EMPLOYMENT TRIBUNALS

Claimant: **Mrs Jugdeep Mahal (Nee Buttar)**

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

Heard at: **East London Hearing Centre**

On: **18, 19, 20, 21 & 25 January 2022**

Before: **Employment Judge John Crosfill**
Members: **Ms A Berry**
Ms J Houzer

Representation

Claimant: Ms R Owusu-Agyei of Counsel

Respondent: Mr T Kempster of Counsel

JUDGMENT

1. **The Claimant's claims brought under Sections 15 and 39 of the Equality Act 2010 are dismissed.**

2. **The Claimant's claims that there was a failure to make reasonable adjustments contrary to Sections 20, 21 and 39 of the Equality Act 2010 by:**

   2.1. delaying in providing her with a parking permit; and

   2.2. Delaying in providing her with a personalised ergonomic chair; and

   2.3. Failing to put in place a system giving practical effect to the recommendation that she take microbreaks each hour succeed. All further claims under those sections are dismissed.

3. **The Claimant's claim that she was unlawfully victimised contrary to Section 27 and 39 of the Equality Act 2010 by serving her with a notice of investigation succeeds. All other claims under the same sections are dismissed.**

4. **The Claimant's claim that she suffered an unlawful deduction from wages contrary to Sections 13 and 23 of the Employment Rights Act 1996 when**

she was not paid premium payments for hours not worked whilst on recuperative duties is not well founded and is dismissed.

REASONS

Introduction

1. The Claimant started work for the Metropolitan Police Service on 1 January 2003. By the time of the events giving rise to this claim the Claimant was working as a Communications Supervisor based at the Bow Police Station.

2. Within these proceedings it has been established that the Claimant is disabled for the purposes of Section 6 of the Equality Act 2010. At the material times the Claimant had the following impairments that amounted to disabilities:

   2.1. Endometriosis, and

   2.2. Osteoarthritis; and

   2.3. Hypertension; and

   2.4. Stress and anxiety.

3. The Claimant contacted ACAS for the purposes of Early Conciliation on 12 November 2018 and received an Early Conciliation Certificate on 7 December 2018. She presented Claim No 3200032/2019 (her first claim) to the tribunal on 8 January 2019.

4. In her first claim the Claimant has brought claims pursuant to Section 15 of the Equality Act 2010, claims that there has been a failure to make reasonable adjustments. Details of the complaints are set out below but they include a failure to give the Claimant a parking permit, allowing time off and providing an orthopaedic chair. The Claimant has also brought a claim for unlawful deduction from wages that concerns a refusal by the Respondents to make 'premium payments' to her.

5. The Claimant contacted ACAS again on 25 February 2019. She was provided with an Early Conciliation Certificate on the same day. On 27 February 2019 the Claimant presented Case No: 3200466/2019 (her second claim).

6. In her second claim the Claimant sets out that she had brought a grievance on 11 August 2018 and presented her first claim. She says that these were protected acts for the purposes of Section 27 of the Equality Act 2010. She goes on to say that she has been subjected to a number of detriments. These are dealt with in full below but include being questioned about her status when accompanying a colleague at a meeting, being served with a Notice of Investigation ('NOI'), a delay in completing an investigation into her grievance, an interaction with Ronnie Jones that she says was bullying and a failure to allow her to shadow Ronnie Jones which she says was a career progression opportunity.

The Hearing/Procedural Matters

7. On 26 March 2019 EJ Gilbert wrote to the parties stating that she was considering making an order that the first and second claims be heard together. EJ Gilbert made case management orders on 16 May 2019 including orders requiring the Claimant to give further information about any disability. She made orders through to a final hearing that was set for 5 days to commence on 24 March 2020.

8. On 22 May 2019 there was a preliminary hearing before REJ Taylor. At that hearing REJ Taylor made orders for an agreed list of issues and directed that the question of whether the Claimant had a disability, and if so what, was dealt with at an open preliminary hearing as a preliminary issue. She made directions for the resolution of that issue.

9. The further preliminary hearing took place before EJ Hallen on 25 October 2019. In a reserved decision sent to the parties on 16 December 2019 he found that the impairments we have identified in our introduction above satisfied the test set out in Section 6 of the Equality Act 2010.

10. The delay in receiving EH Hallen's judgment required the timetable for directions to be reset. EJ Masserella refused to postpone the final hearing but revised the timetable by a letter sent to the parties on 31 December 2019.

11. By 17 January 2020 the parties had agreed a list of issues. That list of issues was included in the agreed bundle of documents at pages 130H-M. The final hearing was postponed as a consequence of the Covid 19 pandemic and what has become known as the 'first lock down'. The matter was relisted before us for a 5 day final hearing. In the interim the Claimant has presented additional claims. We were made aware of them but they have had no bearing on this case.

12. The parties had agreed a bundle of documents in three lever arch files numbered to 1079 but including many more pages that that number would indicate. The Tribunal restricted its reading to documents referred to by the parties in their witness statements, questions of the witnesses and in closing submissions.

13. The parties had complied with the orders of the Tribunal to exchange witness statements and we were provided with a cast list and chronology (although that had not been agreed).

14. At the outset of the hearing we discussed a timetable which would provide a fair allocation of time for each party and permit the hearing to be completed within the allocated hearing dates. We also discussed the list of issues and made some minor refinements and clarifications. We were asked to admit additional documents consisting of 3 e-mail chains. We deferred making any decision as to whether we should have regard to them until we understood their potential relevance. In the event they had no bearing on any of the decisions we have reached.

15. We discussed adjustments for the parties to accommodate their various needs. There was some concern that Inspector Inglis might be unwell and unable to

attend but during the hearing that resolved itself. The Claimant asked that she be allowed to wear a mask to protect herself from Covid and she was permitted to do so. She did not wear the mask when she gave evidence.

16. We read the witness statements and the documents we were referred to before starting to hear evidence. We heard from:

16.1. The Claimant who gave evidence on her own behalf on the second day of the hearing; and

16.2. Patrick Halliday, a Communications Supervisor, who the Claimant accompanied to an attendance management meeting on 28 November 2018 which was conducted by Inspector Fyfe. He was able to comment on what occurred at that meeting.

16.3. On day 3 of the hearing we heard from Ronnie Jones a Band D Communications Supervisor and occasional Acting Duty Officer. He worked alongside the Claimant and had occasional management responsibilities when an Acting Duty Officer.

16.4. We then heard from Liza Wingrove; she is a Deputy Duty Officer based at Bow. She had worked with the Claimant for some time. She had some responsibilities in respect of payroll and was able to comment on the issue of 'premium payments'; then,

16.5. Inspector Douglas Fyfe who was the Duty Officer responsible for supervising Team 1 at Bow. He was the person the Claimant criticised for questioning her status during a meeting on 28 November 2018 and for failing to provide her notes of that meeting.

16.6. Inspector Stuart Elliot who had been the Bow Centre Manager. He was the person the Claimant criticised for refusing her a parking permit and not assisting her finding an appropriate chair to accommodate her arthritis.

16.7. Inspector Andrew Inglis who was the Duty Officer responsible for supervision and running 'Team 5' at the Bow Contact Centre. He gave evidence about his dealings with the Claimant about the car parking permit. He was also the person who issued the Claimant with a NOI.

16.8. We then heard from Daniel Pickett an HR Reward Manager. His evidence dealt with the entitlement to premium payments.

16.9. On the 5th day of the hearing we heard from Anthony Josephs he managed the 'People and Operations' portfolios. His evidence concerned his involvement in the Claimant's request for disability leave on 18 August 2018 and his involvement in her application for a parking permit.

16.10. We finally heard from Gordon Ifill; he is contracted to work as an External Case Assessor a role which is essentially to take an independent view of more serious grievances. His evidence concerned his involvement with the Claimant's first grievance and his decision to pause that investigation because of the issuing of the NOI.

17. At the outset of the hearing on 21 January 2022 Ms Owusu-Agyei made an application to amend the ET1 in case Number 3200466/2019. The proposed amendments sought to introduce two additional protected acts. The first of these related to the contents of an e-mail that the Claimant had sent to DS Jeff Cook in February 2017. In that e-mail the Claimant refers to accusations of racism by a Duty Officer Jo Wood. The second protected act was said to be contained in an e-mail from the Claimant to Gordon Ifill on 2 December 2018. In that e-mail the Claimant suggested that the service of the NOI was an act of victimisation.

18. In the course of the hearing Mr Kempster applied to amend the Respondent's ET3 to allow it to rely on a defence of justification in respect of the Claimant's S15 claim that she was not paid premium payments and her claim that she was not allowed to work overtime whilst on recuperative duties.

19. We allowed both applications and gave oral reasons at the time. We had the following legal principles firmly in mind. The leading case giving guidance upon whether to permit an amendment is ***Selkent Bus Co v Moore*** **[1996] ICR 836** in which the EAT said at 843F-844C:

"(4). Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

20. In ***Vaughan v Modality Partnership*** **UKEAT/0147/20/BA** HHJ Tayler reminded tribunals that the emphasis of the balancing exercise would always take into account the practical effect of allowing any amendment.

21. Mr Kempster, very properly, accepted that the addition of the two additional protected acts would not mean that the Respondent suffered any practical prejudice. That concession was properly made. The relevant documents were already included in the trial bundle and the reasons for any treatment already set out in depth in the parties witness statements. Mr Kempster made the point that the amendment application was made at the 11th hour. That was correct but it did not necessitate any postponement or additional evidence.

22. The issue of whether the service of the Notice of Investigation was because of the February 2017 e-mail was a very obvious point. It is a case that on its face had some merit and dealing with the case without considering that point would have been artificial. We decided that the balance of hardship favoured allowing the amendments.

23. Ms Owusu-Agyei resisted the Respondent's application to rely on defences of justification. She too complained of the late change of position. Allowing these amendments did not mean permitting the Respondent to rely on additional evidence. No postponement was necessary. The points raised were obvious. Again we decided that the balance of hardship favoured granting the amendment.

Our general findings of fact

24. In this section we make findings of fact based on the evidence presented to us. There was considerable common ground between the parties. Only where there was controversy have we set out the competing positions and given our reasons for the conclusions we have reached.

25. We have not thought it necessary to deal with all the evidence we have heard. We have had regard to the entirety of the evidence when reaching the conclusions below but have set out only those matters that we considered important to our decisions and we have restricted our findings to those matters strictly necessary to deal with the matters set out in the list of issues. We found that the Claimant's witness statement contained a great deal of material that was not strictly related to her claim. She makes suggestions of discriminatory treatment that go beyond the claims that she has made. For example there are passages in her witness statement that refer to what could only be understood as direct discrimination because of disability. We have had regard to the whole of her statement in assessing the claims that have actually been brought. However, we derived more assistance from the Claimant's statement when she focussed on the facts directly necessary to establish her claims.

26. Not all of our findings of fact are contained in this section. In our discussions and conclusions below we make further findings of fact in particular about the reasons for the Claimant's treatment and as to what was, or was not, a reasonable adjustment. There may be additional findings of fact or clarifications within that section. We hope it is clear when we make such additional findings.

The work at Bow, the Claimant's role and management

27. The Metropolitan Police Service have three 'Contact Centers' (referred to as MetCC) at Lambeth, Hendon and Bow. The purpose of these Contact Centres is to be responsible for receiving emergency and non-emergency calls from members of the public and to manage the dispatch of police officers to deal with any incidents.

28. The MetCC team at Bow included 16 Communications Supervisors who were responsible for overseeing the work of Communications Officers. That was the role undertaken by the Claimant.

29. The work was divided into two. Telephone calls were initially dealt with on the 'First Contact floor' where calls were triaged and then might be passed to the 'Dispatch floor'. The Claimant was trained and was able to work on either or the two floors.

30. On each of the 'floors' at any time there would be an Acting Duty Officer who was essentially a shift manager. The role of Acting Duty Officer might be fulfilled by an authorised Communications Supervisor (such as Ronnie Jones) or by a Deputy Duty Officer (such as Liza Wingrove). Whilst the Acting Duty Officers had responsibility for managing the shift all of the Communications Managers (at the material time) reported to an Inspector. Until 7 May 2019 the Claimant reported to Inspector Andrew Inglis. After that she reported to Inspector Douglas Fyfe.

The Claimant's health and what was known about it

31. The Tribunal has read the reserved decision of EJ Hallen sent to the parties on 16 December 2019. The findings of fact that have been made by EJ Hallen are binding upon us. In providing the summary below we do not intend to depart from those findings of fact.

32. The Claimant had been diagnosed with endometriosis in late 2016 or early 2017 having suffered with symptoms for several years before that. In 2016 she was diagnosed with hypertension and placed on medication to control this.

33. The Claimant blames the shift patterns that she worked for causing or accelerating these conditions. It is unnecessary for us to make any finding in that respect. In any event we had no medical evidence that directly assisted with this point.

34. Sadly between 2015 and 2017 the Claimant had three miscarriages. Again she suggests that hew working conditions were responsible for this. That is not a matter we need to resolve. On 29 November 2017 the Claimant was referred for an Occupational health assessment. The report that was produced was very brief. It stated (with emphasis added):

'In terms of her prognosis, her underlying medical conditions are long term and chronic conditions. The rate of deterioration cannot be predicted. She may have further flare ups of these conditions, the frequency and severity of which cannot be predicted at this stage'.

35. In response to a proforma question asking whether the Claimant met the definition of disability included in Section 6 of the Equality Act 2010 the OH Clinician said that the Claimant would not meet that definition. No explanation for that conclusion is given. The Claimant was said to be fit for her normal duties save that a recommendation was made that she avoid working for two twelve hour shifts in a row. Further advice was given in the event that the Claimant should become pregnant. It appears that the underlying conditions referred to in that report are endometriosis and hypertension. We find that this report was sent to Mags Mead who at that time was the Claimant's line manager.

36. On 3 July 2018 the Claimant sent an e-mail to Inspector Stuart Elliot. Inspector Stuart Elliot was the Bow Centre Manager. He had a wide ranging remit which included administering the system of parking permits. In a form 728 'Request for a Parking Permit' the Claimant said this:

'I have been having shooting pains in [sic] Neck/Hands often leading to back for a while now. I have now been diagnosed with arthritis in this area however still query for further diagnosis. I have been referred to Physiotherapy in the first instant [sic] for treatment, however may need to have injections and possibly an operation to help relieve the pain. I also have further tests and scans coming up. Aside from my other medical conditions which fall under the Equality Act 2010, this is leaving me with immense pain at times. Travelling too and from work on bus and train is becoming problematic, it is also recommended that I should not be lifting/carrying heavy items to minimise pain. The permit would assist me in managing my current appointments with physio alongside other health conditions as well as minimise the stress and pain this is causing me.

……..Happy to discuss in person further if needs be….

