We find that DS Hadleigh was keen for the claimant to come into the office so that he could manage the Obelisk system. This could not be done remotely.

50. On 25 June the claimant sent an email to the TSU support desk asking for their assistance with one task. The email which is at page 1312 of the bundle set out what needed to be done and was copied to DS Hadleigh. DS Hadleigh replied almost immediately saying that the claimant could do this tomorrow, that is the day he was going to be in the office 26 June, along with any other updates. The claimant replied to this (page 1315) as he thought that his line manager had not properly read the email and identified that there was nothing more he could do. In his reply, the claimant reiterated the action he had taken. As far as the claimant was concerned, he had taken the matter as far as he could. It was the claimant's evidence that the OST needed to complete this task and place it onto the Obelisk system. It was something that the OST should have done upon receipt of the claimant's email because it was urgent that the information be put on the system as if it was not done immediately, operational teams would be unable to access that information with potentially catastrophic effects. He therefore believed that the team would update the information, despite OST being copied into his line manager's instruction that the task was one the claimant should carry out the next day.

51. DS Hadleigh explained that it was not the role of the OST to put this information onto the Obelisk system. It was not, as the claimant suggested catastrophic if they did not. These updates are always on an email system which is available 24 hours a day and the operational teams use this to access information. It was for the office manager

to upload information to Obelisk. This was a complicated and antiquated system but was intended to contain a full operational log for the purposes of record-keeping and transparency. Under her management she expected the acting office manager each week to be responsible for uploading matters to Obelisk. She accepted that there were some circumstances where this was not possible, for example if the officer acting as office manager was also involved in operations. However, while the OST could be used on occasions, this was not their role.

52. The Obelisk system could only be accessed from the office and so the claimant had not been using it during his long period of homeworking while he had been in effect a permanent office manager. It had been his practice to get the OST to upload onto Obelisk for him as this was the only practicable way that it could be done when he was not attending the office.

53. We find that DS Hadleigh gave the claimant a reasonable instruction that he was to carry out a particular task and that the claimant did not do so. We also find that the claimant believed the task would already have been done by others before he came into the office. This seems to us to be a lack of understanding and miscommunication between the two about expectations.

54. The claimant did come into the office on 26 June and as requested starting to work on clearing the tasks from the Obelisk system. By around 1:30 he had completed the 44 tasks and therefore said goodbye to DS Hadleigh and returned home where he was going to continue working in the OM role for the rest of the day. In her witness statement DS Hadleigh describes the claimant being on an 8 AM to 4 PM shift that day. She explained that he came in on public transport and attended a breakfast meeting with her and other colleagues before starting work. At around 1:30 when he approached her to ask if he could go home, she notes that it was early for him to be leaving the office. Nonetheless, because she believed that he had completed a good amount of work she was happy for him to go at that time. If the claimant had been working from 8 AM to 1.30 PM, he was not leaving early but had completed the number of hours occupational health had suggested. Based on her own evidence, DS Hadleigh knew that the claimant had come in earlier and we find therefore that the claimant had come in at 8 AM as he had said and was not leaving early but after the recommended number of work hours.

55. The contact log made by DS Hadleigh records at page 1348 that the following day, on 27 June, she received a call from another DS informing her that the claimant had not completed his updates. This related to the email of 25 June. DS Hadleigh agreed that she would call the claimant and find out what happened. Her contact log records that she called the claimant on his work mobile and asked why the update had not been completed. The claimant replied that he had done this. DS Hadleigh then clarified that she was talking about the email sent on 25 June. She records the claimant initially said he had not seen the email and then that the support desk were intended to be a support function. DS Hadleigh responded that she was relying on the claimant to keep the Obelisk reports up to date while he was OM and not to get the support desk to complete the work. She records that the claimant ended the conversation by apologising for the mistake saying it was a misunderstanding. DS Hadleigh's log records that she thanked him for the apology and said that was the end of it. She also records that she spoke to the claimant later that day about overtime and

she told us the conversation was a civil one.

56. DS Hadleigh accepted in cross examination that she was angry because she felt that the claimant had been disrespectful to her and had not carried out an instruction she had given him. She explained that she knew that she was going to have a very difficult conversation and that her experience within the police generally meant she knew that conversations where younger more senior officers discussed failings by older and longer serving officers were generally difficult. They were not usually welcomed. Nonetheless, while she was cross, this was an internal feeling and she said that she did not shout as that would not be achieve an appropriate outcome. She was adamant that she has never used the phrase *"swanning it working from home"*. At the time she believed the matter was concluded at the end of that call, the claimant had apologised and that was the end of it.

57. In her contact log at page 1348. DS Hadleigh adds "*he did not mention anything about being stressed or upset".* She told us that she made this note an hour after the conversation. DS Hadleigh could not recall but did not dispute that she spoke to DI White about this conversation. She explained that if she did, it was because DI White is her line manager and she needed to update her line manager of any potential issues. She did not report this conversation because she had acted inappropriately in any way. DI White recalled that they did have a conversation, probably as part of the conversation about something else that day and explained that she had had a difficult conversation with the claimant. In her account of what she was told DI White repeated that the claimant had left work early "regardless", by which she meant that the claimant had not completed a task but had nonetheless left the office early. This is information she would have been given by DS Hadleigh and we find it evidences DS Hadleigh's annoyance at the claimant.

58. The claimant's account of the call is different. He sets out that he tried to explain to DS Hadleigh that it was for the support desk to have uploaded the application on the system without delay, but she did not listen. Instead, she was irate with the claimant, told him that one day a week was not enough that she needed five days a week and not *"swanning it working from home*".

59. The claimant felt that his line manager had not appreciated that he was doing a full day's work and that her anger and words were because he had been given an adjustment of working from home. This telephone call had a significant impact on his mental well-being. It made him feel helpless and distraught. While he managed to function for a short time after this phone call, he became increasingly stressed and anxious and unable to sleep that night. The following day, 28 June 2019, he felt too unwell to work and made an appointment with his GP

60. On the balance of probabilities, we find that DS Hadleigh did speak more forcibly on the telephone than she recalls. In her witness statement DS Hadleigh states that she has an unusually loud speaking voice. The notes of the meeting 3 September reflect her saying that she could have raised her voice. We prefer the evidence of the claimant on this point to that of DS Hadleigh and find that she did raise her voice to the extent of shouting at the claimant.

61. We find that DS Hadleigh was very keen for the claimant to return to the office.

This is evidenced by her referral to occupational health in which she sets out the arrangements for a much faster return than was ultimately advised, her email to the claimant of 10 June focusing on his return to work, and her evidence that leaving the office after a five or six-hour shift was early. She also believed that the claimant was not working when he returned home after an office day. In this context, with her understandable frustration that the claimant was challenging her authority, we think it more likely than not that she did make a negative comment about him not working when he was at home, that is that he was "swanning" it working from home.

62. We find that shouting and making this comment were because DS Hadleigh was frustrated by the claimant's working shorter hours and the homeworking arrangements which were in place because of his disability. We accept the claimant's evidence that he found the call very distressing, the comments were obviously unwanted, and we find that they reasonably had the effect of creating an intimidating humiliating or offensive environment for the claimant.

Request for return of property

63. On 28 June, the claimant was signed off for one week for stress at work. The claimant sent an email to his first- and second-line manager stating that he was off for work related anxiety and stress and requesting that he be contacted only at his personal email. This was at page 486 of the bundle. There was no information provided that the condition was expected to go on beyond the 1 week, or any information that the claimant was unable to carry out day to day tasks. With the benefit of hindsight this was the start of a condition that became a disability , but at this point there was nothing to indicate that would become the case.

64. DS Hadleigh responded to this saying she was sorry to hear about his situation. The email provided the claimant with occupational health details of counselling services. Her email also stated that she would arrange for someone to collect any work related materials so that the claimant did not have them lying around the house.

65. In a subsequent email on 1 July 2019, which is included in her log at page 1093, DS Hadleigh then told the claimant that she was going to ask an officer on the team to pop over the following morning to collect his laptop and work phone so he did not have them lying around the house while he was unwell.

66. This email does not give the reasons for making this request that DS Hadleigh included in her witness statement. There she explained that at the time she wanted the laptop returned so the other team members could use it. She thought was necessary to ensure that the TSU retained operational effectiveness. The team at that time worked from tablets and they did not have another laptop from which they could run the programs available on the claimant's laptop.

