EMPLOYMENT TRIBUNALS

Claimant **Respondent**

MS HAYLEY YOUNG v **COMMISSIONER OF POLICE OF THE METROPOLIS**

Heard at: Watford (BY CVP) **On**: 24,25, 26 27 October 2022 & 11 November 2022 (in chambers)

Before: Employment Judge Skehan

Members: Mr A Scott

Mr L Hoey

Appearances

For the Claimant: Mr Denman, Union Representative

For the Respondent: Mr Sendall, Counsel

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal contrary to Section 98 of the Employment Rights Act 1996 is not well founded and dismissed.
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2. The Claimant's claim for direct disability discrimination contrary to Section 13 of the Equality Act 2010 is unsuccessful and dismissed.

3. The Claimant's claim for a discrimination arising from a disability contrary to Section 15 of the Equality Act 2010 is unsuccessful and dismissed.

REASONS

1. The Claimant issued proceedings in this matter on 16 March 2020. The Claimant's claims included unfair dismissal and disability discrimination. Early conciliation was commenced and concluded on 17 February 2020. The claim was defended and the Respondent's form ET3 was submitted on 11 May 2020 and amended on 21 September 2021.

On the first morning of the hearing, we were informed by the parties that there was an agreed comprehensive list of issues and we discussed this agreed list with the parties. Following our initial reading, we revisited the list of issues and requested confirmation as to whether there was any claim under sections 20 and 21 of the Equality Act 2010 relating to 'reasonable adjustments' within the

litigation. We were told by Mr Denman that there was not and he reiterated that the list of issues was agreed to be comprehensive of all issues to be decided by the Tribunal. It had been agreed prior to the hearing that there was sufficient time to deal with liability only. It was common ground between the parties that there were no time issues for the tribunal to consider. The issues are:

Disability

a. At the material time (between February 2018 and the date of dismissal on 9 November 2019) was the claimant disabled within the definition of section 6 of the Equality Act 2010 (EQA 2010) by reason of the physical and mental impairment of fibromyalgia.

b. Did the respondent know or ought it to have known that the claimant was disabled?

c. From what date did the respondent have actual or constructive knowledge of the claimant's disability?

Direct discrimination (section 13 EQA 2010)

d. Did the respondent subject the claimant to the following treatment as the claimant alleges?

    i. The email sent by Supt Tony Josephs dated 30 April 2019

    ii. Dismissal

e. In respect of each act found to have occurred, did the respondent treat the claimant less favourably in respect of said acts than she did or would have treated a comparator in the same or similar circumstances? The claimant relies upon an actual comparator Hypolite Dyer and/or the hypothetical comparator.

f. If so was any of the less favourable treatment because of the claimant's disability?

Discrimination arising from disability (section 15 EQA 2010)

g. Did the respondent treat the claimant unfavorably:

    i. by Inspector Ch Inspt Baker sending an email dated 21 November 2019;

    ii. by dismissing her

h. Did the claimant's absences that led to her inadequate attendance at work constitute 'something arising' in consequence of the claimant's fibromyalgia.

i. If so was the unfavourable treatment because of something arising in consequence of the claimant's disability.

j. Can the respondent show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

Unfair dismissal

k. Was the claimant dismissed for a potentially fair reason within the meaning of section 98 of the Employment Rights Act 1996, namely capability?

l. If so, did the respondent act reasonably in treating the reason as a sufficient reason to dismiss the claimant in all the circumstances within the meaning of section 98(4) of the Employment Rights Act?

2. At the outset of the hearing, we noted the large volume of documentation provided by the parties. The tribunal bundle consisted of over 1700 pages and we were given in excess of 200 pages of witness evidence, with the claimant's witness statement stretching to 100 pages. The tribunal reminded the parties that only information relevant to the issues should be included. Mr Denman later sent an email to the tribunal requesting that identified sections amounting to approximately 20 pages of the claimant's witness statement be disregarded by the Employment Tribunal. The claimant was not asked questions on this part of her witness statement. On the third day of the hearing, the claimant requested that the entirety of her witness statement be included within her evidence. It was noted that as the claimant had already concluded her evidence, the request may derail the tribunal timetable and potentially have consequences however the tribunal considered that it was in accordance with the overriding objective to allow the claimant to include the entirety of her witness statement in evidence as requested. The claimant was re-called to complete her evidence on the final day of the hearing. In the event, the tribunal timetable was salvaged by the parties.

3. As is not unusual in these cases, the parties have referred in evidence to a wider range of issues than we deal with in our findings. Where we fail to deal with any issue raised by a party, or deal with it in the detail in which we heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance in determining the issues. We only set out our principal findings of fact. We make findings on the balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents. This is a unanimous decision of the employment tribunal.

4. All witnesses gave evidence under oath or affirmation. Their witness statements were adopted and accepted as evidence-in-chief. All witnesses were cross-examined. We heard from the claimant on her own behalf. On behalf of the respondent, we heard from:

    a. Ms Muir, who was the claimant's line manager until 18 July 2018;

    b. Inspector Thomas Bolton, who was the claimant's line manager from August 2018 until the claimant's dismissal on 19 November 2019 and was a Police Sergeant (PS) during the relevant time;

    c. Chief Inspector Marcel Baker, who was the claimant's second line manager from 2 July 2018 until the claimant's dismissal on 19 November 2019;

    d. Superintendent Anthony (Tony) Josephs.

    e. Superintendent Gary Warby, who chaired the panel where the claimant was dismissed on 19 November 2019;

    f. Commander Ade Adelekan who chaired the appeal panel that dismissed the claimant's appeal on 22 October 2020.

5. The Claimant was employed by the respondent as a communications officer dealing with emergency 999/101 calls from 13 February 2017. The

respondent's dealing with emergency calls of this nature is an essential service for the people of London.

6. The claimant's employment was terminated by the respondent with effect from 19 November 2019. The rationale provided for the claimant's dismissal by the panel who made the decision to dismiss was that the claimant's attendance level was unacceptable and they were not convinced that the claimant would sustain a satisfactory level of attendance. The panel reviewed 17 occurrences of sicknesses (100 days) that occurred over a 26 month period between February 2017 and April 2019. The panel accepted that the claimant's probation was extended beyond the recommendation 12 months but concluded that this has been in support of the claimant rather than causing her detriment. The panel concludes that there is insufficient evidence in mitigation to allow the claimant to remain within the respondent's employment.