*****Please treat this request as confidential and not to be discussed with other parties/staff****'*

Car parking at Bow and the first refusal of a permit

37. The Respondent's premises at Bow has limited parking space. There are only 22 spaces which is insufficient space for everybody who wants to park. Parking in nearby streets is a possibility but requires a resident's permit for many spaces. The Respondent had published a policy that related to parking at Bow. That policy provided that:

'Eligibility for parking permits

Permits will only be considered for the following:

- *Disabled badge holders*
- *Circumstances such as Occupational health, Compelling personal circumstances or Short Term Welfare Support will require up to date supporting evidence*
- *Motorcycle users*

Applications for permits

Applications should be made through Centre Management on a form 728 and endorsed by the line manager'

38. On 3 July 2018, the same day she had applied for a permanent parking pass, the Claimant asked Inspector Inglis for the 'team daily pass' for 12 July 2018 and later the same day asked for the pass for 6 other dates in July and August 2018. The team daily pass was in essence a floating parking permit that was available for unforeseen circumstances and issued by the Duty Officer.

39. In her covering e-mail to her form 728 the Claimant confirmed that she had spoken to Inspector Inglis, her Line Manager, and that he had told her to apply for a permit.

40. On 4 July 2018 Inspector Stuart Elliot responded to the Claimant. When he did so he copied in Steve Arnold who was an elected representative of the PCS Union. The Claimant had been for some years an elected representative of the PCS Union and remained a member. At the time she had an outstanding complaint about Steve Arnold which was being dealt with internally by the Trade Union.

41. In his response Inspector Stuart Elliot refused the Claimant's request. He said that the request did not meet the eligibility criteria that we have set out above. He went on to say:

'Travelling on public transport can cause as many pains as driving, plus with the present shift pattern most travel should be outside the crowded rush hour.

There is no requirement for you to lift heavy items , so this should not be an issue for travel to work.'

42. The Claimant responded by e-mail the same day. She stated that she was aware of the relevant criteria having sat on car parking reviews when a PCS representative. She reiterated that she was a disabled person for the purposes of the Equality Act 2010. She informed Inspector Stuart Elliot about her grievance

against Steve Arnold. She asked whether her form 728 had been shared with him. She asked for details of how she might appeal the decision.

43. Inspector Stuart Elliot responded on 5 July 2018. He said that the Claimant's application had not provided the required evidence. He said: *'if you apparently have ongoing OH issues plus the current problem, I am surprised you did not apply [in April when all permits were renewed]'.* He then explained that he had been unaware of the Claimant's grievance against Steve Arnold and had copied him in in the interests of transparency. He went on to say: *'If you would like to apply in the correct manor [sic], with evidence from your GP and OH of recent problems then it will be considered on the same basis as every other member of staff'.* He finally said *'You repeatedly quote that your condition comes under the equality act for disability, however this does not automatically entitle you to a pass and you will find other members of staff at Bow who have medical issues who do not have a pass'.* Inspector Elliot copied Steve Arnold in to this response. We see no reason why he did so given what the Claimant had told him. He did not answer the Claimant's question in terms about whether he had shared the medical information she had included in her form 728.

44. The Claimant responded by e-mail in the evening of 5 July 2018. She stated again that she did not want Steve Arnold to be copied in to her e-mails. She said that he *'does not represent my ethnicity, gender and background and I do not recognise him as a PCS representative for me'*. She asked whether the suggestion that she obtain information from her GP and from OH was the route to appealing the original decision and said that she had some forthcoming appointments.

45. Inspector Stuart Elliot responded by e-mail on 6 July 2018. He said that there could not be an appeal as the Claimant had not applied 'correctly' in the first place. He said that he would ordinarily discuss any application supported by evidence with a PCS Representative and a Police Federation Representative. He offered to dispense with sitting with a Police Federation representative if the Claimant consented. He then went on to imply that the Claimant had mentioned her race and ethnicity in an attempt to influence his decision. The Claimant had made no such insinuation and we find that the criticism was wholly unwarranted. All she had said was that she did not consider that Steve Arnold spoke for her.

46. On 20 July 2018 the Claimant had a telephone appointment with an Occupational Health Advisor. The resulting report records the Claimant as having a diagnosis of Arthritis affecting her neck shoulders and back with pain radiating to her arms. The OH Advisor stated that in her opinion the Claimant would meet the definition of disability in the Equality Act 2010. She made recommendations that the Claimant be placed on recuperative duties by working shifts of 8 hours instead of the usual 12 hour shift pattern. She further recommended that the Claimant be given short breaks of 5 minutes each hour in order to enable her to do exercises recommended by her physiotherapist. In response to a question about what reasonable adjustments might be made for the Claimant there was a response that the Claimant had been referred for a *'Posturite workstation assessment due to her arthritic pains'*.

47. In advance of that appointment on 15 July 2018 the Claimant had sent an e-mail to Ronnie Jones and Liza Wingrove telling them that, in the absence of Inspector Andrew Inglis on leave, they might receive notifications on the Respondent's HR

system '*of a sensitive nature'*. She asked that neither of her managers read those notifications stating that she had only permitted her line manager to see them. She said that she would send her applications for premium payments to Ronnie Jones and Liza Wingrove '*as normal'*. Ronnie Jones responded saying that he had no access to any HR notifications and was not able to authorise any premium payments. The reason for this is that the responsibility for dealing with HR matters in the absence of Inspector Andrew Inglis had been delegated to Liza Wingrove.

48. When the Claimant received that report she asked a Duty Officer on another team Shabir Alli to assist her with setting up an appropriate roster. She explained the unusual approach as being because her line manager was *'on annual'*. That was a reference to Inspector Andrew Inglis.

49. Both the Claimant and Liza Wingrove (who would ordinarily have been one of the persons that the Claimant might have approached to implement this roster) devote passages in their witness statement setting out details of the difficulties in their relationship. Liza Wingrove says that the Claimant took against her from the outset of their working relationship. The Claimant says that Liza Wingrove behaved badly towards her because she was using the team parking pass. We accept that the relationship between these two individuals had been poor for some time. The Claimant has included a number of matters in her witness statement which, if true, might have been brought as claims of direct discrimination because of disability. She has not brought any such claims.

50. It is clear from the e-mail correspondence we have seen that, having had her request for a parking permit denied, the Claimant began informally policing the use of the car park. She was given the Team Parking Permit when she asked to use the car park. In July, Liza Wingrove was tasked with providing and seeking the return of this permit. The Claimant, on two occasions, sent reports that some people were using the car park without a permit. She was sent an appropriate response to her e-mail of 24 July 2018 thanking her for the information, saying that some users had reasons for not displaying a permit and saying that reminders to display permits would be sent to others.

51. On 24 July 2018 the Claimant had come to work and completed 4 hours of overtime on what would otherwise have been a day off work. Liza Wingrove asked her if she had parked using the team parking pass which the Claimant had. This was not a date that the Claimant had been allowed to use the team parking pass. Liza Wingrove downloaded CCTV to show that the Claimant had, in her view, misused the team parking pass but she did not take any action in respect of this.

52. The poor working relationship between the Claimant and Liza Wingrove is evidenced by the fact that Liza Wingrove kept a log of her interactions with the Claimant. That shows a high level of suspicion of the Claimant and her motives. In turn the Claimant unjustifiably suggests that this is a log of her 'criminal activities'. We find that there was a great deal of mistrust between these two employees. It is not necessary for us to go any further than that in order to resolve the issues we need to decide.

<u>The 'overtime ban'</u>

53. On 25 July 2018 Ronnie Jones became aware that the Claimant had booked a shift of overtime. He sent her an e-mail that said:

> *'You are currently on recoup for 10 weeks, please can you refrain from booking overtime until they are complete. This is for your welfare at this time. Whilst I am not privy to what is happening and respect your right to privacy. I do however have a duty of care to you, to try and support you at this time and therefore request you do not put any additional pressure on yourself by completing overtime shifts.'*

54. The Claimant has categorised this e-mail as being an 'overtime ban'. We find that the reasons expressed in this e-mail were the reasons for the treatment. These were that Ronnie Jones knew that the Claimant was working reduced hours for her welfare and he believed that working additional shifts was inconsistent with that welfare decision.

The issue of premium payments

55. The Respondent publishes a policy which sets out the employees eligibility for pay which was referred to as the MPS Pay Policy. That policy is published on the MPS Intranet. The MPS Pay Policy is explained in a Pay and Allowances Manual. Section 18 of the version of the Pay and Allowances Manual then in force was headed '*Premium Pay for Attendance at weekends and bank holidays'*. Certain roles had been exempted from premium pay but it was common ground that the Claimant had retained this benefit despite a new scheme having been introduced for new employees. Where an eligible employee worked on a weekend or public holiday they would be entitled to a premium payment equal to 50% of the *'plain time rate'* if they worked a Saturday and 100% of the 'plain time rate' if they worked on a Sunday or bank holiday (an apparent reference to a public holiday).
56. The manual provides that payment can be claimed *'in certain circumstances'* for an employee rostered to work on a weekend or bank holiday even if they do not work the shift. The manual includes a list of circumstances where an employee would be entitled to the premium payment despite having not worked. These are:

    - *'Annual leave*
    - *Special Constable duties*
    - *Jury Service*
    - *Maternity Leave/Maternity Support Leave/Adoption Support Leave*
    - *Suspension on full pay*
    - *Pregnancy related sickness absence*
    - *MPS training courses'*

57. Daniel Pickett told us, and we accept, that in early 2018 he had met with Steve Arnold of the PCS Union who had made proposals to change the existing policy to provide that premium payments could be claimed where shifts were rostered but not worked due to an employee being placed on recuperative duties. No changes were made until 25 September 2019 when a revised policy was introduced. That policy was more generous in that it permitted Premium payments to be claimed in those circumstances limited to 60 days in any year. Employees were entitled to backdate any claims to 1 April 2019.

58. The Respondent also maintains a policy in respect of payment whilst on recuperative duties. That policy is found in the HR Knowledge Manual under a

tidal Ltd Duties: What you need to Know - Police Staff. The manual explains that the purpose of recuperative duties is to give the employee a short term temporary work program following an injury, accident illness or medical incident. Recuperative duties would be offered following an assessment by OH. The duties will be offered for a fixed term only exceeding 6 months in exceptional circumstances. The policy provides the following in respect of remuneration during any such period (emphasis added).

'Whilst on recuperative duties, an individual will continue to earn <u>their normal salary</u>. Unless expressly advised otherwise by OH, an individual should not work overtime as it could delay the return to full duties. No loss of earning will be paid e.g. from potential overtime that could have been worked. In the case of an individual not being able to return to full duties in the timescale provided there will be the option of [a] flexible working arrangement in which the individual will be paid for the hours they work.'

59. The Claimant had submitted applications for payment for (1) the overtime that she had worked and (2) for premium payments. The Claimant had worked on a number of weekends but had worked 8 of the 12 rostered hours as she had been permitted to do in accordance with the advice of the OH advisor. Liza Wingrove received those claims on 30 July 2018. Liza Wingrove tells us, and we accept, that she then discussed the claim with Ronnie Jones and with a member of the HR team. Having done so she sent the Claimant an e-mail asking her to revise her claims. She stated that:

    59.1. The Claimant could not claim for overtime on 21 and 22 July 2018 as she had been on rostered on reduced hours on those days; and

    59.2. That she could only claim premium payments for the time actually worked on weekends and not for the full hours she would have been rostered to do had she not been on reduced duties.

60. The Claimant responded by e-mail on the same day. She disputed Liza Wingrove's interpretation of the pay policy and stated that she had assisted a PCS member make a similar claim before an Employment Tribunal. She asked for details of the HR representative that Liza Wingrove had spoken to.

61. In her witness statement the Claimant says that she believed that *'Liza had incorrectly and maliciously interpreted the policy'*. She went on to say *'I felt that Liza and Ronnie were working in a team in collaboration to criminalise me and do all they can to upset me'.* This, and other hyperbole, that fills the Claimant's statement underlines how poor the working relationships had become. However, we find that the reasons that Liza Wingrove rejected the Claimant's claims for pay were that she did not believe that they fell within the policy. She may not have had a good working relationship with the Claimant but that was not a reason for the treatment.

62. The Claimant continued to take the stance that she is entitled to both of these payments. She raised this with Carl Docherty and with Daniel Pickett. When she brought a grievance this was one of the matters that she raised. We return to her legal entitlement to do so below as well as analysing whether the refusal amounted to unlawful discrimination.

<u>The refusal of disability related leave</u>

63. On 30 July 2018 the Claimant sent Ronnie Jones an e-mail in which she asked for time off to attend a medical appointment on 18 August 2018 with time thereafter as *'disability leave'*. The medical appointment was for physiotherapy to assist the Claimant with her arthritis. The Claimant did not say that in her e-mail.

64. Ronnie Jones sent a prompt response to the Claimant's e-mail. He said that he was not aware of the Claimant having any disability and that he did not wish to invade the Claimant's privacy by asking her about any medical issues. He said as he did not have sufficient knowledge to deal with the request he could not authorise the leave. He suggested that the Claimant either direct her request to a more senior officer, Carl Docherty, or that she await the return of Inspector Andrew Inglis on 8 August 2018. He suggested that this provided sufficient time for the request to be properly considered before the time off was needed.

65. The Claimant has suggested that Ronnie Jones was being disingenuous and that he did know that she had disabilities. That assertion is based on conversations she says that she had with him about earlier periods of absence and in particular a conversation about her miscarriages. It is sufficient for us to say that we find that Ronnie Jones had no knowledge whatsoever about the Claimant's diagnosis of Arthritis. We find that he had some knowledge that the Claimant had previously had time off work due to ill health.

66. The Claimant responded to Ronnie Jones' e-mail on 31 July 2018. She informed him that the purpose of the leave was to attend *'a physio appointment as part of rehabilitation'*. She quoted from the Respondent's policy on Disability Related Leave. That expressly referred to time off being available for physiotherapy appointments connected with rehabilitation. The Claimant copied her e-mail in to Tony Josephs who was the Superintendent in charge of Operations. In her e-mail she complained of the failure to pay her premium payments, the 'overtime ban' and the failure to grant disability leave. She sought a meeting with Tony Josephs to discuss these matters.

67. Having seen the Claimant's e-mail Ronnie Jones decided that, whilst he would have preferred more information, he had sufficient information that he could authorise the leave. He says, and we accept, that this was a decision he took for himself. He asked the Claimant to 'pop up' to see him within minutes of receiving her e-mail. He then sent an e-mail to an administrator asking that the Claimant be given leave in the terms that the Claimant had requested. The Claimant was copied in to that e-mail. Later in the same day the Claimant spoke to Carl Docherty. He also sent an e-mail to the administration granting the Claimant's request.