67. The claimant was very concerned by what he believed to be an unnecessary action and felt that his line manager had decided he would not be returning to work when his sick certificate expired. Further, removing his work mobile phone and laptop isolated him from colleagues and prevented access to work emails and to the Internet which contained HR information. The claimant then decided to email his line manager and the contents of his email sent on 1 July were at page 492 of the bundle. He asked

for a response to a number of questions and sought an explanation for the removal of his work mobile and laptop after two days absence. His email pointed out that he paid for private use of his work mobile. The email concluded that he had never known a request to return work items to be issued with such haste, that he was being treated differently from other colleagues and was therefore seeking clarity.

68. DS Hadleigh replied on 2 July stating that she was happy for him to hold onto his mobile as he paid for personal calls, but the laptop was to be returned since it was issued to facilitate his request to work from home while he recovered from an operation. This was now needed so that other officers on the team could fill the role. She again confirmed that she was arranging for the laptop to be collected. She concluded that she would like to meet the claimant to discuss why he felt he was being singled out as she wished to resolve the issues they had. As an alternative she said that if he preferred he could meet with her line management. We find these are the actions of a supportive manager who is seeking to understand an issue raised by her direct report.

69. The claimant replied to explain that the laptop was provided to him by occupational health and concluded by letting her know that her daily demands for the return of the laptop and that somebody attended his home were not conducive to alleviating any stress or anxiety he currently felt. He requested that she refrain from this approach. He did not respond to her suggestion they meet or that he meet with her supervisor.

70. DS Hadleigh now acknowledges that with hindsight she was premature in making a decision to request a return of this property and it was not the best course of action for the claimant. She accepts that she got the decision wrong but says she did not approach the issue because of disability or injury, but her understanding that at that time the laptop belonged to the team and there was a practical need for it. She says she misread the sick note and believed the claimant was signed off for a month. We accept that this was the case and she was acting under a mistaken view.

71. We accept that DS Hadleigh treated the claimant differently by requesting the return of property so precipitately. We find that this was treating the claimant less favourably than others, but accept DS Hadleigh's explanation for her conduct. That is she was seeking return of equipment to increase operational efficiency in circumstances when she thought a laptop would be out of use for one month.

<u>The claimant's continued absence and request for DS Hadleigh not to attend the sickness absence meeting</u>

72. On 17 July 2019 the claimant was signed off work until 18 August 2019 for stress at work. On 18 July DS Hadleigh emailed the claimant asking whether they could arrange a 28-day visit with him for 29 July. She asked for a response by the 24 July. The claimant replied on 21 July saying that he would need to consult his Federation officer and he will get back to her. On 26 July, because DS Hadleigh was on leave, DI White contacted the claimant asking if there was an update. The claimant replied on the 29 July that he was still waiting for his rep to contact him and he would let her know as soon as possible. On 31 July he then responds that he is still chasing the rep and that is taking longer than anticipated.

73. The claimant did eventually manage to speak to a Federation rep, and as a result he emailed DI White on 1 August 2019. In this email, which is at page 513, he requested that DS Hadleigh not be present at any meeting for the time being. DI White's evidence is that at that time the claimant had given no indication that his sickness absence was related to his relationship with his line manager, and she thought that his request was made on the basis that he did not like DS Hadleigh. In this email the claimant also suggested a date to meet of 14 August.

74. DS Hadleigh's contact log at page 1356 shows that there is a telephone conversation between her and DI White on 2 August which explained that she, DI White, would be taking advice from HR and that she was asking the claimant to state reasons as to why he wished to exclude his line manager from the meetings. Unless he did so, DS Hadleigh would continue to undertake the sickness management .DI White's response to the claimant was at page 513. We accept DI White's evidence that the reasons for the claimant's wish to exclude his line manager were not clear from this email and that she took proper advice from HR to understand her next steps.

75. The claimant replied on 8 August 2019 with additional information. He told DI White w that he was considering instigating a grievance process that could involve his line manager, DS Hadleigh, and therefore did not feel it was appropriate for her to be present at his absence meeting. Even though this is more information, we find he has not specified what the complaint is, just that he is thinking of raising a grievance. DI White responded, indicating that she was happy to meet with the claimant to discuss his potential grievance before the case conference but that she was unable to do so on 14 August. She suggested other dates but these were not suitable for the claimant .

76. DI White felt that she had tried to meet with the claimant. We were taken to an exchange of emails between DI White and HR at page 1251. DI White confirmed that she was not prepared to meet with the claimant in Bromley, that is the Federation representative's headquarters, and that she did not want to travel to Bromley. She was also not prepared to be told when to meet. In response to the claimant's request for a meeting and offering one date when he and the Federation representative could do it, she responded (page 512) with three other dates, despite the fact the claimant said in his email that 14 August was the only date in the near future that was possible. We accept, DS White's evidence on this point that it was still sensible to offer dates even if the claimant might not be able to do than because it was possible that things could be rearranged. We find that she made a reasonable effort to find an appropriate date for this meeting and accept she was unable to meet on the 14th for diary reasons.

77. At the time, the claimant was not asking for a replacement of his line manager, but only that DS Hadleigh not be present at his absence meetings. We accept DI White did not see the request in light. She was looking at a situation where they were trying to encourage the claimant back at work and she was therefore considering the request as a change that would impact not just the management of the current absence, but also operational requirements.

78. DI White explained that she did not feel the change to line management was a reasonable request. In evidence before us DI White expanded on her explanation and told us that it was very complicated for an individual within the unit to have a different line manager. On her evidence any absence decisions would still effect the operation

so DS Hadleigh would need to be involved and the involvement of another manager would be difficult. We accept this would be the case.

79. DS White, DS Hadleigh and Assistant Commissioner Basu all gave evidence that it was common for individuals to suggest they might take grievances against their line management, particularly during an absence process. In those circumstances without more detail such a suggestion would not result in a change of manager.

80. We accept their evidence on this point and find that in the absence of express concerns about his line manager, it was reasonable for DI White not to change the line manager but to proceed as she did and not exclude DS Hadleigh from the meeting .We accept that even bringing in a different manager for the absence process would have been complex and the claimant had not given sufficient information to make this a reasonable step. We find it is not enough to expect the respondent to put together the timing of the phone call , the absence and this request to conclude that DS Hadleigh should be taken out of the process. The claimant did attend the meeting with DS Hadleigh and made no further efforts to speak to DI White separately.

Contact with the claimant

81. The absence management policy has a guideline that a manager should check-in once a week. DS Hadleigh agreed that she did not do any checking on the claimant's well-being for the first two weeks. Her understanding was that the policies were guidance only. The policies do not use mandatory terms but "may" and "should" and we accept they are for guidance.

82. Instead of contact during this period checking in on the claimant, the focus was on arranging the 28-day meeting. This would have been an appropriate meeting to check-in but did not take place at all. As time was passing, on 29 July claimant was invited to a 40 day meeting, a sickness absence management case conference to take place on 3 September. The invitation was at page 500 of the bundle. DS Hadleigh confirmed that she had the appropriate authority to delay the 40-day meeting and to use 3 September as the 28-day meeting instead.

83. DS Hadleigh asked for an occupational health report and the referral was made on 29 July. On 8 August occupational health contacted DS Hadleigh to tell her they had an appointment booked with the claimant and that three attempts had been made to contact him on the number provided, but there was no reply.

84. DS Hadleigh was also in contact with HR support and at page 1320 of the bundle is an email of 31 July from HR which advises completing a stress risk assessment with the claimant to find out what the barriers are that are preventing him returning to work. DS Hadleigh did not carry out this risk assessment. She said she had never done one and in her view that needed to be done collaboratively, sending written questions would not be conducive to finding a solution.

85. DS Hadleigh also accepted that between 29 July 3 September there were no checking in emails. It was her evidence that the process was frustrated by the claimant's lack of engagement. To support her belief that the claimant had not engaged she referred to the missed occupational health appointment. She also referred to the email correspondence set out above in which the claimant simply said he was waiting

for advice from his Federation representative. She said that the email of 8 August which referred to the grievance was not sufficiently detailed. The grievance could have been about anything, and it was not specific enough to understand the position. From her perspective the claimant was not engaging. This was her mindset which led her to proceed in the way she did.