7. We were referred to a list of the claimant's absences from work. While Mr Denman informed the tribunal that the list was agreed, the claimant disputed part related to 3 March 2017, marked as 'not formally recorded' within the schedule. Discounting that instance of 3 March 2017, the claimant had between June 2017 and April 2019, 17 separate absences covering a total of 163 days. The reasons for the absences were varied including digestive disorders, respiratory influenza, psychological disorders, genito-urinary, musculoskeletal including significant ankle sprain, foot leg injury, back injury, back and hip pain. The claimant had various different heath issues. The claimant was originally diagnosed with depression in the 90s and had suffered from IBS for approximately 30 years. Prior to mention of fibromyalgia by the claimant's GP in June 2019, the claimant did not believe she was a disabled person as defined within the Equality Act 2010.

8. The claimant fell on various occasions sustaining injury:

    a. The claimant fell during a break when walking outside in the Respondent's premises on 18 February 2018. The tribunal was provided with pictures taken at the time showing bleeding from the claimant's knee and ripped clothing caused by the fall. The claimant's injury sustained in this fall was recorded by Ms Muir as a grazed knee. Ms Muir said that this was the most appropriate option from a drop-down box within the reporting form. The claimant describes an awkward fall where she had not appreciated a considerable drop in ground-level. She describes deep cuts to her knee and had been shaken by the unexpected fall. She said that she thought she had received short-term injuries that they would diminish over time as the cut healed and bruising faded even though they caused considerable pain and discomfort. The claimant completed her shift following her fall. She did not attend her GP in the days following the fall and no period of sickness absence from work was taken following this fall. There is no medical evidence within the bundle relating to this time.

    b. On 3 March 2018 the claimant slipped on snow and fell on her bottom. There is an entry in the claimant's GP records of 6 March 2018 noting significant ankle sprain. On 13 March 2018 the claimant attended A&E. The claimant was signed off work by her GP.

    c. The claimant says that her ongoing symptoms and pain from the previous falls, with particular emphasis on the first fall of February

2018, led her to attend A&E and have her ankle x-rayed on 29 May 2018. The claimant denies that this visit to A&E was caused by a further fall on or about 29 May 2018. However, the A&E hospital notes record her as reporting that she had fallen "today" on 29 May 2018. If the claimant had not fallen, it is surprising that the hospital would report that she told them that she had fallen. Further there is an email in the bundle from Ms Marisa Howard of 18 June 2018 that records the claimant explaining the trigger for her symptoms for her period of absence from 24 May as a fall on the stairs that resulted in her being taken to A&E and being x-rayed. There is only one reference in the medical evidence (29 May 2019) to the claimant being x-rayed. We conclude on the balance of probability that the claimant had a third fall on or around 29 May 2018 that prompted her visit to A&E at that time.

d. On 9 February 2019 the claimant had a further fall at work. She tripped on one of the potholes in the car park. The accident report records that the claimant fell on her right knee and right wrist and strained her left leg.

9. There is very little medical evidence relating to fibromyalgia within the tribunal bundle. The claimant changed GPs in mid-2019 and her new GP first mentioned the possibility of fibromyalgia to her in June 2019. The claimant was suspended from work (from April 2019) at this time pending a recommendation for dismissal (RFD) hearing. The GP's letter of 4 July 2019 states that:

    a. …I am writing to you with regards to [the claimant] who recently registered with our practice and came to see me for the first time on 9 June 2019 and again on 28 June 2019. [The claimant] is suffering from multiple symptoms including feeling tired all the time, low mood, headaches and aching all over her body with pain and multiple joints including both hips, thighs, back and ankles.

    b. In particular, joint pain started after she fell off a wall in February 2018 and since the incident has had 13 separate illnesses causing absences from work which she believes is directly related to the fall. Prior to this she did not have joint pains and I understand she believes she has been unfairly dismissed by her employer due to her extensive sickness record……

    c. I can see she was diagnosed with depression in 1996 …… In addition she suffers from IBS but has no other significant past medical history.

    d. She has consulted several GPs at her previous surgery regarding joint pains, tiredness aching and feeling generally unwell as a result of the fall and injuries sustained in February 2018. She has been examined and thoroughly assessed each occasion and has been referred to our local musculoskeletal service with some physiotherapy.

    e. I believe that [the claimant's] symptoms, mainly that of depression, tired all the time, headaches and multiple joint pain and tenderness due to fibromyalgia……… this condition cannot be cured, however by making lifestyle modifications….. Symptoms may improve with time'.

10. The letter from the consultant radiologist Keng Ng from Spire Harpenden Hospital of 20 October 2021 follows an MRI of the claimant's ankle. The clinical indication includes the comment, '2 separate accidents/falls in 2018 and 2019 with ongoing symptoms affecting both ankles….'. There is no reference within this letter to fibromyalgia.

11. The claimant mentioned the possibility of fibromyalgia to her suspension support officer in late June 2019. The OH Report of 3 July 2019 sought to assist with the claimant's ability to attend the proposed RFD meeting at [pp1293-1296] notes that the claimant's doctor had informed her that her symptoms "could possibly be Fibromyalgia" and that "Ms Young informs me that she is due to see a specialist and is waiting for an appointment date so that she can get a definitive diagnosis and treatment plan." No such Specialist Report with a definitive diagnosis and treatment plan has been disclosed.

12. We note there is a reference to a diagnosis of fibromyalgia within the letter of 9 October 2020 from the NHS physiotherapist Mr Pollock that:

    a. , 'Ms Young presented today with a diagnosis of fibromyalgia as of June 2019'.

    b. 'This was then confirmed by our internal rheumatology team in August 2020.'

    c. 'Her symptoms appeared to present following a fall at work in February 2017. She reports widespread pain, low energy levels, unrefreshing sleep and problems with her emotional well-being'. No further background is provided.

    We assume the reference to a diagnosis of fibromyalgia in June 2019 refers to the original GP comment. There is nothing within the bundle referencing this confirmation of the diagnosis by the rheumatology team in August 2020 or any other time.