68. The administrator dealing with Ronnie Jones' e-mail of 31 July 2018 suggested that the request should not have been authorised as the Claimant could have used her reduced hours to accommodate any medical appointments. Ronnie Jones responded by asking the admin team to sort this out saying *'I am not putting myself in any position for further allegations'*. We find that that was a response to the fact that the Claimant had made three complaints about decisions that he had taken over the previous days.

69. Ronnie Jones included in his witness statement an account of a difficult working relationship with the Claimant that predated the allegations in this claim. It is sufficient for us to find that Ronnie Jones genuinely believed that the Claimant

had inappropriately questioned whether two of her colleagues had behaved in a homophobic manner towards him. He had questioned those two colleagues himself and believed that the Claimant had made baseless allegations. We find that from that point he regarded the Claimant as a divisive individual and he was suspicious of her motives.

70. The Claimant was permitted to attend her medical appointment on 18 August 2018 within working hours with no loss of pay.

The Claimant's grievance

71. On 11 August 2018 the Claimant submitted a grievance. Within her grievance the Claimant complained of a number of matters. She suggested that she had been the victim of victimisation, bullying, harassment and discrimination on the grounds of race, gender. She suggested that he treatment was associated with the fact that she had been a PCS representative. She named a number of members of the senior leadership team. The only area of overlap between the Claimant's grievance and the claims that we are dealing with was a complaint that Stuart Elliot had denied her a car parking permit and breached confidence in the process.

The adapted chair

72. By 20 August 2018 the Posturite assessment had still not taken place. The Claimant sent Inspector Stuart Elliot an e-mail where she said:

'*I am currently on re-coup and have disabilities; I am often sitting on broken chairs which is contributing to my pain and not aiding my rehabilitation under physio.*

I am currently waiting for access to work to complete an assessment at work however in the meantime please advise as centre manager; should I carry on sitting on broken chairs with disabilities and current health problems? Is there something that can be done in the interim?'

73. Inspector Stuart Elliot responded on the same day. He said that some standard chairs were on order. He suggested that the Claimant spoke to her duty officer in the short term to find a suitable, unbroken chair. He also suggested that the Claimant spoke to Adam Miles at the CMT office who had a comprehensive list of the OH chairs and said that that might help in the short term. The Claimant told us, and it is our common experience, that when a special chair was provided following a recommendation from the OH advisor it was usually tailored for the individual and would be usually marked as being for their own use. Such a system means that the special chair could be adjusted once to accommodate the needs of the user and be available for their use when working.

74. The Claimant accepts that Adam Miles did assist her in finding a chair but as this was not specifically allocated to her it was used by others. She says that there were occasions when this meant that she had to use an ordinary chair many of which were broken. We accept the Claimant's evidence about this. It was common ground that there was a 'chair graveyard'. On 10 August 2018 Inspector Stuart Elliot circulated an e-mail saying that 50 new chairs were on order. He referred to having received e-mails about the 'lack of chairs'. This is consistent with the Claimant's account.

75. On 21 August 2018 Tracey Watts sent an e-mail on behalf of the centre manager. She referred to confusion over who was responsible for providing OH recommended equipment which had caused delays. She asked that recommendations were passed to her so that she could order any chairs. She referred to chairs both for general use and others for personal use. She said that there were a number of OH chairs which might be made available at short notice. That e-mail is consistent with the assistance given to the Claimant by Adam Miles. We find that he supplied the Claimant with a chair that might have been adjusted to suit her condition but was considered for 'general use'.

76. The Claimant raised her concerns again on 30 August 2018 in a further e-mail to Inspector Stuart Elliot. She gave much the same information as she had done previously. She went on to sat that she had received supporting documents from her Doctors and wanted to discuss the issue of a parking permit. She asked that neither the PCS or Police federation representatives have sight of her request. Inspector Stuart Elliot sent an e-mail to all staff on 30 August 2018 in which he referred to the situation with a lack of chairs and to the 'chair graveyard' on the operational floor. Inspector Stuart Elliot responded directly to the Claimant on the following day. He told the Claimant that there were 10 spare chairs on each floor and that the onus was on the Claimant to find a chair that was not broken. He told her that it was her responsibility to take any broken chairs out of service. He went on to say that unless an OH chair had a name on it was for general use. He said *'It is a misconception that all OH chairs are personal issue'*.

77. Inspector Stuart Elliot forwarded his e-mail to the Claimant to Tracey *Watts 'in case the Claimant spoke to her'*. Tracey Watts responded suggesting that applications for parking permits might be made anonymously. Inspector Stuart Elliot suggested that that might be possible if the trade union representatives agreed.

78. The Claimant had a workstation assessment on 24 September 2018. The report that was produced recommended a specialist ergonomic chair with a footrest. The Claimant attended a further OH Assessment on 29 November 2018. The report provided recommended both that the Claimant was provided with a parking permit and that the chair that had been recommended was chased up. The Claimant chased this again on 8 December 2018. A chair was finally provided on 8 April 2019. The Claimant was provided with signage designating the chair for her personal use.

79. When the issue of why it had taken over 6 months to supply the chair that had been recommended was explored in the evidence the explanation was that it was not unusual for procurement requests to take that length of time.

<u>The parking permit re-visited</u>

80. In early October 2018 the Claimant spoke to Inspector Andrew Inglis about the issue of the parking permit. She says that he told her that Inspector Elliot was being difficult. We do not need to make any findings about that matter. The Claimant submitted an application to Inspector Andrew Inglis on 14 February 2018. She attached the form 728 and a letter from her GP in support of her application. That letter, whilst supporting the application, did not list the conditions that the Claimant had. The Claimant again requested that details of her application and conditions were kept confidential. Inspector Andrew Inglis

forwarded the Claimant's request to Inspector Stuart Elliot . Whilst his e-mail did not say whether he did or did not support the application the fact that he forwarded it indicated at least some measure of support.

81. The Claimant's application was acknowledged by Tracey Watts. Her e-mail to the Claimant indicated that any documentation would be treated confidentially. On 23 October 2018 the Claimant spoke to Tracey Watts. She was told that her application would be considered by Inspector Stuart Elliot together with a PCS and Federation representative. After the conversation she sent an e-mail saying that she had not and did not give her permission for any information about her health to be shared.

82. Later on 23 October 2018 Inspector Stuart Elliot sent an e-mail to the Claimant. He told her that her application would be considered by himself together with either Steve Arnold or his deputy Dan Charnley and a Police Federation representative Phil Brewster. He said '*the choice of panel is mine and not yours and the fact that you do not approve of certain individuals gives you no right to demand representatives from a list of your own making'.* He went on to give the Claimant the following ultimatum; *'If you do not want your application reviewed then please withdraw it'.* He then accused the Claimant of making *'veiled threats'* and referred back to the Claimant's earlier references to sex and race. He then repeated his position: *'Your application will be dealt with in the exact same way as every other application, however if you do not want that I suggest you withdraw it'*. We find that the tone of that e-mail was entirely unnecessary. There had been no threats by the Claimant and the criticism of her was entirely unjustified. We return to the content in our discussions and conclusions below but it is sufficient to say that Inspector Stuart Elliot appears to have little understanding about the duty to make adjustments for disabled employees.

83. The Claimant was upset about the content and tone of Inspector Stuart Elliot's e-mail and complained to Chief Inspector Andy Dunn and Anthony Josephs . In her e-mail sent on 23 October 2018 she complained that the process imposed by Inspector Stuart Elliot would mean she had to share confidential information with union representatives. She did refer to the organisation, by reference to her own perception, as institutionally racist and sexist. She stated that she would not withdraw her application. Later in the same day Inspector Stuart Elliot sent an e-mail to Anthony Josephs saying : *'I am not sure why this member of staff has felt the need to e-mail you, as I have been in constant contact with her regarding her parking application. Happy to chat as there is more to this than can be explained on this e-mail'*. We infer that the reluctance to put the *'more to this'* in writing was because Inspector Stuart Elliot did not want there to be a record of what he had to say. The Claimant then asked that her concerns about her treatment be added to her grievance.

84. On 1 November 2018 Inspector Stuart Elliot refused the Claimant's application. He gave his reasons as being the fact that the Claimant, and her GP had not disclosed the nature of the condition she had. He said that there was no evidence from the MPS OH service about the need for an adjustment. He made the statement *'Lastly, if you have a condition that comes under the equalities [sic] act it could prove to be eligible for a Blue Badge, which would automatically provide you with a car park pass'.* He closed his e-mail by saying *'We look forward to you*

getting back to us with the relevant information so that we can properly assess your application'.

85. The Claimant did make further requests to use the team pass and it would appear that requests were authorised by Inspector Andrew Inglis on 3 November 2018.

86. The Claimant sent an e-mail to Anthony Josephs on 2 November 2018. She asked about an appeal process. She said that she had not wanted to disclose her medical conditions to Inspector Stuart Elliot because he had cc'd various people into her initial e-mails. She stated in that e-mail that since her first application had been *'correctly rejected'* she had done everything she had been asked to do. Somewhat robustly she cc's her own trade union representative into the e-mail saying *'Pav – as discussed I am not going to put up with bullying and discrimination at the hands of a group of men that cannot even follow their own process and blatantly lie in their replies to me'.* Whilst we would accept that the Claimant had some legitimate complaints the tone of her correspondence was unlikely to assist in finding a resolution. On 5 November 2018 Inspector Stuart Elliot sent an e-mail to Anthony Josephs again expressing his disappointment that the Claimant had seen fit to complain. He suggested that there had been no refusal to grant a pass but *'we do need some idea of these conditions before we can grant one'.*

87. Steven Arnold joined in the e-mail conversation at that stage. He too suggested that there had been a lack of any supporting evidence for the Claimant's application. He suggested that there was not at that stage a formal appeal process but said one might be implemented in the future. Anthony Josephs then invited Amanda Wixon the Head of Support and PSU Champion and asked her to deal with any appeal if the Claimant asked for one.

88. On 8 November 2018 Amanda Wixon contacted the Claimant saying that she had been asked to review the issue of the parking permit. She noted that Inspector Stuart Elliot has said that he had insufficient information to make a decision and asked the Claimant for a copy of her application and supporting evidence. The Claimant sent an e-mail in response including her application. She stated that she was happy to discuss directly, in person, any clarification on her GP's letter. She asked that Inspector Stuart Elliot not have any further dealings with the matter as she had expanded her grievance to refer to his handling of the application. In a later e-mail Amanda Wixon said *'I need to understand from yourself your medical condition/needs so I can ascertain if a car park permit can be issued. I understand that these details are personal to you, if you are willing to discuss the effects of your symptoms that would help. Have you been given OH support or is that not relevant to your case?'.*

89. On 29 November 2018 the Claimant had a further consultation with an OH advisor. The trigger appears to have been the fact that the Claimant had an absence from work due to work related stress. Amongst the recommendations made in that report were recommendations that the Claimant be considered for a temporary parking pass whilst she adapted to new medication and that she be allowed to take microbreaks from her duties.

90. The Claimant was asked to attend a meeting with Amanda Wixon on 18 December 2018. During that meeting the Claimant felt able to discuss the effects of endometriosis and showed Amanda Wixon her 'dignity kit' that she carried.

She says, and we accept that the meeting was very brief and that Amanda Wixon granted the Claimant's request for a car parking permit during the meeting. She says, and we accept, that Amenda Wixon said words to the effect that Inspector Stuart Elliot could have dealt with the application in the same way as she did.

The grievance and notice of Investigation

91. As we have set out above the Claimant had brought a grievance against various members of the Senior Leadership Team. The scope of that grievance had been expanded to include her complaints about Inspector Stuart Elliot. The person appointed to deal with that grievance was Gordon Ifil. Gordon Ifil is not employed by the MPS but is remunerated for his services as a contractor. His title is that of an 'External Case Assessor'. That role was established in order to allow for independent specialists to be engaged to review the more serious grievances such as complaints of discrimination, bullying or harassment.

92. Gordon Ifil told us, and we accept that is a lawyer, formerly with a trade union, with expert knowledge of UK Employment law and policy. He has extensive experience in handling complicated grievances for MPS Police Officers and staff.

93. The Claimant met with Gordon Ifil on 6 September 2018 and again on 1 November 2018 to discuss her grievance. He then prepared a draft report but did not at that stage share it with the Claimant or anybody else.

94. In August 2016 an employee, Marcel Reyes-Cortez, had raised a complaint that questioned the outcome of a previous assessment. His concerns broadly related to the provision of training but included allegations of bullying and harassment. In the course of the grievance investigation there was a meeting between Marcel Reyes-Cortez and the assessor. The Claimant attended that meeting as the PCS representative for Marcel Reyes-Cortez. The Assessor's report sets out what the Claimant said in the course of the meeting. Marcel Reyes-Cortez's complaints were directed towards a Duty Officer Jo Wood. The report goes on to quote from an e-mail sent by the Claimant after a meeting with the Assessor. The email is quoted as saying:

'Regarding Marcel's grievance and his duty officer Jo Wood please note the following:

- *Over the past 6-7 years I am aware of numerous complaints made against Jo Wood and all similar in nature of bullying, intimidation and over bearing line management, till [sic] date I am not aware of the outcome of the complaints as I have not been cited or dealt with some as a rep.*

- *In the past there have also been accusations of racism, this was at a time when the fairness at work process was the policy. One particular occasion I recall was when Jo had given a list of names (Band E staff) to a black supervisor, she wanted the staff spoken to regarding their statistics on 999 calls. This black supervisor was not even there direct line manager and it was perceived that she is targeting black female staff. Again no conclusion was ever given regarding this, but around this time she was transferred to Lambeth and remained there for a while.*

- *There is fear within Bow regarding this duty officer, some staff are too scared to speak about her as they believe they will be bullied further. It is also perceived that no matter what this duty officer does, management have her back as she manages to get their "statistics" on 999 calls etc. As a PCS rep it is fair to say that this duty officer's name crops up in casework, I do not have any major issues from other teams regarding race, bullying etc.*

- *Marcel has also mentioned that recently a member of staff (band e) had spoken to Jo regarding an Asian police sergeant and bullying, this was a verbal conversation, Jo had appointed another sergeant to "investigate" this verbal allegation, and also got her staff (team) interviewed for this. Again it is perceived on the team and in METCC as a whole that if your are [sic] BME member of staff you will be targeted by her.*

- *SLT in the past have on numerous occasions brushed race under the carpet, on one occasion I had to seek the assistance of a local MP to write to the Commissioner this was before 2011'*

95. Jo Wood became aware of what the Claimant had said. On 22 September 2017 she made a report alleging wrongdoing by the Claimant to the Directorate of Professional Standards. In her report she suggested that what the Claimant had said in her emails amounted to allegations of criminal acts and hate crimes. She suggested that she had previously been subjected to harassment and bullying and that the Claimant played a key role in that. She suggested that the Claimant had breached the MPS Code of Ethics by both making slanderous allegations and not taken any action when she had supposedly committed a criminal act.