86. While we accept that the policy is for guidance only, we find that the absence policy was not followed. There was no weekly contact to check welfare, the 28-day meeting was not put in place. Instead, the process moved straight to a 40-day meeting which is for a different purpose. The respondent says this was because the claimant was not engaging, but we find that he was emailing and suggesting dates. The respondent did not take all the steps envisaged by the policy. The respondent also failed to take steps recommended by HR, that is to carry out a stress risk assessment. The respondent did, however, try to arrange a meeting with the claimant to discuss his concerns which were not particularised. This proved not to be possible.

Absence management case conference on 3 September 2019

87. The case conference took place on 3 September with the claimant, DI White, DS Hadleigh, and HR case manager and the claimant's Federation representative. The notes taken by the Federation representative were at page 529 – 532. They support the claimant's evidence that at this meeting he tried to convey how badly he had been affected by DS Hadleigh's actions. The notes show that he raised the conversation of 13 May which he characterises as having been told to come back, transfer or retire. The notes referred to the conversation on 27 June and refer to the comment *"swanning around at home".* They also record DS Hadleigh's response that she did not make this comment. They record that she is a dynamic person, and she could have raised her voice to the claimant in this call. They also record that the claimant talks about what he saw as the threat of the phone and laptop being removed.

88. The claimant believes that he made it very clear to DS Hadleigh at the meeting on 3 September that she was the source of his stress and why this was the case. DS Hadleigh in her evidence accepts that the claimant told her he was unhappy with how the meeting of 13 May had gone. DS Hadleigh also agrees that the claimant raised the issue of the conversation of 27 June. She agreed that the claimant raised the issue of return of the laptop and said that her email had been threatening, although she disagreed that this was the case.

89. DS Hadleigh contacted occupational health following the meeting on 3 September and she notes at page 414 in the case conference that day the claimant had become quite upset and she believed the source of his stress was related to her. The email goes on that they were hoping to set up a meeting in due course between herself and the claimant to discuss the issues that he may have, but in the meantime, it had been agreed that they needed to establish a return to work plan over the next eight or so weeks.

90. We find that all the matters which had led to the breakdown between the claimant and his line manager had been set out by the claimant at the meeting on 3 September, despite the fact his attempt to do so were shut down by HR. The respondent was on notice at point that there had been a breakdown in the

management relationship and that the claimant believed this was the cause of his absence.

91. We find the DS Hadleigh had understood this, which is why she wanted to talk to the claimant in more detail to understand what could be done. This led her to reaching out to the claimant's Federation rep following the meeting. We find that DS Hadleigh was making efforts to assist the claimant, albeit not in a form that he responded to.

Occupational health report 4 September 2019

92. The claimant had an assessment with occupational health the day after this meeting. Occupational health management advice report is at page 533 – 534. This confirms that the claimant had been diagnosed with stress and anxiety. The respondent admits knowledge of disability from this date. The report recommended management to investigate the claimant's concerns in more detail determine whether any actions which could be taken to address any substantiated concerns of the claimant. It concluded "A continuing support of an empathetic approach was said to be advisable to help the claimant's confidence within the workplace."

93. This report did not contain any formal recommended adjustments, but did have a recommendation. This recommendation made a general comment about investigation of concerns ,but did not specify that they were concerns about his line manager. The report contained less detail than the claimant had explained at the face-to-face meeting with management the previous day. We find that it did not help the respondent move the process any further forward, and did not provide the detail that DS Hadleigh needed in order to be able to make any progress. To carry out these recommended investigations, management would need to talk to the claimant. DI White had made some attempts to do this which it proved impossible for diary reasons.DS Hadleigh also made a number of attempts as set out below.

Attempts by DS Hadleigh to speak to the claimant

94. DS Hadleigh told us that she felt in the meeting on 3rd,the claimant had been prepared to talk about the issues and had started to do so but, regrettably, the conversation was closed down by the HR adviser who took the focus back to that of a 40-day meeting. DS Hadleigh did not feel that she had a proper understanding of the claimant's issues. She was very keen to strike while the iron was hot and therefore following this meeting reached out to the claimant's Federation representative to ask if the claimant would meet her. This exchange is that pages 527 to 528. The Federation rep responded by saying that the claimant expressed that when we left he wanted time to recover and it was not a good idea at the moment. It concluded "*can I please get back to you when I spoken to him again?".* In his witness statement the claimant indicated that he was not able to attend such a meeting as even receiving an email from DS Hadleigh made an anxious and stressed and he was fearful another meeting would adversely affect him.

95. The response by the rep did not reflect this and explain that the claimant would not meet DS Hadleigh at any time, but simply that he did not want to do so at that moment. There is nothing in this exchange would give DS Hadleigh the understanding that the claimant was not at any time prepared to talk with her and that she needed to

engage with somebody else to talk to the claimant. While the claimant may have reached the conclusion later that he could not meet with DS Hadleigh, that is not something that he shared with the Federation representative or his employer at that time. DS Hadleigh was reasonably left with the impression that there was a possibility of a conversation in the future.

96. Even though her offer of a meeting made on 3 September had been refused, DI Hadleigh continued to try to arrange to speak to the claimant. On 9 September, page 547, DI Hadleigh follows up with the claimant's Federation rep asking if she had spoken to the claimant about a meeting with her to continue the discussion. DI Hadleigh in her email states that she felt this could give the claimant the chance to air his views with support from his Federation representative which she hoped could help him move forward in his recovery. DI Hadleigh indicated that she was happy to discuss it on the phone if that was easier.

97. On 14 September, DI Hadleigh again emailed the claimant and his Federation representative. This attached the minutes of the 3 September meeting and talked about the 14 October meeting that had been set up. In her email she set out that if the claimant wanted to meet her before that meeting to continue their discussion, she was happy to meet him and his representative then. She also said that if he had another date he would prefer to meet up and talk things through them to let her know she will try and arrange that.

98. These offers were not taken up. DS Hadleigh confirmed that she did not do anything to formally "investigate" the claimant's issues. While she acknowledged that she could have done so, she felt that an individual has some responsibility for their own recovery, and she had to balance the claimant's needs with that of the rest of the team. The claimant had been off sick for a very long time and was not engaging in the process. He was not providing her with a specific information about what was going on and he could have done that via his Federation rep. She had offered meetings with him and we find that she had taken reasonable steps to investigate the details behind d the claimant's concerns by doing so. He had not at this stage raised a grievance.

Sick pay

99. On 3 July DS Hadleigh sent a letter informing the claimant that he would be moving to half pay in October 2019. The claimant was startled to receive this letter when he had been off sick for a week. The letter heightened his anxiety.

100. DS Hadleigh explained that she emailed the claimant to explain that this letter was in line with regulation 28 of the Police Regulations. While she was conscious that it could be a stressful letter, she emphasised in her covering email it was not intended to cause any undue stress and anxiety. We accept that the letter is automatically generated, and she was obliged to send it. At the point it was generated the claimant had accrued 87 days sickness absence in a period of 12 months.

101. The claimant requested that his pay be extended, and the form requesting an extension was completed by DS Hadleigh on 4 September 2019 and can be found at pages 536 to pages 538 of the bundle. The form was reviewed by a Detective Chief Superintendent who did not consider this as a case which would fall within the

parameters of what would normally attract favourable discretion.

102. The internal process is that following this recommendation, the form was passed to Asst Commissioner Basu, for review. He could not recall the details of the case but gave evidence that he would have reviewed all documentation sent to him. He would have been conscious of the fact that regulation 28 guidance says that stress-related illnesses resulting from working conditions generally do not attract favourable discretion. He believes he would have noted that the claimant's stress and anxiety was caused by his management but that would not attract favourable discretion in ordinary circumstances. He recalls that it would be on that basis that he recommended that full pay not be extended. He did however note that on the case summary the claimant had sustained a hip injury at work and therefore recommended that discretion was exercised for this absence. As a result, 83 days were not counted towards future half pay dates. The claimant did not appeal this decision. The completed consideration form was at page 564.

103. Asst Commissioner Basu had not seen the occupational health report which suggested that an investigation into the claimant's relationship with his line manager would assist him. He was not aware that the claimant had asked for a change in line manager. He told us that his decision would have been the same as it was common for complaints to be raised about line management. Unless he had considered there was some culpable action in the management chain, he would not have asked for any investigation into complaints about line management. He also gave evidence that if he had believed that the injury or disability was caused by culpable management action, that could be a reason to extend discretion.