13. The claimant's disability impact statement refers to a rheumatologist consultant letter of 14 February 2020 and a rheumatologist consultant letter of 11 August 2020. Neither of these letters were disclosed or contained within the bundle. We assume that the latter is the reference referred to within the physiotherapist's letter mentioned above.

14. The claimant's disability impact statement records into alia:

    a. adverse effects on the claimant's ability to carry out her day-to-day activities commencing from February 2018 following a nasty fall in the workplace.

    b. constant pain, low mood, insomnia, IBS, difficulty driving due to restricted ankle use and hip movement , constant pain cramps and stiffness. Frequent headaches, disturbed sleeping patterns anxiety and increase to low mood. Cumulative burnout

    c. for a year, the claimant barely went shopping, household tasks would be straining and the claimant asked for assistance with household chores.

    d. the claimant was unable to hoover, had difficulty ironing, cooking and making her bed as she was unable to stand for more than a few minutes.

e. The claimant avoided social situations due to low mood exhaustion and difficulty travelling.

f. the claimant had reduced mobility

g. the claimant attended the pain clinic in October 2020

15. The claimant produced correspondence from the DWP dated 8 October 2019 indicating that she has been entitled to the daily living component of Personal Independence Payment (PIP) benefit from 8 July 2019, however the DWP letters included in the bundle do not refer to 'Fibromyalgia'. The letter of 8 July 2019 from the DWP also predates the claimant's formal diagnosis of Fibromyalgia by over a year (see above reference to August 2020). The claimant has not disclosed any further documentation that would have been generated during the PIP application process in 2019, such as the Healthcare Professional's assessment that would have detailed the DWP assessment of her medical conditions. The claimant has stated that she has received the mobility element of PIP from 21 January 2022. Again, the letter does not refer to fibromyalgia. The claimant's PIP mobility award, appears to be granted on the basis of the letter from Spire Harpenden Hospital of 20 October 2021 referenced above that relates to the MRI of the claimant's ankle, with no reference to Fibromyalgia.

16. We were referred to correspondence from the DWP dated 12 November 2020 where the claimant was granted Universal Credit/Employment Support Allowance and deemed to have, 'limited capability for work and for work-related activities'.

17. The claimant's contract dated 13 February 2017 include the probationary period clause:

    a. you will be on probation for a period of up to 12 months and confirmation of your appointment will depend on the satisfactory completion of the probationary period. If your work, attendance or conduct during the probationary period is not satisfactory, the appointment will be reviewed and may be terminated……..

18. We were referred to the 'probation: managers guide - police staff ' by the parties that sets out the respondent's internal procedures in respect of dealing with probation. This policy provides that formal probationary reports must be completed at 3,6 and 10 months and envisages a decision being made within the 12 month period. Included within the key principles of the probationary review policy is, 'you must monitor sickness absence and ensure this does not exceed the acceptable standard within the sickness absence management…'. The probationary period for a communication officer was normally not extended for more than six months giving a maximum probation of 18 months. In the claimant's circumstances her probationary period was extended to a total of 21 months prior to the respondent commencing its dismissal procedure. The respondent concedes that while the claimant was managed by Ms Muir there were errors and delays in dealing with the required steps within the probationary review process. The meetings conducted during the probationary period are referred to as 'PDR' or performance and development review meetings.

19. Ms Muir was the claimant's initial line manager. Ms Muir completed the claimant's 0-3 month probation report (13 February 2017 to 13 may 2017). This gives a grade of '3' reflecting a, 'generally meets the required standard,

some development areas'. No issue in relation to attendance is raised at this stage. Ms Muir accepts that there was no meeting with the claimant to discuss the probationary report.

20. Ms Muir completed the claimant's probationary review for the 4-6 month period (13 May 2017 to 13 August 2017). It can be seen that performance issues are highlighted. No performance issues are relied upon by the respondent in respect of the claimant's subsequent dismissal. In relation to attendance, the report notes, '[the claimant] had one period of sickness (June) and has been sent home once (July), she has also been late twice during this reporting period. [The claimant] needs to be aware that any further lateness or sickness absence during the probationary period could result in formal management action. This probationary report is graded '4', which equates to 'rarely meets the required standard, significant development required'. This grade predominantly reflects performance issues raised. Ms Muir did schedule a 4-6 month PDR meeting but this did not go ahead due to the claimant sickness absence and was not rearranged.

21. The 7 to 10 month (14 August 2017-13 December 2017) probationary report was completed by Ms Muir in December. A meeting to discuss this was due to be held on 30 December 2017 but for various reasons including sickness on the part of the claimant and Ms Muir, the meeting was delayed. This is the first probation report to record attendance issues alongside some performance issues. It states 'at the time of compiling this report [the claimant] has been sick on three separate occasions, had issues with lateness and failing to appear for work when scheduled. ……… Therefore it is my recommendation to extend the probation for up to 6 months, to allow me sufficient time to continue monitoring her progress and support her through a development plan to bring her up to the required standard. There was delay on Ms Muir's part and the PDR report was sent to the claimant on 2 March 2018 and the meeting took place on 30 March 2018. The claimant received a letter dated 30 March 2018 stating that her probation would be extended for six months until 12 August 2018.

22. The respondent received an occupational health input on 19 March 2018 recommending that the claimant had short regular postural breaks of a few minutes every hour and a referral for physiotherapy.

23. OH input was received 24 April 2018 stating the claimant was fit for full duties. The claimant left work for a doctor's appointment on 23 May 2018 and was thereafter signed off work for 45 days with musculoskeletal foot/leg injuries until 7 June 2018. It was during this period of absence that the claimant had her third fall on the stairs as referred to above. The claimant remained absent from work until 8 July 2018.

24. The respondent received further OH input on 18 June 2018, during the claimant's sickness absence and the period first the claimant experienced her third fall. OH reported that the claimant was unfit for work but her injuries should resolve with regular exercise and the claimant was advised to undertake micro breaks for 5 minutes every 30 minutes for up to 6 weeks.

25. The documentation within the bundle is difficult to follow. The review document said to cover 10 to 12 months (14 December 2017 to 13 February 2018) was not completed until 19 June 2018 by Ms Muir. This was not sent to the claimant nor was there a meeting to discuss it.