96. Jo Woods was told on 29 September 2017 that her concerns had been passed to the Misconduct and Hearings unit of the Directorate of Professional Standards who were in the process of assessing what action was appropriate to deal with the matter. In an email sent in October 2017 Jo Wood was told that the actions of the Claimant in her position as a PCS representative would be referred to the PCS trade union. It was not clear whether or not there would be any internal investigation. It appears that no action was taken for a considerable time.

97. On 11 May 2018 Jo Wood sent an email to Steve Padwick in the MPS Human Resources department and copied that to Amanda Wixon. She set out her belief that her complaint that the Claimant was in breach of the MPS Code of Ethics needed to be referred to the MetCC Professional Standards Unit to commence the management investigation. Amanda Wixon responded to that email on 15 May 2018 saying that she was not 100% sure how to implement the management investigation due to the fact that the Claimant was acting as a PCS rep at the time. She indicated that she was going to check what the position actually was.

98. Amanda Wixon did commence a management investigation and arranged for Jo Wood to attend a meeting and to make a statement. That meeting eventually took place on 21 June 2018. The person who conducted that meeting David O'Brien from the Professional Standards Unit produced a draft witness statement on a template normally used for criminal proceedings. That witness statement suggested that the Claimant had made a number of unfounded and slanderous comments in her email which we have quoted above.

99. It appears that Steve Arnold was the PCS representative assisting Jo Wood. He complained about the process that had been followed. In an email sent on 5 July 2018 he suggested that there was an investigation into an allegation which he proposed would be *'JB's conduct has breached the MPS Code of Ethics by providing false and misleading information in relation to what she provided to JC'.*

100. Subsequent correspondence suggests that Amanda Wixon was still unsure whether was a matter for the Professional Standards Unit to investigate or whether it was something that should be investigated by the Claimants line manager. On 6 July 2018 David O'Brien sent an email to Stephen Arnold in which he informed him that the matter would be assigned to the Claimants line manager, Inspector Andrew Inglis for investigation. Nothing happened for some months. On 31 August 2018 Jo Wood sent an email saying that there had been delays at every level and she was feeling totally let down.

101. On the 4 September 2018 Inspector Andrew Inglis was sent an email from Nancy O'Neill in the Professional Standards Unit informing him that Amanda Wixon had requested he conducted an investigation into an allegation of wrongdoing by the Claimant. The allegation was phrased as being that the Claimant *'had breached the MPS code of ethics by providing false and misleading information and unfounded and slanderous comments that gave a negative impression of the conduct of d/o Wood'*. In essence this adopted the suggestion that had been made by Steve Arnold. The email continued to inform Inspector Andrew Inglis that was a statement had been taken from D/O Wood she had refused to sign it and he would need to conduct his own investigation to clarify what was being said. It was suggested that when he was at the stage of preparing a Notice of Investigation he could revert to her for assistance. She also told him that matter had been referred to the PCS union and that separate complaints that Jo Wood had made about the grievance outcome had been referred to the grievance unit.

102. One issue that we need to deal with is whether or not Amanda Wixon was aware of the Claimants grievance at the time that she instructed Nancy O'Neill to ask Inspector Andrew Inglis to conduct an investigation. Claimant suggests that it was inevitable that she would have known. The Respondents did not call Amanda Wixon to give evidence. As we have set out above the decision to ask Inspector Andrew Inglis to investigate the Claimant's conduct was taken on 6 July 2018 at the latest. That predates the Claimant's grievance which was sent on 18 August 2018. We find that the reason why Jo Wood's complaint was progressed in August was that Jo Wood and Steven Arnold were pressing for something to be done about her complaints.

103. The complaint that we have been asked to deal with is the issuing of the Notice of Investigation. By closing submissions it was common ground that the final decision to issue a notice of Investigation was taken by Inspector Andrew Inglis. In the light of that, and our findings below, the level of knowledge of Amanda Wixon will have no material effect on the outcome of the claim. However, on the evidence that we heard there was no basis for inferring that Amanda Wixon knew of the Claimant's grievance at the time she instructed Nancy O'Neil to implement a decision that had, on our findings, already been made. There is no direct evidence that she knew anything about the Claimant's grievance prior to the Notice of Investigation being issued.

104. Gordon Ifil sent Amanda Wixon an e-mail on 5 December 2018 and later spoke to her by telephone. Gordon Ifil says that when he spoke to Amanda Wixon on 5 December 2018 she had been unaware of the grievance. He recorded that fact in a later e-mail sent later on the same day to Steve Padwick. We return to those e-mails below. We accept the evidence of Gordon Ifil and find that Amanda Wixon was not aware of the grievance and it follows that it could not have played any part in her decisions in respect of the Notice of Investigation.

105. On 1 November 2018 Inspector Andrew Inglis met with Jo Wood and Steve Arnold. The notes of that meeting tell us that Steve Arnold expressed his frustration at the delays in the process. He stated that the PCS Union had no intention of investigating the Claimant's conduct as she was no longer a PCS Representative. Jo Wood is recorded as complaining that the Claimant had portrayed her as a racist bully. If the notes are a full summary the meeting was brief. Inspector Andrew Inglis did not question the assertion that the comments made by the Claimant were false.

106. By 13 November 2018 Inspector Andrew Inglis had drafted a Notice of Investigation. That is a formal document produced at the outset of any disciplinary investigation within the MPS. The relevant policy, the Police Staff Discipline SOP, provides that where allegations of misconduct or gross misconduct are being investigated the staff member should be informed in writing of that fact and the Notice of Investigation will form the basis of any fact finding process thereafter. He sent that Notice of Investigation to Amanda Wixon and Nancy O'Neil on the same day. Nancy O'Neil responded indicating that Amanda Wixon thought the wording was 'fine'. She suggested removing reference to Jo Wood.

107. On 29 November 2018 Inspector Andrew Inglis sent his revised draft Notice of Investigation to both Steve Arnold and Jo Wood. Steve Arnold suggested an amendment. We were surprised that Inspector Andrew Inglis thought it necessary to agree the wording of a disciplinary charge with the complainant and her representative. The final version of the Notice of Investigation described the alleged misconduct in the following terms:

'It is alleged that as an MPS employee you have bullied and cause [sic] harassment to another member of MPS staff, by giving unreasonable and unsubstantiated criticism of them. The allegation is based on e-mails sent to the grievance team alleging they are a bully and a racist.'

108. The Notice of Investigation was sent to the Claimant on 1 December 2018. She responded asking for any details of the allegation and asking about the likely process. Inspector Andrew Inglis told her that he would need to conduct an interview with both her and the complainant and that given the time of year it would not be until January that these meetings would take place.

109. On 2 December 2018 the Claimant informed Gordon Ifil that she had been served with the Notice of Investigation. She described this action as victimisation. She pointed out the delay in bring the matter to her attention and associated that with the fact that she had brought a grievance.

110. As we said above Gordon Ifil sent an e-mail to Amanda Wixon on 5 December 2018.In his e-mail he set out how far he had got in his investigation and explained that he had spoken to the Claimant twice and had been just about to move on to

speaking to the subjects of her complaints. He stated that he was aware of the Notice of Investigation and was minded to suspend his investigation and refer the matter to the Directorate of Professional Services as he believed that as the complaint related to the Claimant's actions as a representative in an unrelated matter continuing with his investigation might infringe paragraphs 11(4) and (5) of the MPS Grievance SOP. Those paragraphs refer to a person not being subjected to any retaliation where they act as a witness or representative for any person bring a grievance. He asked for further details about the allegations against the Claimant.

111. Gordon Ifil's actions can only be seen as protective of the Claimant. What he is proposing is to halt the grievance process in order that consideration was given to disciplining anybody retaliating against the Claimant. In a later e-mail to Steve Padwick sent on 5 December 2018 Gordon Ifil discusses the difficulties of presenting the Claimant's grievances which included allegations that her managers were racist bullies in circumstances where those managers had (in the case of Jo Wood) and were likely to in the case of others give rise to counter complaints and further disciplinary allegations.

112. On 17 December 2018 Gordon Ifil wrote to the Claimant updating her on his progress to date. He told her that the Notice of Investigation '*restricts my ability to continue my assessment'.* He told her that he was seeking advice from the Discrimination Investigation Unit on how to proceed.

113. On 17 December 2018 the Claimant submitted a second grievance. In that grievance she alleger that the service of the Notice of Investigation was in retaliation for her first grievance and an act of victimisation. She expressly stated that she did not want Inspector Andrew Inglis to be involved in her grievance. At that stage she did not appear to hold him responsible for the service of the Notice of Investigation instead suggesting that Amanda Wixon and Nancey O'Neil along with others were responsible.

114. On 22 January 2019 Gordon Ifil sent an e-mail to Inspector Andrew Inglis.In that e-mail he informed that he was suspending his investigation into the Claimant's grievance pending advice from the Discrimination Investigation Unit. He informed him that he was not the subject of any of the Claimant's grievances and that she perceived him as supportive.

115. Inspector Andrew Inglis was concerned about the process he had instigated. He made enquiries and eventually spoke to Dave Hammatt from the Directorate of Professional services. The advice given by Dave Hammet was then recorded in an e-mail sent on 16 January 2019. In that e-mail Dave Hammatt did not suggest that there was anything in the Respondent's policies that prevented the complaint of Jo Wood being investigated. Inspector Andrew Inglis was directed to paragraph 5 of the MPS Disciplinary Policy that stated that whilst accredited trade union representatives were held to the same standards as others no action would be taken against any representative before the matter was discussed with the union. That provision of course reflects the ACAS Code of practice. Dave Hammett went on to discuss whether a disciplinary investigation would be merited at all if the comments were made as a part of the Claimant's role as a PCS representative. His e-mail is not the model of clarity but he says that *'If based on the information available you feel that the comments are made in the context and isolation of a PCS rep then no other action should be taken'*.

116. Inspector Andrew Inglis spoke to Dave Hammett on 29 January 2019. He then resolved that the notice of hearing was withdrawn. He sent the Claimant a letter to that effect on 22 February 2019. We had no satisfactory explanation for the delay. The letter explained the decision to withdraw the Notice of Investigation by reference to Section 5 of the Police Staff Disciplinary code but also by reference to Section 11 which is aimed at preventing retaliation for persons who had brought or represented persons who had brought grievances.

117. On 4 February 2019 Gordon Ifil made a referral to the Discrimination Investigation Unit. He prepared a summary of the Claimant's grievances. He referred to section 11 of the Respondent's grievance policy. He set out his interim conclusions about the Claimant's grievance. He sought advice as to what steps should be taken where he understood the Claimant as saying that the Notice of Investigation was in retaliation for her doing a protected act. He recommended that this was investigated. The process followed by the Discrimination Investigation Unit was to conduct a 'gravity assessment' Ultimately a decision was made that there was no requirement to investigate whether the issuing of the Notice of Investigation was in retaliation for the Claimant bringing grievances. It is not necessary for us to make any findings about the nature of that decision making process. In his final grievance report Gordon Ifil says at paragraphs 4.93 that the Discrimination had concluded that the Service of the Notice of Investigation *'could definitely constitute victimisation; however rescinding it ended it'.* He states that as the Discrimination Unit had found that there was no indication of misconduct he was bound to accept that finding. He refers to the failure to follow the 'SOPs'. We take that as a reference to paragraph 5 of the disciplinary policy and paragraph 11 of the grievance policy.

118. Once it was confirmed to Gordon Ifil that there would be no action taken in respect of his concerns that the Claimant had been the victim of retaliation and the Notice of Investigation had been withdrawn he proceeded to investigate the Claimant's grievance. As we have said, whilst there was some overlap between the Claimant's grievances and the claims we have to decide there were many other matters that were investigated. Gordon Ifil did not uphold any of the Claimant's grievances although he made recommendations designed to address the relationship concerns. He also recommended that advice from the Directorate of Professional Services should have been sought before the Notice of Investigation was issued. Whilst we have disagreed with some of his conclusions (although using a different legal framework) we thought Gordon Ifil's report was thorough and demonstrated considerable thought. As the Claimant does not suggest that the outcome of the grievance was unlawful, and as we are not bound by any of the conclusions in the report, we say no more about it.

<u>The absence review meeting and subsequent issues</u>

119. On 28 November 2019 the Claimant attended an Attendance Management meeting as the workplace companion for Patrick Hallissey. The meeting was chaired by Inspector Douglas Fyfe. We find that when Patrick Hallissey was invited to the meeting he indicated that it was at short notice and he was unsure whether he could find a representative. That is consistent with an e-mail he sent on 2 February 2019 where he said that he had asked the Claimant to accompany him only shortly before the meeting took place. Inspector Douglas Fyfe told us, and we accept, that he checked with Patrick Hallissey prior to the meeting whether he had secured a representative and that Patrick Hallissey said words

to the effect that he had not obtained union representation but the Claimant had offered to accompany him. We find that this prompted Inspector Douglas Fyfe to say that he knew that the PCS representative Dan Charnley was in the building. We find that this was intended to give Patrick Hallissey the option of having a trade union representative (if that was what he wanted).

120. Ronnie Jones attended the meeting of 28 November 2018 as the note taker. Having considered the evidence of the four participants in the meeting we find that the Claimant was asked on two occasions about her status in the meeting. The first time was at the very outset of the meeting and we are satisfied that the purpose was part of the introductions for the purposes of having an accurate record. There was one further occasion when the Claimant was asked by Inspector Douglas Fyfe about her status. We find that both of these requests were made in order to record accurately the Claimant's status. This was not unimportant in the context of Patrick Hallissey complaining later about the meeting being called at short notice. We have no doubt that the Claimant is sensitive about the fact that she was no longer a PCS representative but find that in the context there was nothing untoward about the questions the Claimant was asked. The Claimant has elevated this into *'repeatedly asking'*. This is an exaggeration.

121. An issue we need to determine is whether at the date of the meeting Inspector Douglas Fyfe had any knowledge of the Claimant's grievance. He says that he did not and gave evidence to that effect. We find that as a matter of policy grievances are treated as confidential. We accept that the evidence of a policy is far from conclusive. In her submissions on behalf of the Claimant Ms Owusu-Agyei suggested three matters from which we could infer that Inspector Douglas Fyfe had knowledge of the Claimant's grievance. The first of these was the fact that Inspector Douglas Fyfe accepted that he was '*generally aware of discord'* between the Claimant and Ms Wingrove and Mr Jones. That he had learned that from Inspector Andrew Inglis and Mr Alli. She relied on the fact that Inspector Douglas Fyfe and Inspector Douglas Fyfe were opposite numbers and interacted frequently. She said that the Claimant had told Inspector Inglis that she had brought a grievance. We would accept that these matters assist the Claimant and that we should weigh them up when evaluating Inspector Douglas Fyfe's denial that he knew anything about the grievance at this stage. We find, to the relevant standard, that Inspector Douglas Fyfe has satisfied us that he had no knowledge of the Claimant's grievance at that time. As a fall back the Claimant has suggested that if Inspector Douglas Fyfe was unaware of her grievance he would have believed that she may put in a grievance. We do not accept that Inspector Douglas Fyfe held any belief that the Claimant might do any protected act. We do not think that ever crossed his mind.