104. Asst Commissioner Basu made the decision not to extend his pay further as in his mind there were no further recommended adjustments would assist with the return to work. Extending the pay would not assist with his return to work and it would not be proportionate to extend full pay when the claimant was unable to perform his role. The respondent has to combat serious acts of crime with limited resources and extending resources for this purpose would not be a reasonable or sustainable use of public money. The claimant was sent the outcome of this review process by letter of 18 October 2019.

<u>Second absence management case conference</u>

105. The second meeting was arranged for 14 October 2019. Shortly before that date, having discussed the position with his GP, the claimant was advised not to attend any meeting if he thought it might have a detrimental effect on his mental health. The claimant therefore contacted DS Hadleigh and DI White (page 562) explaining that the last meeting had a considerable adverse effect on him. He had consulted with his Dr who had advised him not to take part. He explained he would not be attending in person and that his police Federation representative will be present on his behalf.

106. The claimant's Federation representative attended on his behalf and she advised DS Hadleigh that she expected to receive some representations from the claimant as he was not able to attend. In the event she did not and DS Hadleigh therefore made a decision without any input from the claimant as he had not provided any himself or tohis Federation representative on his behalf.

107. A decision was made in his absence at that meeting that he should return to work on 6 November 2019, that is the date that the sick certificate was due to expire. The claimant was sent a letter updating him on what happened at that meeting which was at page 576 of the bundle. It stated that DS Hadleigh required a meaningful medical update from him regarding his illness as soon as possible. DS Hadleigh accepted that she did not explain what a meaningful medical update would be.

108. The claimant did provide some updates on his medical situation. On 6 November he had explained that he had started counselling and had a course of CBT. DS Hadleigh did not find these to be meaningful as this did not give any indication of when the claimant could return.

109. The claimant was also referred to occupational health again on 16 October 2019. DS Hadleigh gave evidence that she was informed by occupational health they could not reach the claimant to make an appointment. This email which is at page 585 said that the claimant had not attended an appointment following the referral on 16 October, that they had tried three times on each of his advised contact numbers and had been unable to get him.

110. The claimant's evidence is that they were emailing his work address which he was not monitoring. As they had not advised they would be calling, he was not listening to or checking his telephone. He did not receive any texts, voicemails, or emails to his personal email address about this. We accept that was the case, however, we also find that from the respondent's perspective they had been told that the claimant was not cooperating with occupational health. We find that this was therefore a legitimate background to the decision to move matters to formal management action. The move to this stage did not preclude an opportunity for the claimant to give his side of the case and for matters that he wanted to raise to be properly considered.

111. The management action notification letter dated 16 October 2019 (page 576) explained the position to the claimant and that included that DS Hadleigh would like to reiterate her offer to meet with the claimant and his representative to resolve any issues that he may have with her. It went on that if the claimant felt that was not suitable she could also arrange a more formal mediation to take place. The claimant did not take up these offers. We find that DS Hadleigh made reasonable efforts to reach out to the claimant for the period after the 40 day meeting. The claimant did not engage with her. She had offered both informal and semiformal I.E, mediation approach to try to move things on. The claimant, while he had referred to the possibility of a grievance, had not raised one.

112. The letter provided that the claimant was to return by 6 November. As the claimant identified, no information had been given to the respondent to suggest that he would return on 6 November, this is just the date that the then most current of his line of sick notes had as its expiry. On 5 November, the day before he was due to return, the claimant was signed off sick again by his GP until 22 December 2019.

<u>Unsatisfactory performance procedure (UPP)</u>

113. Having received this certificate and notification from occupational health that they had tried to contact the claimant but had not reached him, DS Hadleigh had

conversations with the HR adviser and DI White. At this point DS Hadleigh felt that the claimant's absence was not sustainable and was impacting the operational effectiveness of the TSU. This had been a relatively long period of absence and we accept that she reached a reasonable view that the ongoing absence was not sustainable in the absence of any prognosis for a return.

114. The occupational health report had not suggested any adjustments or steps to be taken to aid the claimant's recovery and return to work. It had suggested an investigation, but DI Hadleigh had been trying to contact the claimant with a view to speaking to him. We note that of course when she made the first offer on 4 September, the response from the claimant's representative was not that he would not talk to her, but he needed some time. At this point DS Hadleigh had no reason to believe the claimant would not talk to her at some point which would have allowed her to carry out the very investigation that was being suggested. She had also by this point suggested mediation.

115. DS Hadleigh had tried to engage with the claimant through the sickness policy, but he had been unwilling to do that and so she felt it necessary to instigate UPP process to manage the sickness absence. DI White who was part of the conversation about starting this process also explained that the loss of the claimant was having a significant impact on the TSU team. There was no return-to-work date in sight for the claimant and occupational health had provided no reasonable adjustments to allow a return. Further she felt the claimant was not engaging in the absence management process or communicating with his line managers. While the decision to implement the procedure was DS Hadleigh's, DI White supported it entirely.

116. We find that DS Hadleigh had made substantial efforts to deal with the absence informally before instigating UPP, having two sickness absence management case conferences and offering to meet the claimant to discuss any issues he is having on several occasions. The decision was made to start UPP because the claimant had been off work for five months without an indication either from the claimant or occupational health as to steps that could be taken to assist with his return to work.

117. On 27 November the claimant was therefore sent a letter giving him notice of the first stage meeting to be held under the UPP procedure. That meeting was to be on 9 December 2019. This invitation was at page 614 – 615. DS Hadleigh also records that to date she's received no meaningful medical update further to her letter 16 October. Occupational health had been unable to get any reply. He had been requested to return to work on 6 November and had not. DS Hadleigh was therefore unable to ascertain how she could better assess the claimant returned to full-time role as the lack of information provided. The letter then set out the three stages of the UPP procedures.

118. We have found that the claimant had not had an opportunity to talk about the issues in a 28 day meeting. The occupational health suggestion of an "investigation" and the HR suggestion of a risk assessment were not taken up. The respondent was on notice that the claimant considered there had been a breakdown in his relationship with his line manager, yet the steps set out in the absence policy which contemplate such an issue arising were not pursued. No consideration was given to asking occupational health to contact the claimant. The claimant's request that DS Hadleigh not be present at one meeting was refused.

119. However, we have also found that once DS Hadleigh understood that the issues were around her, she made a number of attempts, including offering mediation, to resolve this and the claimant did not respond. Instead of taking any of these steps, the respondent moved to the UPP process. We also found that she had been told by occupational health the claimant had not responded. In the absence of any information from the claimant or any way to resolve the management issues, the respondent had little choice.

120. The definition of unsatisfactory attendance which could trigger the UPP was set out in the policy documents and we were referred to the later document which contained a table setting out timelines. That suggested informal management actions must have been considered by two months and any dismissal recommendation needs to have occurred by the 11 month of absence. We find therefore that the UPP policy considers that after an absence of 11 months case would be concluded and a dismissal recommendation should be considered.

121. The respondent started the UPP on 27 November after a 5 month absence .We find this is in line with the policy that contemplates dismissal after month 11 as this would allow for reviews. We find that the timing was a reasonable one against the background of no information on any possible return date or adjustments.

<u>The first UPP meeting</u>

122. As part of the internal discussions about moving to the UPP there was some debate between DI White, HR, and DI White's supervisor about who should chair the UPP meeting. These documents were pages 605 to 606. They indicate that all agree, having given it some thought, that DS Hadleigh should chair the stage one meeting and that if the claimant was unhappy with stage I because of the chair, then the next stage would be with DI White which will allow him to make representations again at that time. It was thought important to follow the process.

123. We also note, as referred to in the policy, that the process allowed an appeal if an individual was unhappy with the identity of the person who chaired such a meeting. The claimant did not raise any objections to the meeting being chaired by DS Hadleigh. We find that the respondent did therefore turn its mind to the question of DS Hadleigh's ongoing involvement and it reached a reasonable decision on how it would progress. Further, the claimant had opportunities to object to this decision and did not do so.

124. This meeting was therefore chaired by DS Hadleigh and took place in his absence. The claimant's Federation representative was present, and notes of this meeting were at page 629. The Federation representative was able to provide some medical update, that the claimant has private counselling had two sessions and was feeling the benefit. There was also going to be a consultation with occupational health on 27 December.

125. The claimant was sent a formal letter after this meeting dated 9 December which gave a written improvement notice. It required a return to work on 6 January 2020. DS Hadleigh explained that she had selected this date simply because it was the date on which the sick certificate was due to expire. She issued this at a time when there had been no improvement in six months. She accepted it was within her gift to make the

period longer than one month. She thought this was a realistic return to work date.