26. The probationary review document said to cover 12 to 15 months (14 February 2018 to 13 May 2018) within the bundle was completed by Ms Marisa Howard as a counter signing manager on 8 July 2018. Ms Howard's comments conclude with an acknowledged improvement in the claimant's performance but concern being raised in respect of her attendance levels. It states '…[The claimant] should be mindful that her attendance levels if they continue could cause her further escalation in the discipline process for probationers. It is more likely than not that the probation review document was not sent to the claimant and no meeting to discuss the review was arranged.

27. On 8 July 2018 the claimant returned to work after a 45 day absence. Ms Muir considered that her relationship had deteriorated with the claimant and requested that the claimant be reallocated a new line manager. This was facilitated by the respondent. PS Bolton was appointed as the claimant's line manager by 19 July 2018. Ch Inspt Baker was the claimant's second line manager.

28. On 18 July 2018 occupational health reported that the claimant was fit for recuperative duties and on 25 July 2018 the claimant commenced an agreed 'recoup plan'. This involved agreed shorter working hours, with no corresponding reduction in pay for a defined period of time.

29. The 15 to 18 month probationary review (14 May 2018 to 13 August 2018 form was part completed by Ms Muir on 6 August 2018. This review highlights ongoing performance issues and ongoing sickness level concerns. It states '[the claimant's] sickness levels far exceed MPS expectations and have done so since starting at Met CC. Even taking into account the fall and sickness periods….. Please note the reviews for this PDR will be completed by PS Bolton who is now [the claimant's] line manager.' PS Bolton's comment of 8 August 2018 is that, 'I have taken over as [the claimant's] line manager on July 19 but was an annual leave until August 4. Unfortunately [the claimant] was off sick from August 3. She returned to work on August 7 and we were able to have a brief meet and greet while doing the return to work interview on August 8. We have discussed the role and responsibilities going forward any expectations around sickness and are both hoping that the previous disappointments and setbacks can be put to the past……' This PDR was countersigned by Ch Inspt Baker on 23 August 2018 as the claimant's second line manager. Ch Inspt Baker notes that while performance was previously an issue, '… At this time it does not cause me concern'. However [the claimant's] attendance remains an issue, totalling five occasions within this extension with 79 days lost to sickness. I note that some of the sickness was due to an injury whilst within the workplace but even after taking this into consideration her attendance is a major cause of concern…….. I believe a further three month extension is required to allow [the claimant] to demonstrate her ability to maintain satisfactory attendance.'

30. We were referred to the notes of the PDR review meeting held with the claimant on 24 August 2018. The claimant had not seen the PDR review document as of this date. However, the notes from the meeting confirmed that the claimant's improvement in respect of her performance is acknowledged but her attendance remains an issue. Ch Inspt Baker reiterates to the claimant that the ongoing concerns related to her sickness absence only. It can be seen that there was some discussion in respect of the reasons for the claimant's recent sickness absence and it is noted that

there had been 8 periods of sickness equalling 86 days. The claimant comments that sickness relating to depression was due to, 'a build up on the team..' At this point, the claimant states that she 'feels supported'. There is reference elsewhere in the bundle to the respondent considering a six-month extension of probation reducing this to 3 months at the claimant's request. The claimant was informed in writing on 24 August 2018 that her probationary period would be extended for three months due to unsatisfactory attendance. The claimant was informed that if a further adverse report is received at the three-month stage being 12 November 2018 then a recommendation may be made for her dismissal based on failing to reach the required standard of attendance.

31. The claimant had considerable issues with timekeeping during her employment. For example the claimant is recorded as arriving late to work on 7 April 2018, 16 August 2018, 31 August 2018, 1 September 2018, 30 October 2018, 22 December 2018, 17 March 2019, 16 April 2019. These occasions were dealt with by way of 'shift slide' by the respondent. Shift slides were also provided to the claimant on preplanned occasions.

32. On 23 November 2018, PS Bolton completed a further probationary review report for the period 19 to 21 months (14 August 2018 to 30 November 2018). This review focused upon the claimant's attendance record. During this period the claimant had the following sickness absences:

    i. 10 – 13 September(4 days), doctor's note states depression and back pain

    ii. 20 September- 20 October (30 days), doctor's note states lower back and hip pain

    iii. 6 November – (1 day), sore throat & cough

    iv. 14 to 17 November (4 days) sore throat, cough.

33. In summary PS Bolton notes that the claimant's only objective was to improve her attendance record which has sadly not been achieved. PS Bolton's grade for the claimant's probationary review was a '5' indicating a failure to meet acceptable standards. Ch Inspt Baker, as the claimant second line manager records on 27 November 2018 that he has no hesitation in recommending the claimant for dismissal during the probationary period and states his rationale as, '…[the claimant's] unacceptable attendance and the impact this sickness has on her colleagues and the ability of us to provide a level of policing to support the people of London'. The claimant attended a meeting with Ch Inspt Baker and PS Bolton on 23 November 2018 to discuss the PDR. The claimant notes that she did not have a probation review document prior to the meeting. It was noted that the claimant's sole objective was to improve her attendance records which she considered achievable at the time. This did not happen. The claimant confirmed during her evidence that she was aware that her sole objective had been to improve her attendance record. Ch Inspt Baker confirmed to the claimant that there were three possible outcomes following their meeting. As he was unable to confirm the claimant within her role, he was not willing to extend the probationary period further. He described the next stage as a state of flux almost a continuation of probation while he passes the file to the PSU. Thereafter one of three options will happen, either confirmation of employment, extension of probation or dismissal.

There is a comment at the end of the minutes of the meeting stating, 'The meeting was followed by Sgt Bolton speaking to [the claimant] and advising her that these decisions are by no means final and the best chance if you wish to remain in employment is to show that she can do the job and complete a period of full attendance…….'. The attendance records show that the claimant was absent from work due to illnesses recorded as hip pain and musculoskeletal issues on 5 further occasions following this meeting prior to her suspension, with sick notes covering a total period of 28 days.

34. Ch Inspt Baker reiterated within his evidence that high levels of unpredictable absence impose significant burdens upon other staff who have to provide cover and upon the respondent which needs to provide a reliable and efficient service to the public. The critical importance of "bums on seats" was stressed by Chief Inspector Baker in his evidence.