122. Ronnie Jones took some time to produce the minutes of the meeting. On 2 February 2019 Ronnie Jones told the Claimant that he anticipated circulating the minutes of the meeting of 28 November 2018 the following day. He cannot recall if he said that he would send them to both the Claimant and Patrick Hallissey. We would accept that he gave the Claimant the impression that he would. That is consistent with an e-mail he sent to Inspector Douglas Fyfe where he said that once Inspector Douglas Fyfe had approved the notes he would send them to 'all parties'. Inspector Douglas Fyfe reviewed the minutes and responded to Ronnie Jones saying *'I am happy for you to send them to send them to Pat and Sarah [from HR]'*. That prompted Ronnie Jones to ask if they should be sent to the

Claimant as well. Inspector Douglas Fyfe responded saying *'No she is not acting as a PCS Rep just a friend if Pat wants to give her a copy he can, any updates or replies should come from Pat and not her'.*

123. On 3 February 2019 the minutes were sent to Patrick Hallissey. He then sent an e-mail to Inspector Douglas Fyfe and Ronnie Jones indicating that he had forwarded the minutes to the Claimant. He suggested in that e-mail that Inspector Douglas Fyfe had been hostile towards his wish to have the Claimant as his representative.

124. Objectively the fact that the Claimant was not sent the minutes directly is a matter which the Tribunal regard as approaching trivial. She knew she had attended the meeting as a friend and not as a trade union representative. She was not a designated point of contact for any communications about Patrick Hallissey. We accept that the Claimant was upset about not being included in the circulation of the minutes. She then took it upon herself to investigate the reasons for that. She spoke to Ronnie Jones. The Claimant agreed that that conversation was cordial. She says that Ronnie Jones told her that Inspector Douglas Fyfe had told him not to send her a copy of the minutes. We find that in essence that is what he did but that he did so in good humour and by saying *'I can neither confirm or deny it'*. Both knew that that would be interpreted as an acknowledgement of the instruction that had been given.

125. Shortly after they spoke the Claimant sent Ronnie Jones an e-mail asking him to say whether any reason had been given by Inspector Douglas Fyfe for his instruction. We find that Ronnie Jones, correctly, inferred that the Claimant was complaining about not being copied in to the minutes. He responded giving an account of their conversation which we have accepted above. He accused the Claimant of misrepresenting the conversation. He told her that he had explained at the time that he had been told that as a 'colleague' as opposed to a trade union representative there was no requirement for the notes to be sent to her. We accept that he had done so in the earlier conversation. It is clear to us that Ronnie Jones was becoming mildly irritated by the Claimant. The Claimant sent a further e-mail who gave a further account of the verbal exchange that does not markedly differ from that of Ronnie Jones. She indicated that she was reviewing the minutes but had not agreed them. We find that Ronnie Jones was becoming increasingly frustrated at what he regarded as 'stirring' by the Claimant. We are not surprised by that. The Claimant's doggedness was out of any proportion to the fact that she had received the minutes of a meeting indirectly.

126. At 17:37 on 3 February 2019 the Claimant sent a further e-mail to Ronnie Jones. She attached an amended copy of the minutes. She criticised the fact that Ronnie Jones had included in the minutes matters that he had raised in the meeting. She said: *'the role of the note-taker should be one of impartiality, from my experience note-takers do not add comments of partake in meetings' .* She went on to say that if the minutes were not agreed then the meeting would need to be conducted again with *'an independent note taker'*. Ronnie Jones responded promptly saying only that he would await comments from all participants before circulating a revised copy of the minutes.

127. There was really little between the Claimant and Ronnie Jones about what happened next. There were written accounts from both the Claimant and Ronnie Jones recorded in e-mails sent on the same evening. We find that Ronnie Jones

went over to the Claimant to discuss the minutes. He says, and we accept that he wanted to ask the Claimant whether she was OK with his suggestion about awaiting comments from all parties. However we would accept that he was very annoyed that the Claimant had questioned his impartiality. He says, and we accept, that the Claimant said words to the effect that she wanted any discussion in writing. That further irritated Ronnie Jones who accepts that he said *'You know what Jugdeep I am done with this, I am done with the fact that you are so rude to me, I am done with the fact that you constantly undermine me and I am tired of you bullying me*'. After a few more exchanges Ronnie Jones walked off.

128. The Claimant complains that this is an act of victimisation and we need to make findings of fact as to whether Ronnie Jones knew of any of the Claimant's protected acts. He did know that the Claimant had complained about his initial decision not to grant her disability leave. He told us, and we accept, that he learned of the Claimant's first claim to the employment tribunal from the Respondent's solicitors. It is necessary for us to find when that might have been. Ronnie Jones had no clear recollection about when that might have been. When the Respondent's solicitors put in their ET3 and grounds of resistance that followed a practice we are aware is common in cases involving the police service. They asked for a stay because the Claimant's grievance was unresolved. The basis of the application was that they were unable to take instructions pending the outcome of that process. We find it more likely than not that Ronnie Jones was not contacted and asked for his instructions prior to 3 February 2019. Had he been the application for a stay and the basis of putting in a holding response would have been dishonest. It is not likely that professional solicitors would act in that manner. Inspector Douglas Fyfe said that he too learned of the proceedings only when contacted by solicitors. We find that he too did not know of the proceedings until after 3 February 2019 for the same reasons.

Duty Officer Shadowing

129. The Claimant was interested in promotion to become a Duty Officer. She was told by Inspector Andrew Inglis on 3 February 2019 that she should try and arrange to shadow a duty officer. We find that the onus was on the Claimant to arrange this. Ronnie Jones was copied in to that e-mail.

130. At 15:15 on 3 February 2018, the same day as the disagreement that arose about the minutes, Ronnie Jones took the initiative and proposed that the Claimant shadow him on either the 11th, 12th or 13th February 2018. Despite the fact that he had had a disagreement with the Claimant in the evening of 3 February 2018 Ronnie Jones sent an e-mail to 'Duties' asking that the Claimant be recorded as shadowing him on 12 February 2018. We find that this indicates a willingness to return to a professional relationship.

131. Ronnie Jones then had some leave. He returned to work on 12 February 2018. He says, and we accept, that he completely forgot that the Claimant was due to shadow him on that day. He says, and we accept that 'Duties' had not actioned his request so there was nothing to remind him or to alert the Claimant to the fact that the Claimant was meant to have shadowed him on that day. Ronnie Jones tells us, and we accept that he offered the Claimant an opportunity sometime later to shadow him.

The law to be applied

132. In the course of the hearing we canvased with the parties whether it would assist the advocates if we provided a draft self-direction covering the areas of law raised by these claims. Both advocates welcomed the suggestion and we provided a draft which we had discussed between ourselves. In their closing submissions both parties had an opportunity to comment on the proposed self-direction. The law, set out below was the product of that process.

133. We are conscious that it is not sufficient for us to demonstrate a knowledge of the legal principles. We need to apply them and to demonstrate that we have had the applicable law in mind when we reached our conclusions. Agreeing the relevant legal principals was as much for our benefit as it was for the parties and we have endeavoured to apply those principles in our discussions and conclusions below.

The burden and standard of proof under the Equality Act 2010

134. The standard of proof that we must apply in every case is the civil standard that is the balance of probabilities. In other words, we must decide whether it is more likely than not that any fact is established.

135. The burden of proof in respect of all claims brought under the Equality Act 2010 is governed by section 136 of that act the material parts of which are:

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

136. Accordingly, where a claimant establishes facts from which discrimination could be inferred (a prima facie case), then the burden of proving that the treatment was in no sense whatsoever unlawful passes to the respondent. The proper approach to the shifting burden of proof has been explained in ***Igen v Wong*** **[2005] ICR 9311** which approved, with some modification, the earlier decision of the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd*** **[2003] IRLR 332**. Most recently in ***Base Childrenswear Limited v Otshudi*** **[2019] EWCA Civ 1648** Lord Justice Underhill reviewed the case law and said:

17. Section 136 implements EU Directives 2000/78 (article 10) and 2006/54 (article 19), which themselves derive from the so-called Burden of Proof Directive (1997/80). Its proper application, and that of the equivalent provisions in the pre-2010 discrimination legislation, has given rise to a great deal of difficulty and has generated considerable case-law. That is not perhaps surprising, given the problems of imposing a two-stage structure on what is naturally an undifferentiated process of fact-finding. The continuing problems, including in particular the application of the principles identified in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 93, led to this Court in Madarassy v Nomura International plc [2007] EWCA Civ 33, [2007] ICR 867, attempting to authoritatively re-state the correct approach. The only substantial judgment is that

of Mummery LJ: it was subsequently approved by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37, [2012] ICR 1054. In Efobi v Royal Mail Group Ltd [2017] UKEAT 0203/16, [2018] ICR 359, the EAT held that differences in the language of section 136 as compared with its predecessors required a different approach from that set out in Madarassy; but that decision was overturned by this Court in Ayodele v Citylink Ltd [2017] EWCA Civ 1913, [2018] ICR 748, and Madarassy remains authoritative.

18. It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:

(1) At the first stage the claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):

> *"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*
>
> *57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. …"*

(2) If the claimant proves a prima facie case the burden shifts to the respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

> *"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."*

He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.

137. Inferences can only be drawn from established facts and cannot be drawn speculatively or on the basis of a gut reaction or 'mere intuitive hunch' see ***Chapman v Simon*** **[1994] IRLR 124** see per Balcombe LJ at para. 33 or from 'thin air' see ***Chief Constable of the Royal Ulster Constabulary*** **[2003] ICR 337**.

138. Discrimination cannot be inferred only from unfair or unreasonable conduct **Glasgow *City Council v Zafar*** **[1998] ICR 120**. That may not be the case if the conduct is unexplained ***Anya v University of Oxford*** **[2001] IRLR 377,** CA**.** Whilst inferences of discrimination cannot be drawn merely from the fact that the Claimant establishes a difference in status and a difference treatment see ***Madarassy v Nomura International plc*** **[2007] ICR 867** 'without more', the something more *"need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire.*

In other instances it may be furnished by the context in which the act has allegedly occurred" see ***Deman v Commission for Equality and Human Rights*** **[2010] EWCA Civ 1279** per Sedley LJ at para 19.

139. Where there are a number of allegations each single allegation of discrimination should not be viewed in isolation, but the history of dealings between the parties should be taken into account in order to determine whether it is appropriate to draw an inference of racial motive in respect of each allegation ***Anya v University of Oxford*** and ***Qureshi v Victoria University of Manchester and Another*** **(Note) [2001] ICR 863, EAT**.

140. The burden of proof provisions need not be applied in a mechanistic manner **Khan *and* another *v Home Office* [2008] EWCA Civ 578**. In ***Laing v Manchester City Council*** **2006 ICR 1519** Mr Justice Elias (as he then was) said:

"the focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race""

141. Such an approach must assume that the burden of proof falls squarely on the Respondent to prove the reason for any treatment. It is an approach that should be used with caution and is appropriate only where we are in a position to make clear positive findings of fact as to the reason for any treatment or any other element of the claim. We shall indicate below where we consider that it is open to us to follow this approach.

142. Section 136 applies to a claim that there had been a failure to make reasonable adjustments. In order for the burden to pass the Claimant needs to demonstrate that there is a policy, criterion or practice (or physical feature) that places them at a substantial disadvantage in comparison to a person without their disability and that there is some apparently reasonable adjustment that would alleviate that disadvantage. If they do so the burden shifts to the Respondent to show that the adjustment was not reasonable ***Latif v Project Management Institute*** **[2007] IRLR 579** and ***HM Prison Service v Johnson*** **UKEAT/0420/06**.

Equality Act 2010 - Statutory Code of Practice

143. The power of the Equality and Human Rights Commission to issue a code of practice to ensure or facilitate compliance with the Equality Act 2010 is afforded by Section 14 of the Equality Act 2006. Such a code must be laid before Parliament and is subject to a negative resolution procedure. The current code was laid before parliament and came into force on 6 April 2011 ('the code'). Section 15 of the Equality Act 2006 sets out the effect of breaching the code of practice. Paragraph 1.13 of the code explains that:
The Code does not impose legal obligations. Nor is it an authoritative statement of the law; only the tribunals and the courts can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act.

Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.

Disability - Knowledge

144. The Claimant has brought claims under Section 15, 20 and 21 of the Equality Act 2010. Section 15(2) provides a defence where the employer did not know or could not reasonably be expected to know that the employee had a disability. Slightly more is required before an employer is required to make reasonable adjustments. Schedule 8 paragraph 20 of the Equality Act 2010 requires the employer to have knew or ought reasonably to have known of the disability and that the disabled person is placed at a disadvantage.

145. In ***Gallop v Newport City Council*** **2014 IRLR 211, CA** the Court of Appeal held that it will be sufficient to establish knowledge of disability if the employer knew or ought to have known the facts which when analysed satisfy the statutory definition of disability. That requires knowledge of an impairment but not necessarily a diagnosis. Knowledge that that impairment has a substantial effect on ordinary day to day activities and knowledge of the facts that establish the long term condition.

146. The Statutory Code of Practice deals with the question of knowledge in the context of a claim under Section 15 of the Equality Act 2010 in the following paragraphs:

5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

147. Under a heading 'When can an employer be assumed to know about disability' are the following paragraphs:

'5.17 If an employer's agent or employee (such as an occupational health adviser or a HR officer) knows, in that capacity, of a worker's or applicant's or potential applicant's disability, the employer will not usually be able to claim that they do not know of the disability, and that they cannot therefore have subjected a disabled person to discrimination arising from disability.

5.18 Therefore, where information about disabled people may come through different channels, employers need to ensure that there is a means – suitably confidential and subject to the disabled person's consent – for bringing that information together to make it easier for the employer to fulfil their duties under the Act.'

148. Paragraph 6.19 of the Statutory Code of Practice gives the similar guidance about the steps it would be reasonable for an employer to take to ascertain whether an employee had a disability for the purposes of making a reasonable adjustment:

*6.19 For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially***.**

Discrimination because of something arising in consequence of disability – the law

149. Section 15 of the Equality Act 2010 says:

15 Discrimination arising from disability

(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.

150. In ***Secretary of State for Justice and anor v Dunn*** **EAT 0234/16** the EAT confirmed the position in the Statutory Code of Practice para 5.2, that the four elements that must be made out in order for the claimant to succeed in a S.15 claim are:

150.1. there must be unfavourable treatment

150.2. there must be something that arises in consequence of the claimant's disability

150.3. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability, and

150.4. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

151. The Statutory Code describes what might amount to a detriment in paragraph 5.7. It says:
For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the

treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably.