126. Occupational health provided their next advice in a report dated 17 December 2019. It referred to the main factor of his stress-related depressive symptoms as work related issues, that is recent difficulties about a return to work and the breakdown of the relationship with his line manager. The report did not suggest any reasonable adjustments, but did suggest some action that could be taken.

127. The prognosis was it was hoped that therapy would assist recovery and *"if resolution could be considered to his work related stressors, it would also assist his recovery"*. DS Hadleigh accepted this is more meaningful than the information the claimant had provided, but it did not say when the claimant was likely to get back and did not give a timescale. If the occupational health report had said the claimant be ready to return from 3 to 6 months, she would have considered this, but there was no indication from occupational health.

128. DS Hadleigh accepted that she did not try to further resolve the concerns as the report suggested because she had already tried to do that, and it had not worked. We accept that she had made reasonable efforts to do this but the claimant had not responded.

129. DS Hadleigh was taken to page 664 which is an entry in her log about a conversation on 10 January. She records that the situation could be brought back if the claimant would engage with her but that he was refusing. She expresses her upset that the claimant's career could end like this, but says the power is in the claimant's hands as she had offered several times to meet, and this had been refused. We find that DS Hadleigh did want to resolve the matter but could not get a response from the claimant.

130. DI White gave evidence that once she had seen this information the occupational health report about resolution she did consider whether she should change the claimant's line manager, but decided it was not reasonable to do so at this point. It would be a more appropriate first step to seek to understand what the problem was to try to repair and rebuild the relationship. No compelling reason had been given to make this decision and occupational health had not recommended it. They had recommended the issue be resolved.

131. The claimant's line management was changed at a later date, and it was therefore something that was possible. As the claimant was off sick, we accept that it would have made little difference at this point if his line management had been moved. In any event, that was not what occupational health were suggesting, which was a resolution to the management issue. The respondent had tried to do this by suggesting meetings with the claimant with his Federation representative present, or mediation. We find the respondent did turn its mind to what could be done following this report, but reasonably concluded that no further steps could be taken.

132. We note page 655 an email of 9 January 2020 from the Federation representative to HR in which she notes that the claimant was refusing to meet the manager due to his anxiety for local resolution and she, his representative, was at a loss what to do about that. The rep does not suggest any other steps that could be taken

Second UPP meeting

133. The claimant did not return to work and on 19 December was signed off until 7 February 2020. On 7 January DS Hadleigh sent an email to DI White, copied to HR, in which she set out that the claimant was signed off until 7 February. She had received an occupational health report which said that the claimant was still unfit to return to work. She identified that the cause of the stress was said to be the breakdown of the relationship with his line manager but said that she had had no reply to her offers to meet the claimant to rectify the breakdown.

134. HR replied to both, confirming that as the claimant had not met the written improvement notice specified date, the policy states that line management would normally consider progressing to UPP stage II meeting. While DI White had been involved throughout this process, as second line manager she took the decision to progress to the next stage. She considered that DS Hadleigh had made substantial efforts to deal with the claimant's sickness absence informally before instigating this formal process. There had been two sickness absence management case conferences, DS had offered to meet the claimant to discuss any issues and there be a number of occupational health referrals. However, the claimant had been off work for over five months with no indication as to any steps to be taken to assist him with a return to work. DI White had already considered if there were any steps she could take to achieve resolution as the medical report had suggested an had concluded there were not.

135. DI White decided to progress to the next stage and the claimant was sent a letter advising him of this on 13 January 2020. This letter was at page 668 and did not contain the required summary of why the claimant's attendance was unsatisfactory. DI White could not explain why this was the case. The second meeting was to take place on 4 February 2020. The claimant again did not attend but was represented by his Federation rep. She was able to confirm that the claimant was still undergoing one-to-one counselling, but no return date could be given.

136. In the absence of any information about a return date DI White decided to issue a final written improvement notice. DI White believed that the claimant was not engaging with the processes because he had not attended a meeting in person for over four months. There was no update about when he could return to work in any capacity, and she therefore concluded there was no other option. The claimant was therefore required to return to work on 9 March 2020. The claimant did not do so.

137. DI White was due to retire, and her last working day was the end of March 2020. Management of the UPP process was therefore handed over to DI McDonald in early April 2020.

138. The claimant was asked about ill-health retirement by email on 1 May 2020 and confirmed that he did wish to take up this option. The UPP process was therefore put on hold to allow this discussion to be explored. We find that the UPP process could therefore be paused if the respondent chose to, but accept that it made the decision to do this at this stage because here had been a change in the claimant's circumstances. For the first time he was suggesting that he did not want to return to work, but wanted to take the option of ill-health retirement. That was not something that he had raised

before and we find that it was sensible and reasonable for the respondent to pause UPP process at this stage as it had new information,but had no reason to do that before this.

Change of line manager

139. DI White was made aware in early 2020 that the claimant had raised a grievance against DS Hadleigh. DI White therefore met with her line manager, Acting Superintendent Davies, to discuss whether it was appropriate to remove DS Hadleigh as the claimant's line manager.

140. On 28 April 2020 A/Supt Davies sent an email which said that based on detailed been provided within a solicitor's letter about how the claimant perceived the breakdown in his relationship with DS Hadleigh, DS Barrett was to take over as the claimant's line manager with immediate effect.

141. We note that the respondent was able to change line management immediately if it wished to. Nonetheless, we have accepted DS White's evidence that a change in line management was complex. We find that the decision to do so at this stage was because a formal grievance had been submitted. We also find that because of the complexity which we have accepted, it was reasonable for the respondent not to move line management when there was only a suggestion of a grievance which had not then been formulated by the claimant or seen by the respondent. We also find it would be less complex to change line manager for the purposes of concluding an absence process than it would for daily task management. At the time that DS White was making her decision she was contemplating the claimant's return and was thinking about the management of tasks and not just the management of absence process.

142. We also find that the claimant did not at the relevant time believe that removing DS Hadleigh as his line manager would allow him to come back to work. That is not a view that he expressed at any point. He does of course on 8 August ask for her to be removed from our meeting but that is the extent of the adjustment that he requests.

Jurisdiction

143. The respondent considers that some of the claims are out of time. The claimant gave evidence in his witness statement on this point. He believes was a course of conduct pursued against him by his line management and HR that was continuous. Alternatively, he explained that from June 2019 he had been mentally unwell and throughout his employment was using every ounce of energy to deal with internal processes.

144. The claimant was unable to deal with confrontation. His witness statement also set out that he did not realise how serious the situation become until around March 2021 and then the circumstances of the pandemic disrupted communications. He presented his claims as quickly as was able to do once he felt able to deal with it.

145. We considered the medical evidence that was contained within the bundle. This included an assessment of the claimant which led to his being referred to low intensity cognitive behavioural therapy. This referral, which at page 5495 -50 of the bundle, identified that as at 30 August 2019 the claimant was reporting symptoms of low mood

and anxiety. He completed a patient health questionnaire which indicated moderate symptoms of depression and mild symptoms of anxiety. The clinical outcome routine evaluation also indicated moderate levels of psychological distress.

146. The occupational health notes that accompany 4 September consultation (page 418) referred to the claimant's current symptoms as being low in mood with reduced concentration and recall. He is identified as sleep deprived, upset, lacking motivation and feeling tired and fatigued.

147. The bundle contains at pages 642 to 644 consultation notes of the meeting with occupational health on 17 December 2019. They provide more detail on the management advice report which was sent to the respondent. These notes indicate that the claimant is suffering from a deep depression. It also notes that he has some memory and concentration issues and disordered thinking/perception.

148. The claimant had prepared a disability impact statement which is at pages 80 to 89 of the bundle. This identified that in August 2019 when he had arranged to meet his police Federation representative he was so anxious he could not attend the police station. The meeting had to be held in a coffee shop. His impact statement that it took a week get over this meeting. Again, the impact statement said that taking part in the meeting on 3 September was very difficult and took him days if not a couple of weeks to recover. At this stage he said that he was functioning on a really basic level, could not concentrate, was very anxious, tired, exhausted and constantly very emotional.

149. The claimant started cognitive behavioural therapy on 30 August and had five sessions lasting on 15 November 2019. He needed more help and then started a total of 25 one-to-one counselling sessions between October 2019 and October 2020.