35. There was confusion between parties in relation to correspondence in the bundle of 1 November 2018 stating that an occupational health report had not been disclosed to the respondent as the claimant had not consented to the same. On the balance of probabilities, we conclude that it is likely that this requested report was effectively 'rolled into' another report completed at this time. There was no non-compliance or obstruction on the part of the claimant.

36. It can be seen from the documentation that the respondent had an internal verification process which means that once the claimant's line managers decided to recommend dismissal, the papers were passed to HR Case Management and then on to the Misconduct and Hearings Unit for verification. At that stage an analysis of the procedures to date was undertaken before verification is provided that the case can be referred to a panel for a hearing. During this process, the defects in the PDR process were acknowledged and reviewed. The respondent considered that the case was suitable for a hearing. The defects in the PDR process were also open to challenge and consideration as part of the RFD hearing mentioned below.

37. We were referred to documentation indicating that the claimant had been informed of the possibility of applying to alter her working hours with a view to improving her attendance. It was common ground that the claimant did not make an application for flexible working. The claimant told us that she did not think she would be granted flexible working as she did not have a disability and the process would involve a long wait. The claimant also comments within her witness statement as to the undesirability of reducing her hours with the subsequent reduction in pay.

38. On 25 April 2019 the claimant was suspended from work pending determination of the RFD meeting for unsuccessful completion of her probation. The claimant remained suspended until the termination of her employment.

39. The claimant was informed on 17 May 2019 that on 27 November 2018 Inspector Baker made a recommendation for the claimant's dismissal on the basis she had failed to meet the standards required by the Metropolitan police service during her probationary periods. In accordance with the respondent's policy the matter was dealt with by a panel. The recommendation for dismissal meeting (RFD meeting) was scheduled for 27 June 2019. The claimant did not attend the RFD meeting as scheduled.

When contacted by Ch Inspt Baker she said that she was sick citing an IBS flareup. The RFD meeting was rescheduled and eventually took place on 19 November 2019.

40. The claimant first told the respondent of her doctor's opinion in respect of fibromyalgia in June 2019. The claimant passed this information initially to her suspension support officer and also to PS Bolton. When the claimant failed to attend the original meeting scheduled for 27 June 2019, the respondent sought an occupational health report to assess the claimant's fitness to attend a rescheduled meeting. This OH report makes reference to fibromyalgia as set out above and concludes that the claimant is fit to attend the hearing.

41. The RFD panel was chaired by Supt Warby on 19 November 2019. The notes of this meeting are within the bundle. The claimant was accompanied by Mr Denman. During the course of the meeting the panel is provided with oral submissions from both PS Bolton and Ch Inspt Baker. There is no substantive dispute in respect of the claimant's absences. The panel requested that PS Bolton and Ch Inspt Baker forward their written reports from which they read to the panel for ease of reference. These were forwarded as requested to the panel. They were not copied to the claimant. Supt Warby said that in the event, the written reports were not read by the panel. The findings of the panel set out in paragraph 6 above.

42. The claimant complains that she was not allowed to speak during the hearing. She acknowledges that the meeting notes reflect opportunities for the claimant and her representative to make submissions and a request as to whether they have anything further to add. The claimant complains that she was disadvantaged by not receiving a copy of the written reports of Ch Inspt Baker and PS Bolton.

43. The claimant lodged an appeal against dismissal on 2 December 2019. The appeal meeting was initially arranged for 26 February 2020 but was adjourned because the claimant failed to attend. The reconvened hearing for 5 May 2020 was cancelled due to the Covid 19 lockdown. At that point all hearings and appeals were postponed until further notice. The hearing was reconvened for 18 August 2020. The claimant attended the hearing and it was subsequently adjourned for OH input in respect of fibromyalgia and resumed on 22 October 2020.

44. The email referred to below from Supt Joseph dated 30 April 2019 was referred to relating to consistency of treatment for staff. It was also submitted that the claimant's absence from work would not have been as high as it was in the absence of falls at work. Flaws within the probationary review process were also highlighted. The panel wished to seek occupational health input relating to weather any reasonable adjustments obligations arose from the claimant's fibromyalgia references.

45. The subsequent occupational health report was produced without reference to the claimant, as she was no longer an employee of the respondent. The report provides general information in respect of fibromyalgia noting every person is different and reasonable adjustments would vary depending on the job the individual carried out and the severity of their condition. Potential reasonable adjustments are listed. The report states that fibromyalgia is unlikely to completely exclude an individual from carrying out role within the respondent. The symptoms experienced by the claimant acknowledged and

the report states that the claimant' s past sickness absences 'could well be linked to [fibromyalgia]' the report acknowledges the claimant's belief that fibromyalgia is caused by her workplace fall in February 2018 but also notes additional falls.

46. The claimant's appeal was reconvened on 22 October 2020. During this meeting the previous adjustments made by the respondent were discussed. These included micro breaks and an eight-week recuperative hours plan in July 2018. The panel accepted that the claimant had fallen at work however was no medical evidence that linked all of her absences directly to those falls at work. Panel noted that there was no formal diagnosis of fibromyalgia. It was noted that a direct referral for fibromyalgia had not taken place as that information that came to light following the claimant's suspension. Further the adjustments that had been made mirrored those mentioned within the OH report. The panel concluded that even taking into account the adjustments that have been made for the claimant, her attendance still fell well outside the MPS attendance policy allowing up to a 25% leeway as a potential reasonable adjustment for absences that may be linked to a disability. The claimant's appeal was unsuccessful and confirmed in writing on 9 November 2020.

47. For the sake of completeness we note that repeated references were made by the claimant to complaints relating to various individuals within the respondent including Ms Muir, PS Bolton and Ch Inspt Baker. The claimant complains that her credibility was unreasonably questioned and there is documentation showing that the respondent questions the reasons provided for some of the claimant's absence from work. However, none of the individuals complained of made the decision to terminate the claimant's employment. That decision was made by a panel chaired by Supt Warby. There is no evidence that would lead this tribunal to question or suspect that the decision to dismiss the claimant made by the panel was made for any reason other than that stated being the claimant's attendance record.