152. In ***Williams v Trustees of Swansea University Pension and Assurance Scheme and anor*** **2019 ICR 230, SC** the Supreme Court approved the guidance in the Statutory Code with Lord Carnwath, giving the Judgment of the Court saying**:**

……little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a "subjective/objective" approach. While the passages in the Code of Practice to which [Counsel] draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section.

153. In asking whether treatment is unfavourable there is no need to seek a comparison with the treatment of others. The Statutory code says, at paragraph 5.6:

'Both direct and indirect discrimination require a comparative exercise. But in considering discrimination arising from disability, there is no need to compare a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.'

154. At paragraphs 5.8 and 5.9 the Statutory Code says this about the requirement to show that there is 'something' that arises as a consequence of disability:

5.8 The unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability.

5.9The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet.

155. The approach to the question of whether unfavourable treatment is 'because of' 'something arising in consequence' of disability is that set out in ***Pnaiser v NHS England and anor*** **2016 IRLR 170, EAT** where Simler P (as she was) said:

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely

to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

156. To demonstrate that unfavourable treatment was 'because of' something arising in consequence of disability it is sufficient to show that the 'something' was an effective cause and, if it was, it is immaterial that there were other effective causes of the treatment see ***Hall v Chief Constable of West Yorkshire Police*** **2015 IRLR 893, EAT** and ***Charlesworth v Dransfields Engineering Services Ltd*** **EAT 0197/16**

157. An employer cannot be liable under this section for any unfavourable treatment unless they knew or ought to have known that the Claimant was disabled – see sub-section 15(2) above. However, once they know of disability it is irrelevant whether they recognised that the 'something' that caused their act or omission was because of disability, see ***City of York Council v Grosset*** **2018 ICR 1492, CA**.

158. The Statutory Code sets out the requirements of the justification defence – that the treatment is a proportionate means of achieving a legitimate aim. The material paragraphs are 4.26 to 4.32 and will not be reproduced here. The test is the same as in justifying treatment that would otherwise be unlawful direct discrimination. A convenient summary the relevant principles is set out in ***Chief Constable of West Yorkshire & another v Homer*** **[2012] ICR 708** in the opinion of Lady Hale where she said:

"19. The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination. It is not limited to the social policy or other objectives derived from article 6(1), 4(1) and 2(5) of the Directive, but can encompass a real need on the part of the employer's business: Bilka-Kaufhaus GmbH v Weber von Hartz, Case 170/84, [1987] ICR 110.

20. As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:

> *". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."*

He went on, at [165], to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80:

> *"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"*

As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] EWCA Civ 846, [2005] ICR 1565 [31, 32], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement."

159. Where the unfavourable treatment arises because the employer has failed to make reasonable adjustments, the employer is unlikely to be able to make out the defence of justification. See paragraphs 5.20 – 5.22 of the Statutory Code and see also ***Griffiths v Secretary of State for Work and Pensions*** **2017 ICR 160, CA**

Failing to make reasonable adjustments Sections 20 & 21 of the Equality Act 2010

160. When dealing with a claim that there has been a failure to make reasonable adjustments the Tribunal are obliged to have regard to the relevant code of practice. For claims brought in the employment sphere the relevant code is the Equality and Human Rights Commission Code of Practice on Employment 2011. Paragraph 6.2 of that code describes the duty to make reasonable adjustments as follows:

The duty to make reasonable adjustments is a cornerstone of the Act and requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled.

161. The reference in that paragraph to the right to have 'additional steps' taken reflects the guidance given by Lady Hale in ***Archibald v Fife Council*** **[2004] UKHL 32** which whilst referring to the Disability Discrimination Act 1995 is equally applicable to the Equality Act 2010.

……this legislation is different from the Sex Discrimination Act 1975 and the Race Relations Act 1976. In the latter two, men and women or black and white, as the case may be, are opposite sides of the same coin. Each is to be treated in the same way. Treating men more favourably than women discriminates against women. Treating women more favourably than men discriminates against men.

Pregnancy apart, the differences between the genders are generally regarded as irrelevant. The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment.

162. The material parts of Section 20 of the Equality Act read as follows:

Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

(4)…..

(5)The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

163. The phrase 'substantial' used in sub-section 20(3) is defined in section 212(1) of the EA 2010 and means only 'more than minor or trivial'.

164. Sub-section 39(5) of the Equality Act 2010 extends the duty to make reasonable adjustments to an employer of employees and job applicants.

165. The proper approach to a reasonable adjustments claim remains that suggested in Environment ***Agency v Rowan*** **[2008] IRLR 20**. A tribunal should have regard to:

165.1. the provision, criterion or practice applied by or on behalf of the employer; or

165.2. the physical feature of premises occupied by the employer;

165.3. the identity of non-disabled comparators (where appropriate); and

165.4. the nature and extent of the substantial disadvantage suffered by the claimant.

166. The code gives guidance about what is meant by reasonable steps at paragraph 6.23 to paragraph 6.29. Those paragraphs read as follows:

6.23 The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to

make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

6.24 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.

6.25 Effective and practicable adjustments for disabled workers often involve little or no cost or disruption and are therefore very likely to be reasonable for an employer to have to make. Even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms – for example, compared with the costs of recruiting and training a new member of staff – and so may still be a reasonable adjustment to have to make.

6.26 [deals with physical alterations of premises].

6.27 If making a particular adjustment would increase the risk to health and safety of any person (including the disabled worker in question) then this is a relevant factor in deciding whether it is reasonable to make that adjustment. Suitable and sufficient risk assessments should be used to help determine whether such risk is likely to arise. Duty to make reasonable adjustments

6.28 The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- *whether taking any particular steps would be effective in preventing the substantial disadvantage;*
- *the practicability of the step;*
- *the financial and other costs of making the adjustment and the extent of any disruption caused;*
- *the extent of the employer's financial or other resources;*
- *the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and*
- *the type and size of the employer.*

6.29 Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

167. The requirement to demonstrate a 'practice' does not mean that a single instance or event cannot qualify but that to do so there must be an 'element of repetition' see ***Nottingham City Transport v* Harvey UKEAT/0032/12JOJ**. This might be demonstrated by showing that the treatment would be repeated if the same circumstances ever arose again.

168. Whilst the code places emphasis on the desirability of an employer investigating what adjustments might be necessary for a disabled employee, a failure to carry out such investigations will not, in itself, amount to a failure to make reasonable adjustments although that might be the consequence ***Tarbuck v Sainsbury's Supermarkets Ltd*** **2006 IRLR 664, EAT**.

169. An employer will not be under a duty to make reasonable adjustments until it has knowledge of the need to do so. This limitation is found in schedule 8 paragraph 20 of the Equality Act 2010 and the material parts read as follows:

Lack of knowledge of disability, etc.

20(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

Victimisation Contrary to Sections 27 and 39 of the Equality Act 2010

170. A claim for victimisation is brought under section 27 of the Equality Act 2010. The material parts of that section read as follows:

27 Victimisation

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

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

171. Victimisation in the employment field is rendered unlawful by reason of Section 39(4) of the Equality Act 2010. That sub section provides, amongst other things, that it will be unlawful to victimise an employee by subjecting her to a detriment. The meaning of 'detriment' is the same as we have set out above.

172. No comparator is required to establish victimisation ***Woodhouse v West North West Homes Leeds Ltd*** **[2013] IRLR 733**. What is necessary is that the employee establishes that they did a protected act and that they have suffered a detriment. Thereafter the examination turns to the reason why the detriment was suffered and is subject to the burden of proof provisions which we have set out above. The question is whether the reason for the treatment was because the worker had done a protected act or that the employer knew that he or she intended to do a protected act, or suspected that he or she had done, or intended to do, a protected act? See - Baroness Hale in ***Derbyshire and ors v St Helens Metropolitan Borough Council and ors*** **2007 ICR 841, HL**, and Lord Nicholls in ***Chief Constable of West Yorkshire Police v Khan*** **2001 ICR 1065, HL** both cases decided before a change in the wording included in the Equality Act 2010 but not affected on this question.

173. The test of causation '*because'* is not to be approached by asking 'but for the Claimant doing the protected act would the treatment have occurred' but by asking whether the protected act was the reason for the treatment ***Greater Manchester Police v Bailey*** **[2017] EWCA Civ 425** and ***Nagarajan v London Regional Transport*** **[2000] 1 A.C. 501**.

Discussions and conclusions

174. As indicated above we shall make some further findings of fact within this section dealing in the main with the reasons for the Claimant's treatment and whether steps were reasonable for the Respondent to take.

175. The structure of this section reproduces the list of issues as originally agreed together with the amendments to the case of each party permitted during the hearing. We shall not set out the list of issues separately but the hearings of each section reproduce the questions posed in the list of issues.

Did the Respondent know, or could it reasonably have been expected to know that the Claimant was disabled as set out above at all material times?

176. At the outset of the hearing this issue was clarified. It was accepted that from 20 July 2018 there was actual or constructive knowledge of the fact that the Claimant met the statutory test for disability by reason of endometriosis, with associated stress and anxiety and arthritis. That date corresponded with the Respondent obtaining a further report from their Occupational Health advisors. We consider that that concession was rightly made. The issue for us was restricted to the period before that date. The earliest complaint made by the Claimant relates to Stuart Elliot refusing the Claimant's request for a parking permit. The Claimant says that that happened on 4 July 2018. The dispute is limited to whether the Respondent ought to have known at that date that the Claimant had relevant disabilities.

177. We have set out above the information that was before the Respondent prior to 4 July 2018. We see no reason why the Respondent should not in this case be fixed with the knowledge of the information contained within the medical report of 29 November 2017. In reaching that conclusion we have had regard to the fact that the report was commissioned due to a management referral and that it was later shared with at least some of the Claimant's managers. We have had regard to paragraph 5.17 of the Statutory Code of Practice which we have set out above. Whilst that report indicated that the Claimant would not in the opinion of the occupational health clinician meet the statutory definition of disability, the clinician reminded the Respondent that this was a matter to be decided by a tribunal. The clinician refers to 2 underlying medical conditions which might cause tiredness and refers to those as long-term and chronic. She goes on to refer to the potential for deterioration (which she said was unpredictable) and further unpredictable flareups.

178. We have set out above what the Claimant told Inspector Stuart Elliott when she made her application for a car parking permit. She told him that she had been recently diagnosed with arthritis but made reference to the fact that it had been present for some time. She referred in terms to her other underlying conditions as amounting to disabilities for the purposes of the Equality Act 2010. She told him that she was having difficulties using public transport and lifting and carrying. She then said that she was happy to discuss things further but asked that her application be treated as confidential.

179. Applying the law as it was explained in ***Gallop v Newport City Council*** it is not necessary for the Claimant to show that the Respondent knew or ought to know that she met the statutory test. All that is required is that they knew or ought to have known the facts required to establish that that test was met. Inspector Stuart Elliott actually knew that the Claimant had an impairment of arthritis because she told him. The Respondent knew through the occupational health report that the Claimant had long-term and chronic conditions the rate of deterioration of which could not be predicted. We are satisfied that the Respondent knew or ought to have known that there was an impairment. Inspector Stuart Elliott knew, because the Claimant told him, that she had difficulties with ordinary day-to-day activities of using public transport lifting and carrying. The Claimant wrote to Inspector Stuart Elliott some seven months after the original occupational health report and informed him that her conditions amounted to a disability.

180. The Respondent had actual knowledge of the relevant impairments, some knowledge of how long those impairments had been present and some knowledge of the effect of those impairments on the Claimant's ability to carry out day-to-day activities. The question remains whether any gaps in that knowledge are matters which the Respondent ought to have known about. We have set out various passages of the Statutory Code of Practice which deal with this question. What is envisaged is that an employer will put in place a system for gathering knowledge about disability which will respect the employee's dignity and privacy.

181. The Tribunal finds that the assertion by the Claimant that she had a disability gave rise to a need to make reasonable enquiries whilst properly respecting her dignity and privacy. Her request that the application for a parking permit and her underlying reasons for it are kept confidential was in our view entirely understandable. The Tribunal finds that Inspector Stuart Elliott's approach to the Claimants disabilities was far from what is envisaged by the Statutory Code of

Practice. He immediately flouted her request to keep her application confidential by sharing it with others. He declined to take up the Claimant's offer to meet with him to discuss her application.

182. We find that had Inspector Stuart Elliott spoken to the Claimant she would have given him sufficient detail of her Endometriosis, hypertension and arthritis fixing him with sufficient knowledge of all of the relevant ingredients of disability. As a matter of common knowledge Inspector Stuart Elliott ought to have recognised that arthritis is generally a progressive condition. Had he asked the Claimant about it we have no doubt that he would have recognised that the effect of that condition were, at the least, likely to last for 12 months. Had he asked the Claimant he would have learned that her other conditions had already lasted for 12 months. The Claimant could have explained without going into undue detail how her conditions affected her day-to-day activities.

183. Accordingly we are satisfied that the Respondent in general, and Inspector Stuart Elliott in particular, ought to have known that the Claimant was disabled by no later than the point at which the Claimant first applied for a car parking permit.

The claims pursuant to Sections 15 and 39 of the Equality Act 2010

6(a) Stuart Elliot refusing the Claimant's request for a designated parking permit, as she allegedly did not meet the criteria.

184. As we have set out in our findings of fact Inspector Stuart Elliott refused the Claimant a car parking permit on 4 July 2018 and 1 November 2018. We do not understand the Respondent to be disputing that refusal of a car parking permit could amount to unfavourable treatment. We are satisfied that the refusal of a permanent car parking permit would be unfavourable treatment even in circumstances where the Claimant was often able to use the team permit. The former could be used as a right the latter required the Claimant to request the car park permit and she could not be certain that that would be granted as it was a matter of discretion.

185. The 'something arising' in consequence of disability is not found in the Claimant's ET1. The 'something arising' from disability that was included in the agreed list of issues was the difficulties the Claimant had with *'mobility, her inability to work full rusted hours; difficulty working 12 hour shifts in a row; and disadvantage using non-economically assessed office furniture'*. Of those it appears that the relevant 'something arising' was the Claimant's difficulty with mobility. We do not think that it would do any injustice to the Respondent by unpacking that a little bit. We understand the Claimant's reasons for asking for a car parking permit was that she felt it difficult to use public transport because of two things. Firstly she was fearful that she would bleed causing her discomfort and a loss of dignity. In addition her arthritis impacted upon her mobility making travelling by public transport uncomfortable. We would accept that both of those matters arose from the disability is that the Claimant has established.