150. The claimant describes the impact on his mental health throughout the period is impacting short-term memory and sleep patterns. He can suffer from mood swings and can become very agitated and short tempered. As a result of anxiety and poor sleep is often slow to respond to situations and has poor focus or confusion which he finds distressing. He states that the first day of suffering this was from the telephone call from DS Hadleigh in June 2019. It becomes worse when he had to recall what has taken place.

151. The claimant as set out above did not attend 14 October 2019 meeting that his GP had advised him to avoid situations that he found stressful. We note that at page 563 of the bundle the claimant Federation rep informs DS Hadleigh that she is expecting some representations from the claimant for his case, even though he was not attending. While he did not do this, the claimant did email the respondent in November and was therefore capable of some actions.

152. While we were not taken to it, the bundle contains a formal grievance which the claimant submitted on 9 January 2020. The claim was lodged on 22.5.2020, following ACAS early conciliation from 9.1 to 14.2.2020.

Relevant Law / Submissions

Direct Discrimination

153. Section 13 describes direct discrimination as:

> *"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

Discrimination arising from disability (s15)

154. Section 15 EqA, which is headed 'Discrimination arising from disability', provides that

"(1) A person (A) discriminates against a disabled person (B) if –

> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability".*

155. Pnaiser v NHS England summarised the proper approach to establishing causation under s 15 First, the tribunal has to identify whether the claimant was treated unfavourably and by whom. It then has to determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant. The tribunal must then determine whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

156. Any allegation of discrimination arising from disability will only succeed if the employer (or other person against whom the allegation is made) is unable to show that the unfavourable treatment to which the claimant has been subjected is a proportionate means of achieving a legitimate aim.

Harassment

157. Three forms of behaviour are prohibited under S.26 EqA, which is entitled 'Harassment' 'general' harassment, i.e. conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment –

S.26(1) sexual harassment – S.26(2), and less favourable treatment following harassment – S.26(3).

158. The general definition of harassment set out in S.26(1) applies to all protected characteristics, except marriage and civil partnership and pregnancy and maternity. It states that:

> "*a person (A) harasses another (B) if: A engages in unwanted conduct related to a relevant protected characteristic – S.26(1)(a), and 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"* – S.26(1)(b).

S 26(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."*

159. While both counsel agreed that there was little dispute in the law, we were directed to some specific cases by the claimant's representative and we set out below her submissions on the point which we accept.

"In Buchann v Commissioner of Police of the Metropolis the EAT addressed an appeal relating to a claim under s.15 based on the application of the Metropolitan's police UPP. The EAT gave some useful, general guidance on the relevant stages in a s.15 claim (para 42):

"The starting-point must be the words of s.15(2)(b) [sic] of the Equality Act 2010. This requires the putative discriminator A to show that 'the treatment' of B is a proportionate means of achieving a legitimate aim. The focus is therefore upon 'the treatment'; and the starting point must be that the ET should apply s.15(2)(b) [sic] by identifying the act or omission which constitutes unfavourable treatment and asking whether that act or omission is a proportionate means of achieving a legitimate aim". Judge David Richardson accepted the Claimant appellant's argument that simply justifying the general UPP policy was insufficient (para 48 and 49):

> *"In my judgement it will be rare in disability cases concerned with attendance management for the approach in Seldon to be applicable. This is because generally speaking the policies and procedures applicable to attendance management do allow…for a series of responses to individual circumstances…*

As we have seen, the respondent's policies allowed for such an individual assessment; and…so did the Regulations. The various steps which the claimant criticised were not mandated by the Regulations or the respondent's policies. It is therefore impossible to assess whether such a step was a proportionate means of achieving a legitimate aim simply by asking whether the Regulations or the respondent's policies were justified."

In City of York Council v Grosset UKEAT/0015/16 the EAT explained that the test of justification is an objective one to be applied by the tribunal. 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] IRLR 746 stated: 'the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment'.

HHJ Eady QC summarised the position in Ali v Torrosian (t/a Bedford Hill Family Practice) [2018] UKEAT/0029/18, the authorities on this objective balancing exercise show that to be proportionate the conduct in question has to be both an appropriate and reasonably necessary means of achieving the legitimate aim; and for that purpose it will be relevant for the Tribunal to consider whether or not any lesser measure might have served that aim: (see paras 16 and 17). Although there may be evidential difficulties for a Respondent in discharging the burden of showing objective justification when it has failed to expressly carry out this exercise at the time, the ultimate question for the Tribunal is whether it has done so: (see para 27)."

Reasonable adjustments

160. In general, the duty to make reasonable adjustments requires the taking of "such steps as it is reasonable to have to take" to avoid a disabled person being put at a "substantial disadvantage" which includes a "provision, criterion or practice".

161. The tribunal must consider the PCP applied by or on behalf of the employer, the identity of non-disabled comparators (where appropriate), and the nature and extent of the substantial disadvantage suffered by the claimant.

162. The duty is 'reactive', it requires there to be an identified applicant or employee, and for the employer to know, or be reasonably expected to know, that that person is disabled, and that they are likely to be at the substantial disadvantage without the adjustment.

163. We were referred by the respondent to Griffiths the Secretary of State for work and pensions [2017] ICR 1359 which provides that in circumstances where the disadvantage alleged is the application of sickness management policies, it will not normally be reasonable to require an employer to disregard lengthy periods of disability -related sickness absence or extend sick pay.

164. Again, there was no dispute between the parties representatives as to the law and we set out the claimant's submissions on the question of sick pay as a reasonable adjustment.

> *"In circumstances where the employer is off work there may be instances were the consequences to work are irretrievable and the duty to make adjustments have fallen away HM Prison Service v Johnson [2007] IRLR 951. However, the particular step need not be effective in preventing the disadvantage altogether, in order to be reasonable, and the effect of adjustments can be considered cumulatively. Moreover, the EAT in Fareham College Corporation v Walters [2009]*

IRLR 991 determined that a refusal to allow a phased return to work could amount to a PCP, requiring reasonable adjustments, such that the failure to make adjustments to that PCP could amount to discrimination even if the Claimant had not become fit enough prior to her dismissal to return to work.

As regards to adjustments to a sick pay policy, Meikle v Notts County Council [2004] IRLR 703 and O'Hanlon v Comrs for Revenue and Customs [2007] IRLR 404 provide some useful guidance. In O'Hanlon the employer operated a sick pay policy whereby after a certain number of days off sick, pay would be reduced. Ms O'Hanlon had had more than the permitted numbers of days of sick, due to her depression, and argued that it was a failure to make reasonable adjustments to reduce her pay. The Court of Appeal upheld the Employment Appeal Tribunal decision that the employer had not failed to make reasonable adjustments by not paying the Claimant full pay, for the period after she had had the permitted number of days absent. The Claimant argued that the PCP affected her in particular because the reduction in pay caused her financial hardship and stress, which affected her in particular because of her depression. The Court of Appeal considered the "full pay" argument on the assumption that the PCP did place Ms O'Hanlon at a substantial disadvantage

. The Court of Appeal went on, however, to agree with the EAT below that the Respondent had not failed to make reasonable adjustments by not awarding a higher sick pay. Although O'Hanlon had suffered financial hardship the Respondent had done all they could to reduce absences to a minimum, by reducing the Claimant's hours whilst she worked for example, and had not piled on added pressure by threatening disciplinary action. In the circumstances it was not reasonable to expect the Respondent simply to pay the salary in full once the Claimant had exhausted the usual sick pay. The Court of Appeal also explained that it would be a very rare case where an adjustment to pay someone more than sick pay would be reasonable and distinguished the case of Meikle:

> *"74. It is important to note, however, that the court [in Meikle] did not find that the pay ment of full pay was a reasonable adjustment independently of the other specific adjustments which ought to have been made and would have resulted in the employee returning to work without having to take such lengthy absence*
> *s. It was never suggested that the adjustment lay simply in granting full pay. Liability arose because of the failure to make reasonable adjustments to accommodate her back into the classroom. This had the knock-on effect of rendering the failure to give her full pay unjustified. Admittedly there was no express finding that the case could not have been put in that way, but it was not even suggested that this might have been a more straightforward route."*

Burden of proof

165. In Igen v Wong ltd [2005] EWCA Civ 142, [2005] ICR 931, CA. remains the leading case in this area. There, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the

tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove — again on the balance of probabilities — that the treatment in question was 'in no sense whatsoever' on the protected ground.