48. The email sent by Supt Tony Josephs dated 30 April 2019 relates to the probation extension appeal of CO Hypolite-Dyer. This employee had appealed the proposed extension of their probationary period. The email confirms that Supt Josephs decides to dismiss the extension of probation on the basis that there were procedural errors and the first stage adverse warning and the employee is informed that he has successfully passed his probation and is confirmed in his role as communications officer.

49. Ch Inspt Baker sent an email dated 21 November 2019 following the claimant's dismissal to the claimant's former team. This concludes that he made a recommendation for dismissal of the claimant and that the RFDH panel members made the decision to dismiss the claimant with immediate effect. The email is stated to be for the purpose of preventing any misinformation. Baker Ch Inspt Baker says he will not be providing any further information and wished the claimant the best for the future. The email concludes by stating:, 'NB….. I will take this opportunity to remind you all about the impact that sickness and lateness has on our colleagues and the ability of was to provide a level of policing and support to the people of London. Therefore attendance management will continue to be a priority of mine while we continuously strive to improve our service delivery'. Ch Inspt Baker told the tribunal that the reason for this email was because the claimant's colleagues have been discussing the claimant's dismissal. He

was aware of false information relating to the same circulating amongst the claimant's colleagues such as she had been dismissed because she had a fall at work. He says that the email was factually correct and his comment relating to sickness and lateness was a fair reflection of the position.

50. For the sake of completeness, we note it is common ground that the respondent was aware from June 2019 of the GPs reference to fibromyalgia and that this potentially could be a disability as defined within the Equality Act.

The Law,

51. Section 98(1)(b) and (2) of the Employment Rights Act 1996 (ERA) sets out the potentially fair reasons for dismissing an employee. One such reason is where the dismissal 'relates to the capability or qualifications of the employee for performing work of the kind which he was employed… to do' — S.98(2)(a). Capability is defined in S.98(3)(a) ERA as 'capability assessed by reference to skill, aptitude, health or any other physical or mental quality'. Once an employer has shown a potentially fair reason for dismissal, the tribunal must go on to decide whether the dismissal for that reason was fair or unfair. This involves deciding whether the employer acted reasonably or unreasonably in dismissing for the reason given in accordance with S.98(4) of the Employment Rights Act 1996 (ERA). That provision states that 'the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —

- (a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b)shall be determined in accordance with equity and the substantial merits of the case'.

52. As S.98(4) makes clear, it is not enough that the employer has a reason that is capable of justifying dismissal. The tribunal must be satisfied that, in all the circumstances, the employer was actually justified in dismissing for that reason. In this regard, there is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one for the tribunal to decide. The well known Burchell test from *British Home Stores Ltd v Burchell [1978] IRLR 379* applies and the tribunal must decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted.

53. We note the alternative potentially fair reason of "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held". This is usually shortened to "some other substantial reason" or SOSR (section 98(1)(b). *In Screene v Seatwave Ltd UKEAT/0020/11* it was confirmed that a tribunal may find the statutory reason for dismissal is different to that put forward by the employer and still find that the dismissal was fair. In that case it was noted that the decision to dismiss, was grounded on exactly the same set of facts regardless of the label used.

<u>Disability</u>

54. The definition of disability can be found in section 6(1), Equality Act 2010:

"A person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on her

ability to carry out normal day-to-day activities". "Substantial" means "more than minor or trivial".

Direct Discrimination.

55. Section 13 EQA provides the statutory basis for the direct discrimination claim. This provides that where an employer, because of the protected characteristic of disability, treats the claimant less favourably than it treated or would treat others. When looking at a relevant comparator section 23 EQA provides that there must be no material difference between the circumstances of each case. The principle was expressed in the well known case of *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285* as follows:

    "...the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class."

    Only those characteristics which the employer has taken into account in deciding to treat the claimant in a particular way, with the exception of the alleged discriminatory characteristic, are relevant

56. As regards the burden proof, it is for the Claimant to initially prove facts which could establish that an act of discrimination occurred. It is only once this has been satisfied that the burden shifts to the employer. Once the burden has passed to the Respondent, it is on them to show that a contravention did not occur (s.136 EQA 2010).

Discrimination arising from disability

57. In these circumstances, Section 15 EQA, provides that an employer discriminates against a disabled person if the employer treats the employee unfavourably because of something arising in consequence of their disability, and the employer cannot show that the treatment is a proportionate means of achieving a legitimate aim. If the employer can establish that it was unaware — and could not reasonably have been expected to know — that the claimant was disabled, it cannot be held liable for discrimination arising from disability.

Deliberations and Findings

Disability

At the material time (between February 2018 and the date for dismissal on 9 November 2019) was the claimant's disabled within the definition of section 6 of the equality act 2010 (EQA 2010) by reason of the physical and mental impairment of fibromyalgia?

58. The claimant's impact statement described adverse effects on the claimant's ability to carry out her day-to-day activities starting from February 2018, however it is difficult to identify any particular time frame when the claimant was impacted from her evidence. The claimant's symptoms are increasing as time goes on. It can be seen from the DWP award of PIP with effect from 8 July 2019 that the symptoms she experienced from at least 8 July 2019 (arising from whatever condition) were having a substantial detrimental effect on her ability to carry out her day-to-day activities.

59. The claimant has pleaded her case by reference to fibromyalgia only. We have carefully considered whether we can attribute the adverse effects experienced by the claimant from July 2019 to fibromyalgia. The first reference to fibromyalgia is the GP's letter of 4 July 2019 as set out above. However we have carefully considered the weight that we can place upon this letter. There are obvious errors within this letter such as reference to a fall from 'a wall'. It is possible that the GP did not have an accurate picture of the claimant's initial fall at work. The GP attributes his reference to fibromyalgia to falls experienced by the claimant at work without reference to other falls experienced by the claimant. We have found that the claimant's evidence in relation to the falls that she has experienced is unreliable. The claimant has a tendency to downplay or omit references to falls she has experienced outside work. The end result is a likelihood that the GP has not been provided with a comprehensive history of relevant events that could have given rise to musculoskeletal issues. The contemporaneous evidence of subsequent falls including the need for the trip to A&E and x-ray suggest that these are significant events that may well have given rise to some symptoms. There is a real risk that any belief of 'fibromyalgia' by the GP in July 2019 has been influenced by an absence of potential alternative reasons for the claimant's musculoskeletal pain such as subsequent accidents/falls. Fibromyalgia is by its nature, a difficult condition to identify. For these reasons we place considerably reduced weight upon this GP letter. There is no other medical evidence supporting the existence of fibromyalgia until the reference to the diagnosis in August 2020. Taking the entirety of the evidence into account we conclude that while the claimant has shown she had considerable symptoms during the material time we consider that it is more likely than not that these arose from conditions other than fibromyalgia which she had not mentioned in her original claim. The claimant has not shown on the balance of probability that the difficulties that she experienced with her day-to-day activities as of June/July 2019 were attributable to fibromyalgia.