186. In her skeleton argument Ms Owusu-Agyei departs slightly from the Claimant's case as it had formerly been understood. She suggested that the something arising from the Claimant's disabilities was the manner in which she described her disabilities in her application for a parking permit. It is said that this description

led Inspector Stuart Elliott to reject the application. The first question is whether it can properly be said that the Claimant's description of her conditions is something that itself arises as a consequence of disability. We can think of some factual circumstances where that might be true. A person with a disability which impacted on their ability to set out a description of their condition in writing would in our view be able to say that the absence of a full description arose as a consequence of their disability. We find that the Claimant initially gave details she thought were sufficient in her early application and offered to elaborate on them in confidence. In her later application she declined to give any details because she believed that they might be shared. We do not accept that the Claimant's concerns about personal privacy arose as a consequence of her disabilities. Such concerns can, and we find did, exist entirely independently of disability.

187. The Respondent's parking policy which we have quoted above requires applications to be supported by 'up to date' evidence. In support of her earlier application the Claimant had not provided any supporting evidence. She later acknowledged that on a strict reading of the policy her first application was properly rejected (within the terms of the policy as opposed to the Equality Act 2010). In her second application the evidence that the Claimant did provide from her GP did not say what conditions she relied upon (on instruction of the Claimant). The fact that the Claimant had not provided such evidence did not arise as a consequence of her disability it arose because initially the Claimant thought that she had provided enough information and could supply more orally and latterly because she did not want her information to be shared.

188. The case set out in the list of issues is that the Claimant was refused a parking permit because of her mobility issues. We find that the Claimant has not established any facts from which we might infer that was the case. The reality is that the Claimant's case – as presented in her reasonable adjustment's case, is that her mobility issues were not properly explored.

189. We have not accepted that content (or lack of content) of the Claimant's applications arose as a consequence of her disability. It follows that we cannot infer any discriminatory act on that basis.

190. Putting to one side any question of the burden of proof and moving to the issue of the reason for the treatment complained of we find that the only reason that Inspector Stuart Elliott refused the Claimant's application for a car parking permit was that he believed that the Claimant's application did not meet the requirements of the policy which he believed required any application to be supported by up-to-date evidence (which he understood to mean evidence from a doctor or the Respondent's Occupational Health provider). We find that that was the entirely of his reasons and that the Claimant's mobility issues (which did arise in consequence of her disability) played no part in his reasons. That is sufficient to dispose of the case in the list of issues.

191. Ms Owusu-Agyei in paragraph 16 of her skeleton argument argues that the reason for the treatment that we have found is because of something arising in consequence of disability. She says, correctly, that there can be more than one link in the chain. The first link she identified is the Claimant's need for a parking permit which arises as a consequence of the symptoms of her disability. The second link is the requirement for evidence. We do not accept that the failure to evidence the need for a parking permit arises as a consequence of disability. It is

the background but not in our view a 'consequence'. We therefore reject this way of putting the Claimant's case.

192. For the reasons set out above we do not uphold this claim. We do however uphold the claim that the same treatment amounted to a failure to make reasonable adjustments for the reason we set out below.

6(b) On 30 July 2018 Ronnie Jones advising the Claimant that he could not authorise disability leave for 18 August 2018

193. There was no dispute that on 30 July 2018 Ronnie Jones' initial response to the Claimant's request to take leave on 18 August 2018 was to decline to deal with it himself and to suggest that the Claimant approach a superior manager. Upon receiving information from the Claimant that the purpose of the request was to attend a physiotherapy appointment necessary for her recoupment Ronnie Jones granted the request on 31 July 2018.

194. We would accept that as the Claimant was working a shift pattern she would have been assisted by a reasonably prompt response. We do not accept the argument put forward by the Claimant that Ronnie Jones's suggestion that she ask a superior manager's permission rather than him is tantamount to a refusal. However we would accept that it caused a delay. The Claimant had fiercely guarded information about her disabilities. Ronnie Jones' email was polite and explained why he acted as he did. The Claimant could had she wished to do so have responded giving Ronnie Jones some indication of why her request met the criteria in the policy. She could have taken up his suggestion to speak to a superior officer without any difficulty at all. However we accept this would require the Claimant to take additional steps. Perhaps by a narrow margin, the Claimant could regard that as being a disadvantage.

195. The Claimants says that Ronnie Jones had some knowledge of her miscarriage(s). Even if that were so, this appointment the Claimant wished to attend had nothing to do with those events/disabilities. That appointment was a consequence of the Claimant's recent diagnosis of arthritis. The Claimant did not tell Ronnie Jones about her arthritis at that stage. Even in her email of 31 July 2018 the Claimant does not say anything more than the fact that the nature of the appointment was to have physiotherapy. We find that Ronnie Jones was unaware that the Claimant needed to attend the appointment for a reason connected with her arthritis.

196. Before any duty arises under section 15 of the Equality Act 2010 the person alleged to be the discriminator must have actual or constructive knowledge of the relevant disability. We have found above that Ronnie Jones did not have any actual knowledge of the Claimants arthritis. That leads to the question of whether he ought to have known. The Claimant had made it clear that she did not wish to share any information about her disability outside a very limited circle. We have referred to passages in the statutory code of practice which suggest that whilst the may be a duty to make enquiries it is necessary to respect the disabled persons dignity and privacy. We consider that Ronnie Jones acted in accordance with the spirit of the code when, rather than ask the Claimant about the reasons for her appointment, he directed her to a more senior manager explaining that he did not know enough about her conditions to grant her disability leave.

197. The situation we have here is that some parts of the organisation (Inspector Stuart Elliott), did have constructive knowledge of the Claimants disability by way of arthritis. However, some individuals within the organisation did not. Whether or not a duty arises in those circumstances would turn upon the question of whether Ronnie Jones as Acting Duty Officer ought to have been given sufficient information by his superiors to enable him to make decisions about matters such as disability leave. The information necessary in this case would have been information that the Claimant had arthritis which was long-term and that it substantially affected ordinary day-to-day activities. We find that it would not have been reasonable in the light of the Claimants request that her personal medical information be kept confidential to have made it more widely known than absolutely necessary that she suffered from this particular disability. Given that the decision could be taken by a more senior manager either on the same day or still in sufficient time for the Claimant to have attended the appointment we find that Ronnie Jones did not have any constructive knowledge of the relevant disability at the time he made his decision. We suspect that the Claimant would have been very upset indeed had the information that she had disclosed to Inspector Elliott been shared with Ronnie Jones.

198. We therefore find that Ronnie Jones did not discriminate against the Claimant by not immediately granting her request a disability leave. Whilst we do not see that it is possible for the Respondent to be vicariously liable for actions which are not unlawful just because the organisation had been necessary constructive knowledge of disability we go on to deal with the reason for the treatment.

199. In her skeleton argument Ms Owusu-Agyei invites us to accept the evidence of Ronnie Jones when he said *'I didn't have any information at all from which to make a decision'*. In his witness statement Ronnie Jones says *'I respected the Claimant's privacy and did not expect her to inform me of her disability, particularly because of our difficult working relationship… and the fact that I was conscious that she may not wish to divulge this information to me'*. Ms Owusu-Agyei invites us to find that it was Ronnie Jones' requirement for evidence that was the reason for the decision. We do not accept that he imposed a requirement for evidence. We accept that the reason that Ronnie Jones suggested that the Claimant speak to somebody else about her request was that he did not himself know enough to grant the application and he did not want to ask the Claimant for further information for the reasons given in his witness statement.

200. We would accept that the need to attend the physiotherapy appointment arose because of something arising as a consequence of disability. We would further accept that the request that the Claimant made for time off arose as a consequence of her disability. Had the Claimant not had arthritis she would not have made the request to attend the appointment and to take that time off as disability leave.

201. We do not consider that the absence of information and a reluctance to ask for information is something which arose in consequence of the Claimant's disability. This is not a case where the Claimant's reticence to talk about her disabilities is a feature of the disabilities themselves. We find that Ronnie Jones perceived the Claimant as likely to complain if he asked personal questions. We do not find that that perception arose as a consequence of the Claimant's disabilities.

202. We therefore find that the reason for the treatment is not something which arose in consequence of the Claimants disability of arthritis or indeed any other impairment amounting to a disability. It follows that even if we had found in favour of the Claimant issue of knowledge we would not have accepted that the reason for the treatment was something arising in consequence of disability.

6(c) The decision by Ronnie Jones and Liza Wingrove on 30 July 2018, that the Claimant was not entitled to premium payments for weekend working during recuperative duties without consulting the Claimant.

AND

6(e) Lara McPherson informing the Claimant that she was not entitled to premium payments whilst on recuperative duties, as decided by Francis Holland

203. Below we have set out our conclusion that the Claimant was not contractually entitled to premium payments for weekend working during recuperative duties.

204. The way the issues are set out above would suggest that it was the communication of the Respondent's position on pay that amounted to the detriment complained of. That can be disposed of very simply. The reason why Ronnie Jones Lisa Wingrove, Lara MacPherson and Francis Holland informed the Claimant that she was not going to receive premium pay for hours not worked was because they all believed, correctly in our view, that the Claimant was not entitled to the pay she was claiming. That is not something arising in consequence of the Claimants disability.

205. The way Ms Owusu-Agyei put matters before us did depart from the list of issues but was consistent with the way the parties dealt with the matter before us. She says that:

    205.1. the reason that the Claimant was unable to work her full shifts was because she was on recuperative duties as a consequence of her disability; and

    205.2. that was the reason she was not paid the premium payments.

206. The Respondent agrees that the reason the Claimant did not receive premium payments was that she had not worked the full shifts and that this was because of her disabilities.

207. We permitted the Respondent to rely on a defence of justification. The Respondent says the policy was necessary and proportionate to achieve the legitimate aim of 'controlling expenditure'. Somewhat unfairly given the substantial amendments made by the Claimant in her case Ms Owusu-Agyei categorise this as an 11th hour defence.

208. The first question we need to address is whether a disabled employee unable to work the full contractual hours can consider it to be unfavourable treatment where the employer has decided to confer some benefits (normal salary) on those persons on recuperative duties but has not decided to confer others.

209. Whilst not a part of her normal salary the premium payments that the Claimant received were part of her pay. The effect of the Respondent's pay arrangements

was that the Claimant's pay was reduced because she was unable to complete her full shifts. In her witness statement she sets out the sums she claims which totalled £260.91 over the 10 weeks she was on recuperative duties.

210. We find that the purpose behind the premium payments is to compensate the employees for working on days which would usually be holidays. When the Claimant was on recuperative duties she gave up less 'holiday time' than normal. The present case differs from the situation in ***Williams v Trustees of Swansea University Pension and Assurance Scheme***. In that case the benefit in question was available only because the employee was disabled. The fact that the trustees had adopted a scheme not as favourable as it might be did not mean that there was unfavourable treatment. The present case is more analogous to sick pay. In ***Browne v The Commissioner of Police of The Metropolis*** **[2018] UKEAT 0278** the EAT did not question the correctness of a decision that the effect of a policy of limiting sick pay amounted to unfavourable treatment. Whilst there is some force in the argument that the Claimant is actually saying that she was not treated favourably enough we have come to the conclusion that an employee unable to access full premium payments because of the effects of a disability could reasonably consider that they had been disadvantaged.

211. The unfavourable treatment was because of the Claimant's need for shorter shifts which were in turn a consequence of her combined disabilities. It follows that the treatment would be unlawful unless it was justified.

212. We have set out the proper approach to justification above. We remind ourselves that whether treatment is justified involves the Tribunal taking an objective decision for itself. We do not simply defer to the view of the decision maker - ***Hardy & Hansons plc v Lax***.

213. The Respondent needs to establish a 'legitimate aim'. Here the Respondent relies on the need to control expenditure. We would accept that as a public body there is a need to control expenditure. The Respondent, like any private body, does not have infinite resources and needs to make budgetary decisions to allow it to carry out its important public duties within its means. Money spent in one area will impact on the ability to spend that money in some other area. Daniel Pickett told us, and we accept, that in recent times the Respondent had been subjected to *'significant cutbacks'* and budgetary considerations became even more important.

214. The Claimant's claim is for 'just' £260.91. We do not find that the small value of the claim is relevant to the question of whether a legitimate aim exists at all. There would be a legitimate aim in controlling expenditure even for a lesser sum. We return to this when considering the proportionality of the decision not to pay the Claimant.

215. We accept that the Respondent has established a legitimate aim that is in principle sufficiently important to require the Tribunal to look at whether the means adopted by the Respondent were proportionate. The measure of not paying premium payments for hours not worked when on recuperative duties is rationally connected to the legitimate aim of the Respondent living within its means and/or controlling expenditure.

216. We turn to the issue of whether the policy was 'necessary' or proportionate. The sum claimed by the Claimant was small. The premium payments lost made up a fairly small proportion of the Claimant's pay. That said, the Claimant worked part time and her overall pay was not very high. A payslip we were provided with showed a net payment of £2337 in February 2018. We would describe the effect of the pay policy as having a modest effect on the Claimant's pay.

217. We find that it is necessary not only to have regard to the pay claimed by the Claimant but to the overall cost to the Respondent in changing the policy. We find that it would have caused resentment and claims of unfair treatment if the Claimant had been paid the premium payments when others in similar positions were not. We draw support for this approach from the discussions of the issue in ***O'Hanlon v Revenue and Customs Commissioners*** **[2007] EWCA Civ 283** where the Court of Appeal approved the approach of the Tribunal in taking account the wider costs of changing a policy.

218. We would accept that the Respondent cannot justify potential discrimination by reference to a policy. What needs to be justified is the effect of that policy on an individual see ***Buchanan v Commissioner of Police of the Metropolis*** **[2017] ICR 184**. However, in this case the effect of the policy was no harder on the Claimant than on any other employee. As the Claimant could work for at least part of her rostered shifts the effect of the policy was, as we have said, modest.

219. Whilst we acknowledge that the test for whether an adjustment is reasonable is not the same as whether treatment can be justified, whether it would have been reasonable to maintain premium payments during recuperative duties raises the same issues as a suggestion that maintaining sick pay is a reasonable adjustment. As was made clear in ***O'Hanlon v Revenue and Customs Commissioners*** whilst it may be reasonable in some cases there would have to be very good reasons why that was the case. We have regard to the suggestion that maintaining pay may be counterproductive as it may provide a disincentive to return to full duties.

220. Daniel Pickett told us, and we accept, that at the time the Claimant was making enquiries the pay policy that applied to her was under review. The Respondent recognises trade unions and any changes to the pay policy are a part of collective consultation/negotiations. It was agreed that from 25 September 2019 a more flexible policy had been introduced which allowed employees on recuperative duties to claim premium payments limited to 60 days in any year.

221. It does not follow in our view that the fact that the policy was changed at a later stage that the policy in place at the time cannot be justified. Whilst we need to ask whether some less discriminatory measure would be proportionate to the legitimate aim, we need to look at the situation at the time.

222. We have regard to the fact that the Respondent was open to reviewing the policy and at the time of the alleged discrimination was beginning to do so. Those considerations required consultation and discussions on a collective basis.