166. The Court of Appeal explicitly endorsed guidelines previously set down by the EAT in Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT, albeit with some adjustments, and confirmed that they apply across all strands of discrimination.

167. The bare facts of a difference in treatment and a difference in status only indicate a possibility of discrimination, they are not 'without more' sufficient material from which a Tribunal can conclude that there has been discrimination, Madarassy v Nomura International [2007] IRLR246 CA para 54-57. Likewise, that the employer's behaviour calls for an explanation is insufficient to get to the second stage: there still has to be reason to believe that the explanation could be that the behaviour was "attributable (at least to a significant extent)" to the prohibited ground. Therefore 'something more' than a difference of treatment is required.

Limitation period

168. S123 Equality Act provides that

> "….a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> ……..
>
> (3)For the purposes of this section –
>
> (a) Conduct extending over a period to be treated as done at the end of the period

169. Where there is a series of distinct acts, the time limit begins to run when each act is completed, whereas if there is continuing discrimination, the time only begins to run when the last act is completed. There is a distinction between a continuing act and an act that has continuing consequences. Where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where however there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing even though the act has ramifications that extend over a period of time.

170. The Court of Appeal in Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548, CA Court clarified that the correct test in determining whether there is a continuing act of discrimination is that set out. In Commissioner of Police of

the Metropolis v Hendricks 2003 ICR 530, CA, the Court of Appeal made it clear that it is not appropriate for employment tribunals to take too literal an approach to the question of what amounts to 'continuing acts' by focusing on whether the concepts of 'policy, rule, scheme, regime or practice' fit the facts of the particular case. Those concepts are merely examples of when an act extends over a period and should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'. Thus, tribunals should look at the substance of the complaints in question and determine whether they can be said to be part of one continuing act by the employer.

171. In considering the just and equitable extension, the Court of Appeal made it clear in Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA, that the onus is on the claimant to convince the tribunal that it is just and equitable to extend the time limit. The exercise of the discretion is an exception.

172. Previously, the EAT (British Coal v Keeble) suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in S.33(3) of the Limitation Act 1980. That section deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

173. The Court of Appeal in Southwark London Borough Council v Afolabi 2003 ICR 800, CA, confirmed that, the checklist should be used as a guide. However, the Court went on to suggest that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

174. In Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA, the Court of Appeal pointed to the fact that it was plain from the language used in S.123 Equality Act that it would be wrong to interpret it as if it contains such a list.

Conclusion

175. Having made findings of fact and set out the relevant law above, we now set out our conclusions applying the law to those findings. We do so using the issues list as a way of addressing these.

Jurisdiction

176. The first question was one of jurisdiction which was put this way

1 Are any of the Claimant's claims out of time as:

(a) They occurred on or before 22 February 2020; and

(b) They do not form part of conduct extending over a period which ended after 22nd February 2020; and

(b) It is not just and equitable to extend time and allow the claim to proceed

177. The claimant submitted that DS Hadleigh and DS White acted in tandem and we have found that was the case. DS Hadleigh's line manager agreed and approved her actions. It was further submitted that the claimant considers that the events that occurred, that is meeting on 13 May, the phone call on 27 June 2019 and 28 June 2019 email are all connected and further that these are connected with the commencement of the UPP process.

178. It was submitted that because DS Hadleigh was the connection between all of these events, that they amount to conduct extending over a period. While we understand the claimant's perspective on this, there is a distinction between a continuing act and an act that has continuing consequences. Tribunals should look at the substance of the complaints in question and determine whether they can be said to be part of one continuing act by the employer.

179. On the facts as we have found them, the events in May and June, while they are said to lead to the claimant's absence, are not connected to the decision to implement the UPP process. The events are different in nature. It is the consequences to the claimant that continue, not the acts themselves.

180. We therefore conclude that complaints relating to these three events are out of time. We have considered whether or not we should exercise our discretion on a just and equitable basis to extend time. In the circumstances here we do not consider that as appropriate.

181. In reaching this conclusion we have taken into account the length of the delay. By the time a complaint is brought in May 2020 the events are many months old. We have taken into account the reason for the delay. The claimant tells us that firstly he viewed it as a continuing act and secondly his mental health meant that he was unable to proceed any earlier.

182. We have carefully considered the evidence as to the claimant's mental health in July through to October 2019. We have found that as at 30 August 2019 he was suffering from moderate depression, mild anxiety and moderate levels of psychological distress. Again at 4 September we have found that he was suffering from low mood, reduced concentration and recall. We have accepted the claimant's account of his mental health as set out in his impact statement. We have found that the claimant was having difficulty in dealing with the situation, certainly by August and early September 2020. We also accept that from the date of the 'phone call in June 2019, the claimant was having difficulty in sleeping, concentrating and handling stress.

183. While we accept the claimant was unwell from 27 June 2019,he was able to communicate with his Federation representative and respond to emails. While we sympathise with his position, we conclude that he was able, with the help of his Federation representative, to submit matters in a period up to 14 October. Up until that time, he was engaged in correspondence with the respondent and, while he was finding it difficult, was talking to his Federation representative. Despite his ill-health the claimant was also able to re-engage with his representative in January 2020 we conclude that the claimant had access to professional advice throughout this period and therefore, even taking into account his ill-health, he could have brought the claim earlier.

184. We have considered the matter in the round and taken into account the prejudice to both parties. There will always be prejudice to a claimant who is unable to pursue some part of his claim. If we do not extend discretion, the claimant does still have the possibility of some remedy open to him as part his claim would remain. In considering prejudice to the respondent one could argue that as we have heard the evidence there is little prejudice in now exercising a discretion, since there is no saving of time costs by limiting the issues the tribunal has to hear. We conclude that nonetheless, the respondent did suffer some prejudice because witnesses were required to recall events that occurred in mid 2019.

185. On balance we conclude that the prejudice is greater to the respondent on this occasion and, as we have found the claimant was capable of bringing the proceedings via his rep earlier, we are not extending our discretion. The tribunal therefore has no jurisdiction to hear the discrimination complaints that relate to any acts which occurred before 22 February 2020.

Knowledge of disability

186. While it was agreed that the claimant was at all material times, a disabled person for the purposes of S.6 Equality Act 2010 ('EqA') due to the physical impairment of 'right hip/thigh injury', the respondent did not accept that the same applied to the claimant's mental impairment of stress and anxiety. The respondent accepted it had knowledge from until 4 September 2019.This is the date when the occupational health report identified the impact on the claimant's ability to carry out day-to-day duties because of his stress and anxiety and identified that it could be long-term.

187. It was submitted by the claimant that the respondent had knowledge much earlier because DS Hadleigh had asked for the return of equipment the day after the claimant had submitted his sick note relating to this illness. It was common ground that this was the first notification that the claimant was suffering from any such mental impairment. We conclude that it could not amount to disability at the material time. The respondent could not have knowledge that a condition that was said to last for a week was likely to be long-term. There was no evidence of an impact on ability to carry out day to day duties.

188. We conclude that the respondent was only aware that the claimant was disabled by reason of mental impairment from 4 September.

Direct Discrimination (s.13 EA)

189. It is agreed that the Respondent subjected the Claimant to the following treatment: DS Hadleigh on 28 June 2019 sending the Claimant an email saying that she would arrange the return of 'work related materials' due to the Claimant's sickness absence

190. We have found that this was less favourable treatment, but that it was not because of the claimant's disabilities. We have found that DS Hadleigh made this request for what she believed to be legitimate operational reasons. For this reason this claim, even if it were in time, does not succeed.

Discrimination arising from disability (s15 Equality Act 2010)

191. The Claimant alleges the following as acts of unfavourable treatment:

(a) The threat of disciplinary action and presentation of an ultimatum on 13th May 2019;

(b) DS Hadleigh telephoning the Claimant on 27th June 2019, being angry and shouting at the Claimant, stating that one day per week in the office was not enough and referring to the Claimant "swanning it at home" during a telephone conversation on 27th June 2019.";

(c) DS Hadleigh on 28 June 2019 sending the Claimant an email saying that she would arrange the return of 'work related materials' due to the Claimant's sickness absence;

(d) Instigating the UPP procedure in relation to the Claimant on 27 November 2019;

(e) Continuing the UPP procedure in relation to the Claimant between November 2019 and 30 March 2020, when it was paused until 10 April 2020 and thereafter not confirming whether it had been further paused.

192. We have found that the event at (a) above did not occur in this way. There was no such threat or ultimatum and based on our findings of fact, even if this were not out of time, this claim could not succeed.