60. This claimant's unreliable approach to the history of her falls is also apparent within the letter from Spire Harpenden Hospital of 20 October 2021 [1540] that records the claimant , 'fell on two separate occasions in 2018 and 2019 with ongoing bilateral ankle symptoms.

61. We conclude that the claimant's ability to carry out her day-to-day activities deteriorated further following July 2019 by reference to the DWP award of 12 November 2020 where the claimant was granted Universal Credit/Employment Support Allowance and deemed to have, 'limited capability for work and for work-related activities'. While we note that we do not have a copy of any formal diagnosis of fibromyalgia, we have seen cross references to the fibromyalgia diagnosis provided by the rheumatology department in August 2020. We consider that it is more likely than not that the claimant received a diagnosis of fibromyalgia in August 2020. Due to the length of time following the various falls experienced by the claimant as set out above and the claimant's ongoing symptoms, we consider this diagnosis to carry more weight. We conclude, by reference to both the DWP awards indicating a likely substantial adverse effect on the claimant's ability to carry out her day-to-day activities and the claimant's diagnosis, that the claimant was a disabled person by reason of fibromyalgia with effect from August 2020. The material time identified ends on 9 November 2019. We conclude

that the claimant was not a disabled person by reference to fibromyalgia during the material time.

62. We also address the claimant's submission in respect of the cause of her fibromyalgia. The claimant also places significant emphasis on her first fall of February 2018 and alleges that this is the trigger for her subsequent development of fibromyalgia. While it is common ground between the parties that a fall potentially may trigger the onset of fibromyalgia, it is one of a host of potential causes and there is no medical evidence produced by the claimant providing any indication as to the cause of the claimant's fibromyalgia. Further, even if the claimant's fibromyalgia was triggered by a fall, as the claimant has experienced multiple falls and produced no reliable evidence commenting on potential triggers, we conclude that the claimant has not shown on the balance of probability that her fibromyalgia was triggered by her fall at work in February 2018 as alleged or indeed any other identifiable event.

63. We have considered whether any of the various absences that led to the claimant's dismissal, can be attributed to fibromyalgia. All of these absences predate the claimant's first mention of potential fibromyalgia. Further, potential causes other than fibromyalgia for the various absences can be found within the documentation, for example the claimant has been diagnosed with IBS and depression, she experienced repeated falls including identifiable ankle injuries that warranted x-ray in May 2018. We do not have reliable evidence to link any of the claimant 17 absences for work to any underlying health condition or in particular fibromyalgia either at the time of her dismissal or subsequently.

64. The claimant was not a disabled person and her claims for direct disability discrimination contrary to section 13 of the Equality Act 2010 and discrimination arising from disability contrary to section 15 of the Equality Act 2010 must fail.

65. We note that even if the claimant had shown that she had a disability by reference to fibromyalgia as of July 2019, the claimant's claims under section 13 and section 15 of the Equality Act are entirely linked to her absences from work. These absences occurred prior to the claimant's suspension and prior to any mention or suspicion of fibromyalgia from the claimant's part. The claimant has provided insufficient evidence to link these previous absences to her fibromyalgia for the reasons set out above. Therefore, these claims appear destined to fail in any event.

66. The claim relating to the email of 30 April 2019 is difficult to understand. This does not relate to treatment of the claimant but treatment received by another disabled employee. The factual background of both scenarios are different and we consider that this allegation is not capable of constituting direct discrimination. We have considered this email within the unfair dismissal claim by reference to an argument relating to consistency of treatment.

Unfair dismissal

Was the claimant dismissed for a potentially fair reason within the meaning of section 98 of the employment rights act 1996, namely capability?

67. There was no suggestion during the hearing that the reason for the claimant's dismissal by the panel led by Supt Warby was anything other than

that stated by the panel. Supt Warby's evidence was uncontested on this point. The claimant was dismissed because her attendance level was unacceptable and the panel was not convinced that the claimant would sustain a satisfactory level of attendance. The panel reviewed 17 occurrences of sicknesses (100 days) that occurred over a 26 month period between February 2017 and April 2019. We conclude that the respondent has dismissed the claimant a potentially fair reason under section 98(2)(a), namely capability to perform the work she was required to do.

68. We note that it is possible that the circumstances may be classed as a 'some other substantial reason' dismissal, however we heard no submissions in relation to this point. We consider that should the dismissal be properly considered as a 'some other substantial reason' scenario, this would effectively be a relabelling exercise and our findings below would apply equally.

If so, did the respondent act reasonably in treating the reason as a sufficient reason to dismiss the claimant in all the circumstances within the meaning of section 98(4) of the employment rights act?

69. The claimant raises elements of procedural unfairness in respect of the dismissal:
    a. It is the case that the initial steps taken by the respondent to manage the claimant's probationary period were mishandled by Ms Muir. However the respondent acknowledged this to be the case within its internal procedure. The procedure relied upon by the respondent prior to this dismissal effectively commences when line management for the claimant was taken over by PS Bolton and Ch Inspt Baker. While this is a flaw, we do not consider sufficient either on its own or viewed cumulatively with other matters to render this dismissal unfair. We note that the consequence of this initial failing within the respondent's internal processes resulted in the claimant been provided with additional time to address her attendance record.
    b. The claimant commenced employment in February 2017. The claimant argues that she should have been confirmed in her post due to the passage of time by August 2018. The claimant makes reference in particular to the scenario of her colleague Ms CO Hypolite-Dyer. While this was raised as an issue within the disability claimant appears to be an argument in respect of lack of consistency and unfairness. We do not consider that argument persuasive. CO Hypolite-Dyer appealed the extension of her probationary period, whereas the claimant made no such appeal. We do not know the circumstances of Hypolite-Dyer's case. In the claimant's case, the procedural errors within the process are identified, the claimant' s probationary was extended for a further period and the claimant was clearly informed about the problem with her attendance record and provided with an opportunity to address her attendance record. The extension of the claimant's probationary period arguably provided with her with further opportunity to improve her attendance record.
    c. We do not consider that the claimant was materially disadvantaged by not receiving an advance copy of PS Bolton and Ch Inspt Baker's oral submissions during the dismissal hearing. The documents were prepared by both PS Bolton and Ch Inspt Baker as a script and it was not intended by either individual that they be submitted to the panel. The claimant heard the submissions made by PS Bolton and Ch Inspt

Baker at the dismissal hearing. While these documents were sent to the panel post hearing, we accept Supt Warby's evidence that they were not in any event read by the panel. We do not believe that the respondent's handling of this matter gives rise to any material procedural unfairness sufficient either in isolation a combination with other matters to render the dismissal unfair.

d. We conclude on the balance of probability that the claimant was allowed a reasonable opportunity to answer questions and make submissions during the dismissal panel hearing. It is expressly recorded within the minutes that the claimant was provided with an opportunity to add any other matters she considered relevant.

70. We note when examining the procedural background that there was no dispute between the parties in respect of the claimant's absence record. The period questioned by the claimant during the course of her evidence relating to March 2017 did not form part of the 17 absences taken into account by the panel.
71. The claimant had been warned expressly as of August 2018 and was fully aware that her attendance record was considered inadequate by the respondent and could result in the termination of her employment. The claimant's probationary period was extended for the sole reason to allow her the opportunity to address her attendance record.
72. We conclude that substantial support was provided to the claimant during the course of her employment by way of use of occupational health services and adjustments such as micro breaks and a recoup plan. The claimant was informed of the possibility of applying for flexible working but no such application was made by the claimant.
73. The respondent conducted a further probationary review in November 2018 where it was concluded that the claimant's absence record was unacceptable and it was recommended that the claimant's case be put forward for consideration of dismissal. This was not a decision in respect of the termination of the claimant's employment and PS Bolton expressly noted to the claimant that even at that stage, an improvement within the claimant's attendance record would be relevant. The respondent took the additional internal step of passing the claimant's case to the respondent's internal unit to assess whether or not it was considered appropriate to convene a recommendation for dismissal hearing. Neither PS Bolton nor Ch Inspt Baker were involved within this process. This process was concluded and the claimant was suspended. It is noted that the claimant's attendance did not improve following the meeting in November and the claimant was absent on five more occasions prior to her suspension.
74. An independent panel was convened to consider the claimant's circumstances. The decision to dismiss was made by this independent panel who had no previous dealings with the claimant. This panel acted reasonably in reconvening their meeting following non-attendance by the claimant.
75. The claimant was accompanied at the meeting. We conclude on the balance of probability and particularly by reference to the respondent's notes of the meeting, that the claimant and her representative had a reasonable opportunity to put forward her submissions at this meeting.
76. The claimant was afforded the opportunity to appeal and did so. We heard no submissions as to any complaint in respect of the procedure followed by the respondent during the appeal process.
77. We note that when examining the timeline in this case there is considerable delay. Neither side made submissions in respect of the delay with the

respondent's procedure and we can see that the delay is caused by a variety of reasons. The claimant failed to attend both the dismissal and appeal hearing as originally organised requiring these meetings to be rescheduled. The respondent sought occupational health input in respect of both the claimant's ability to attend a meeting prior to the dismissal meeting and prior to the appeal, on issues relating to fibromyalgia. Further, the process extended beyond March 2020 and encountered the Covid 19 related to delays. We do not consider that delay raised any material procedural unfairness in this matter.

78. We now turn to the substantive question of fairness. It is common ground that the claimant at the time of dismissal the Claimant had been unable to work due to sickness for a total period of 163 days equating to 100 working days. The claimant's individual absences were not connected to her fibromyalgia or any underlying health condition linking the various reasons. This is a scenario of intermittent absences due to a multitude of ailments. It can be seen from the narrative above that the respondent had provided considerable support to the claimant by way of repeated referrals to occupational health, incorporating various adjustments such as micro breaks. Highlighting the possibility of applying for flexible working. It is the case that the claimant's level of absence was considerably above that which the respondent considered satisfactory, even when incorporating a 25% increase leeway due to the possibility of disability. As the claimant presented with intermittent periods of illness, this is not a case where medical evidence may have assisted with a reasonable prognosis or projection of the possibility of what will happen in the future. We note that even in the case the claimant could show a link with fibromyalgia, while this would provide a label for the various illnesses, there is no evidence to suggest that it provided any form of treatment avenue or prospect of improving the claimant's overall health and subsequent attendance record. It can be seen from the evidence that the claimant's health continued to deteriorate following her suspension and further still following her dismissal by reference to a worsening symptoms and the DWP awards.

79. Alongside the circumstances of the claimant, we consider the respondent's position as the police force for London and the provider of emergency service response facilities. The claimant was employed as a 999/101 operator. The respondent has an obligation to provide a reliable emergency response service to the London area. To do so, it needs to ensure that it has sufficient staffing level and high levels of sickness absence made it difficult for the respondent to provide that required service. This is a scenario where the tribunal considers that a reasonable employer is entitled to say 'enough is enough'. The claimant had been warned that her level of absence was unacceptable and that level of absence have not improved. We conclude that the decision to terminate the claimant's employment in the circumstances falls within the band of reasonable responses of a reasonable employer.

80. We also note that the passage of time has shown that the claimant's condition has substantially worsened. In the event we are wrong in respect of the fairness of this dismissal, we note that the claimant's deteriorating health would have been likely to lead to further absences from work. We note in particular the DWP awards are set out above. In the circumstances we conclude that had the claimant not been dismissed, it is more likely than not that her employment would have terminated shortly afterwards due to unsatisfactory absence in any event.

81. For the reasons set out above we conclude that the claimant's claim for unfair dismissal is not well-founded and is dismissed.

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Employment Judge Skehan

Date: 5 December 2022

Sent to the parties on: 20 December 22

For the Tribunal Office