193. We have found that the event at (b) did occur as the claimant suggests and we conclude that this was unfavourable treatment because of something arising in consequence of the claimant's disability. The respondent has not put forward any legitimate aim on which she relies. We conclude that the claimant would succeed on this claim if the tribunal had jurisdiction. The claim does not succeed because it is brought out of time.

194. We have found that the event at (c) did occur but it was not in consequence of the claimant's disability. It was in consequence of DS Hadleigh's belief that she needed to achieve operational efficiency by reusing equipment. The claimant would not

succeed even if it were brought in time.

195. We then considered the event at (d), instigating the UPP procedure on 27 November 2019. The respondent accepted that this was instigated due to the claimant's continued absence from work since 20 June 2019, this absence of relatively stress and anxiety disability and that this would amount to unfavourable treatment. The respondent relied on the justification defence.

196. The Respondent relied on the following legitimate aims:

(a) Ensuring the operational effectiveness of the TSU;
(b) Balancing the workloads of the whole TSU team fairly;
(c) Ensuring that police officers are able to provide satisfactory attendance in order to enable her to discharge her statutory duties;
(d)Ensuring the effectiveness, efficiency and reliance of the police service at a proportionate cost.

197. We accept that these are legitimate aims, but the key issue for us, as identified in the submissions made by counsel for the claimant, is to decide whether or not, in the claimant's case it was proportionate to begin the UPP process at the time they did. It was submitted on the claimant's behalf that it was not proportionate because the respondent had not taken "all" steps set out in its absence management process .We have accepted this was a guidance document and the steps and timing were not mandated.

198. .We have found that not "all" steps were taken. We have found that line management had not been in contact with the claimant to check-in on his health during the first month's absence. There had not been a 28 day meeting, but instead the process had moved to the 40 day meeting. The respondent had not "investigated" the issues when occupational health suggested that. DS Hadleigh did not carry out the risk assessment recommended by HR.

199. While they did not take "all" steps, we have also found that DS Hadleigh she made efforts to resolve things. She did so immediately once she became aware the claimant felt he had been singled out by the request to return equipment but this was not taken up. From 3 September the claimant was offered meetings with her with his Fed rep present. He was also offered mediation. He did not raise a grievance. The claimant did not respond to these meeting requests and did not make it clear that he was not prepared to meet DS Hadleigh. Whatever the reason, he did not attend all the occupational health appointments. The respondent did not have information about a possible return or about steps for that return at the time the decision to implement UPP process was taken.

200. While the respondent's actions were not perfect, we conclude that proportionality does not require "all" steps to have been taken .We find that the respondent had done enough in the circumstances of this case. They were presented with a claimant who was absent for many months, he was not engaging with them, he was not providing information about any possible return date and he was not providing them with any information that would allow them to address his issues. In submissions and in cross examination the respondent's witnesses were criticised for continuing to

offer meetings with DS Hadleigh who was said to be the cause of the stress. The claimant did not identify he would not speak to her. He was also offered mediation. On We conclude that the action of starting the UPP process was proportionate in these circumstances. The claim does not therefore succeed on this basis.

201. As to issue (e), the same considerations arise. The question is one of proportionality. The difference between November and March was one further occupational health report which suggested it would assist the claimant if a resolution can be found to his management issues. While this is a further prompt from occupational health take some action, we have found that DI White considered this and DS Hadleigh had made efforts to do so which had been refused by the claimant. Again, we conclude that the respondent's action in continuing the UPP prcess were proportionate and the claim does not succeed.

Failure to make Reasonable Adjustments (s20, 21 and s39(5) Equality Act 2010)

202. The PCPs relied upon and the disadvantages were these

(a) PCP1 the Claimant alleges that he was at greater risk of being subjected to the UPP because of his condition of stress and anxiety. Further and/or alternatively the instigation and continuation of the UPP caused an exaggeration and increase of the Claimant's stress and anxiety
(b) PCP2 the Claimant alleges that being line managed by DS Hadleigh resulted in very significant, increased stress and anxiety because of his condition of stress and anxiety;
(c) PCP3 the Claimant alleges that he was more likely to receive reduced pay because he was likely to be absent for a lengthy period due to his condition of stress and anxiety and the reduced pay would cause an exaggeration and increase of stress and anxiety;

203. In relation to PCP 1, the respondent accepts it applied the UPP to the claimant and that due to his stress and anxiety disability he was more likely to be absent/subjected to the UPP. In the respondent's submission, the claimant's amount of absence was by any possible standard, continuing and indefinite so that UPP was appropriate without any further adjustment as to the amount of absence.

204. . The claimant's submissions were that the respondent's failure to carry out all appropriate steps before implementing the UPP, made it unreasonable for them to take into account his stress absence

205. We have a found that the timing of starting the UPP process was within policy and was reasonable. Taking into account the case of Griffiths, we consider that an employer is not normally required to disregard lengthy periods of disability -related sickness absence and, on the facts here, conclude that this is not a case when additional allowance should have been made. The policy was operated after a lengthy period of absence and in the absence of any prognosis.

206. While we have accepted there were some failures by the respondent in the first

28 days of the claimant's absence, we have found that they did all they reasonably could to find out if the claimant was able to return to work and to create the circumstances in which he could. The claimant had a fed rep throughout. By the time they implemented the UPP the claimant had been absent for five months. We conclude that no further adjustment by waiting any longer or disregarding periods of this absence would have been reasonable. This would not have got the claimant back to work. This claim does not succeed.

207. In relation to PCP 2, which in written submissions on behalf the claimant was put as not changing the claimant line management before 30 April 2020. We have found that it would have been complex to change line management. Further, DS Hadleigh was not managing the claimant on a day-to-day basis from the day he went off sick, but only managing his sickness absence and, from February 2020 ,did not manage his sickness absence, as that was transferred to others.

208. . While the claimant had asked that DS Hadleigh not attend the meeting which took place on 3 September, we have found that he did not ask for her to be removed from his line management at any point. It was not suggested or recommended by occupational health who referred to an investigation or resolution.

209. We have found that the respondent did not have knowledge that the claimant satisfied the definition of disability until 4 September 2020. We have found that at this point the claimant was too unwell to return to work. We also found that the claimant did not at the relevant time suggest that removing DS Hadleigh as his line manager would help him return to work. We conclude therefore that removing DS Hadleigh as his line manager after 4 September is not a reasonable adjustment as it would have had no effect on the claimant returning to work.

210. PCP 3 relates to not continuing to pay the claimant after he moved to half pay. There was no dispute as to the case law on this point which provides that it is only in very rare cases where an adjustment to normal sick pay would be reasonable. We were referred to Meikle which identified a circumstance where the failure to make reasonable adjustments was in fact the reason why the individual could not return.

211. The claimant's submissions were that because "all" supportive action was not taken to support the claimant's return, this is one of the unusual cases where it would be reasonable to adjust to sick pay policy to pay the claimant beyond his contractual entitlement. It was the claimant's submission that it was these failures that meant the claimant continued to be off sick.

212. We have found that, while there were failures to take "all" supportive action within the first month, from 3 September onwards efforts were made to reach out to the claimant and to engage with him and he failed to do so. There is no evidence that had this occurred the claimant would have been able to return. We conclude that failure to take some supportive steps at the outset of the process are not sufficient to fall within the rare circumstances where an adjustment to pay sick pay would be reasonable. This claim does not succeed.

Harassment (s.26 EA)

213. The two acts relied on as incidents of harassment are

(a) The threat of disciplinary action and presentation of an ultimatum on 13th May 2019;

(b) DS Hadleigh telephoned the Claimant on 27th June 2019, was angry and shouted at the Claimant: stating that one day per week in the office was not enough and referring to the Claimant “swanning it at home”.

214. As referred to above, we have found that the first incident did not occur as the claimant describes it cannot therefore amount to harassment. We have accepted the claimant’s account of 27 June 2019 of the telephone call and have found it was unwanted treatment relating to his disability for his hip and that this did reasonably have the effect of violating his dignity or of creating an intimidating, degrading, humiliating or offensive environment for him. The claim is, however out of time and does not succeed for that reason.

215. As set out above all of the claims are dismissed.

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Employment Judge McLaren
Date: 21.07.22

JUDGMENT & REASONS SENT TO THE PARTIES ON
Date: 04.08.22

FOR THE TRIBUNAL OFFICE