223. We have regard to the fact that the policy in place did provide employees with their normal salary whether they worked their full duties or not. That substantially reduced the potential discriminatory effect of the policy. An employee not able to

work a full rostered shift on a weekend or bank holiday would not get the pay but also they did not have to give up all of the day ordinarily viewed as a holiday.

224. We take into account all of those matters. We weigh up the discriminatory effect against the legitimate aim pursued by the Respondent. We have come to the conclusion that the decision taken not to make premium payments was a proportionate means of achieving a legitimate aim. The fact that the Respondent has subsequently adopted an even more generous scheme does not mean that the previous scheme was unlawful at the time.

6(d) The decision by Ronnie Jones and Lisa Wingrove to place the Claimant on an 'overtime ban' without consulting the Claimant

225. As we have set out in our findings of fact above the Claimant had agreed to do some overtime before she was placed on recuperative duties. She completed one shift of that booked overtime before being told that, whilst on recuperative duties, she must not do any more overtime.

226. The Respondent's policy on recuperative duties states that an employee on reduced duties shall not undertake overtime unless OH advise to the contrary. The rational for this policy is self-evidently aimed at health and safety and ensuring a speedy return to full duties. The Respondent says that this is so obvious that the Claimant cannot show that the treatment is unfavourable. We disagree. We find that the Claimant could have reasonably thought that this was to her disadvantage as it prevented her from topping up her salary. She was placed on restricted duties aimed at reducing the length of a shift. It was not necessarily the case that she could not work a number of shorter shifts. OH were not asked to comment upon the health implications of that.

227. We accept that the reason for the treatment was because of something arising as a consequence of disability. In this case the fact that the Claimant needed reduced shift levels to allow for a period of recovery from the symptoms of disability(s). We need to consider the issue of justification.

228. The legitimate aim identified is the health and safety of employees or 'welfare'. We accept that preserving the welfare, health and safety of employees is a legitimate aim. To an extent it is also a legal duty. Restricting overtime for employees on restricted duties due to their health is rationally connected to the legitimate aim of preserving health and safety.

229. The issue is proportionality. We accept the point made by Ms Owusu-Agyei that there was no individual welfare consideration undertaken by Ronnie Jones or anybody else. The Claimant was referred to the relevant policy and that was all.

230. We do not find that the relevant policy amounts to a blanket ban on overtime during periods of recuperative duties. The policy provides an exception 'when HR advise otherwise'. We find that the base policy is one which is entirely reasonable. Where reduced duties have been put in place on HR advice it would not be sensible for the employee to offer or the employer to ask that the employee take on additional duties by way of overtime. That would run the risk of defeating the purpose of having reduced duties.

231. There was a financial disadvantage to the Claimant as she would not be able to do overtime whilst on recuperative duties but she was in receipt of her full salary.

If the Claimant did work overtime (but less than the amount her hours had been reduced by) she would have been financially better off than simply working for her contracted hours. That would be a windfall.

232. The Claimant did not ask for a further OH report to see whether she ought to be permitted to work overtime. She was aware of the relevant policies and could have asked for a referral had she wished to do so. We do not know whether that would have been recommended or not. The OH report of 20 July 2018 refers to work related stress as the cause for excessive tiredness.

233. We find that the request that the Claimant not work any overtime whilst she was on reduced hours was a proportionate means of achieving the legitimate aim of preserving her welfare, health and safety. The discriminatory effect of this was mitigated by the fact that the Respondent paid the Claimant her normal salary despite her reduced hours. The 'ban' was not a blanket ban and it would have been open to the Claimant to seek an exception. In the absence of contrary advice the Respondent could reasonably have assumed that the Claimant's welfare was best met by working reduced hours.

234. We have concluded that the effect that the policy had on the Claimant's ability to undertake overtime was justified in the circumstances of this case.

<u>6(f) Stuart Elliot advising the Claimant on 31 August 2018 that it was her responsibility to look for a chair that 'worked'.</u>

235. We have set out above the correspondence about chairs that the Claimant received. The Claimant was told that it was her responsibility to track down a working chair. Whilst we would accept that employees can be expected to assist themselves the duty to provide safe office equipment is a duty owed by the employer. That is more so where the employer, as here, was under a duty to make reasonable adjustments for a disabled employee. We find that Inspector Stuart Elliot was unnecessarily rude to the Claimant and that being told that she should locate a working chair for herself was unfavourable treatment.

236. The next issue we need to deal with is whether the tone and content of Inspector Stuart Elliot's e-mail was because of something arising in consequence of the Claimant's disabilities. The 'something arising' identified by Ms Owusu-Agayei in her written submissions is the fact that the Claimant was disadvantaged by non-ergonomically assessed office furniture. We would accept that it was that 'something' that caused her to make her request.

237. The Claimant's reasons for asking for a chair arose in consequence of disabilities. It does not follow that Inspector Stuart Elliot's reasons for responding as he did were because of that 'something'.

238. We find that the reason Inspector Stuart Elliot responded as he did was that he found the Claimant demanding, he did not regard her as disabled, he was more generally frustrated about the issues of chairs in the workplace and thought that employees did not do enough to help themselves. None of these things are to his credit. He was rude and thoughtless. We do not have to resort to the burden of proof but shall assume that the Respondent needs to show that the reason for the treatment complained of was nothing to do with the 'something arising' the Claimant has identified. We are satisfied that the reasons we have identified are nothing whatsoever to do with that 'something arising'. The Claimant's difficulties

with non-ergonomically designed office furniture were the background but not the reason for the treatment.

The claims under Sections 20/21 and 39 of the Equality Act 2010 – reasonable adjustments

239. It is convenient to deal with the claims that there was a failure to make a reasonable adjustment by reference to the provisions, criteria or practices identified in the list of issues. We shall set those out together with the adjustment contended for.

Paragraph 9(a) and (f) 'Requirement to work from the Respondent's premises' and 'allocating parking on a first come first served basis'

Adjustment contended for – a parking permit.

240. There was no dispute that the Respondent did apply a requirement that the Claimant work at the Bow Police Station. The issue was whether that placed the Claimant at a substantial disadvantage compared to people not sharing her disability.

241. We accept the Claimant's evidence that she found using public transport difficult because of occasional bleeding outside her ordinary menstrual cycle. She tried to cope with this by carrying a 'dignity kit' but that was not something she could use on public transport. In addition we would accept that the Claimant's arthritis caused her difficulty in movement. That made travelling by public transport painful on occasions. We remind ourselves that the word substantial is defined as meaning more than minor or trivial. It is certainly not the case that the Claimants disabilities made it impossible for her to travel on public transport but that is not the test. We accept that it was harder for the Claimant with her combined disabilities to travel by public transport than somebody who did not share her disabilities. We are satisfied that the Claimant has established that she suffered from a substantial disadvantage in comparison to people without her disabilities. In the list of issues the Claimant has suggested that the substantial disadvantage included 'exacerbation of her disabilities'. If that is meant in the technical sense that travelling by public transport made her existing conditions progress then we did not have sufficient evidence to reach that conclusion. We do accept that travelling by public transport gave rise to fatigue, pain and discomfort and anxiety (particularly about the risk of bleeding on public transport).

242. As we have set out above no duty to make reasonable adjustments will arise unless the Respondent had actual or constructive knowledge of the disability and the substantial disadvantage caused by a PCP. We have found above that Inspector Stuart Elliott ought to have known the full extent of the Claimants disabilities at the point that she applied free parking permit for the first time. For the avoidance of doubt that finding extends to the effect that those had on her ability to travel by public transport. Inspector Stuart Elliott's insistence that the Claimant evidence her need for a parking permit with information from occupational health and/or her GP and the fact that he did not take up her invitation to discuss her medical condition privately with her do not provide any defence. The Respondent has in our view failed to follow the statutory guidance for enabling employees to raise sensitive matters around their disabilities in a manner which respects their dignity and desire to keep matters private.

243. The next issue is whether it would have been reasonable to have provided the Claimant with a car parking permit. Ultimately the Claimant was provided with a car parking permit. It was not suggested that it was unreasonable for the Respondent to have done so. The issue for us is therefore limited to asking whether or not the car parking permit ought to have been provided at an earlier stage.

244. The Respondent's case was essentially that it was not reasonable to provide a car parking permit unless the need for it was properly evidenced. The approach of Inspector Stuart Elliott was that that evidence would not only be provided to him that would be discussed with representatives from the two trade unions. It was said that provided transparency and ensured that people were treated consistently in circumstances where there were very few car parking spaces.

245. We have already stated that the requirements imposed by Inspector Stuart Elliott did not respect the Claimant's dignity and desire to keep her disabilities confidential. We would accept that an employer is entitled to ask for information about disabilities but the imposition of rules about where that information might come from maybe unreasonable if the disabled employee is able to give sufficient information themselves.

246. We find that had Inspector Stuart Elliott spoken to the Claimant he may well have been satisfied that she had real difficulties using public transport. If he had not been and if he wanted further information he could and in our view should, have given the Claimant and assurance that her wish to keep this information confidential would be respected as far as reasonably possible.

247. We would accept that where a scarce resource like car parking spaces is being allocated by management it is a good idea that that is done in a reasonably transparent manner. We would accept that that might include involvement of trade unions. However, that would not in our view necessitate sharing confidential information with trade unions. All that would be necessary would be to reveal the basis upon which any car parking permit was issued. We note that ultimately the car parking permit was issued without any involvement from the trade unions. A compromise suggestion which was floated was that applications could be made anonymously.

248. The duty to make reasonable adjustments would in our view be thwarted if an employer was allowed to say it is not reasonable to make an adjustment without the trade unions having access to confidential medical information.

249. The Claimant is recorded as accepting that her initial application for a parking permit was properly rejected. She did so accepting that had been made without supporting medical evidence. We do not think that her concession was properly made. The duty to make reasonable adjustments falls upon the Respondent once it has actual or constructive knowledge of the disability and the substantial disadvantage. Had Inspector Stuart Elliott sat down with the Claimant ascertained the extent of her disabilities and the disadvantages she suffered from her at worst he would have asked her for confirmation from her GP or made a swift to clear up any evidential concerns.

250. We find that the Respondent ought to have provided the Claimant with a parking permit within two weeks of her initial application.

251. We turn to the question of whether or not the Respondent complied with its duty to make reasonable adjustments by allowing the Claimant to use the team day pass when she was at work. We find that the Claimant frequently was given the team day pass and was able to avoid travelling on public transport. However, she had to ask and knew that it was a matter of discretion whether she would be given the pass or not. The adjustment contended for was a pass which could be used as of right. We find that it would have been a reasonable adjustment to have given her that pass and that allowing her to use a pass on ad hoc basis was not a complete substitute. The Claimant gave evidence which we accept that she was asked by Liza Wingrove why she was being allowed to use the team pass. Had she been given her own pass she would not have faced such questioning. The issue of how often the Claimant had to ask for a pass and whether it was ever refused might be raised on the question of remedy.

252. We did not understand the Claimant to be pursuing any separate complaint about the 'first come first served basis'.

Paragraph 9(b) 'requirement to work with non-ergonomically assessed equipment and Office Furniture'

Adjustment contended for – the provision of an ergonomically assessed office chair and/or undertaking a work station assessment. Paragraphs 11(b) and (e)

253. The Respondent accepted that it had a practice of requiring employees to work at workstations furnished with standard office furniture (unless reasonable adjustments were made).

254. It was not disputed that the Claimant's arthritis place her at a substantial disadvantage when using ordinary office furniture. We would accept that that would be exacerbated when it appears that many chairs were broken. The substantial disadvantage took the form of pain and discomfort when sitting on an ordinary office chair.

255. It was not argued with any great enthusiasm by Mr Kempster that the Claimant ought to have found one of the orthopaedic chairs and adapted it to her use on each occasion she turned up to work her shifts. We would have found that this would have placed the Claimant at a substantial disadvantage because of the difficulties of locating and then adjusting an office chair. We note that when an assessment was finally done and a chair finally delivered the Claimant was instructed how to adjust it.

256. The issue here was not so much whether or not there was a duty to provide an ergonomic chair to the Claimant. Ultimately that was done. The issue is whether or not it was reasonable to delay the provision of the chair. The occupational health report of 20 July 2018 recommended an assessment. That assessment did not take place until 24 September 2018. An ergonomic chair was provided on 8 April 2019.

257. The Respondent relies upon the difficulties with procurement. It also suggests that it was reasonable to expect the Claimant to find an orthopaedic chair and adjust it herself as an interim measure. We would accept that the Claimant was given some assistance with this.

258. We accept that the requirement to make reasonable adjustments must take into account difficulties in purchasing special equipment and organising proper assessments. An employer could not be expected to act instantly. However in our view there was inordinate delay in obtaining a specially adapted chair in this case. The Respondent is a substantial organisation. Whilst it must follow proper procurement processes the Claimant was not the only or first person who needed specially adapted furniture.

259. There was no evidence before us that the Respondent had looked at the possibility of hiring a chair or searching within the organisation for a chair that was no longer in use. Had the Claimant been allocated one of the orthopaedic chairs for her personal use that would have avoided the need to adjust the chair on every occasion and made the delay in obtaining the recommended chair more reasonable. Not even that simple step was taken. That would have been a reasonable interim measure.

260. We find that any delay in providing a new chair in excess of four weeks from the date of the assessment is unreasonable.

261. It follows that we find there was a failure to make reasonable adjustments to the practice of providing ordinary office furniture firstly by not allocating the Claimant an orthopaedic chair for her personal use on an interim basis and secondly by not purchasing he recommended chair and ensuring delivery within a reasonable time.

262. We have dealt with the claim as presented to us as a reasonable adjustments claim. The claim would have fitted more easily into a claim that the Respondent had failed to provide an auxiliary aid. The outcome would have been the same.

263. Insofar as it is contended that it was a reasonable adjustment to carry out an assessment in itself we dismiss that aspect of the claim. The Claimant did not need an assessment. She needed a chair. The reasoning in ***Tarbuck v Sainsbury's Supermarkets Ltd*** **2006 IRLR 664, EAT** is a complete answer to that claim.

Paragraph 9 (c) and (e) Requirement to work set office hours/Requirement to work shifts with minimal breaks.

Adjustment contended for - permitting the Claimant to take micro breaks each hour.

264. It was not disputed that the Respondent would ordinarily expect employees to work continuously save for recognised break times. We find the Claimant has therefore established the PCP she contends for.

265. The occupational health report dated 20 July 2018 makes a recommendation that the Claimant be permitted to take 'micro breaks'. A later occupational health report dated 29 November 2018 recommends that she continued to take micro breaks allowing her to alternate her positioning to manage the condition and enable her to perform some desk-based exercises.

266. We are satisfied that the PCP identified by the Claimant place her at a substantial disadvantage because working continuously for a long stretch of time resulted in her suffering from pain.

267. We find that the Claimant was told that she could take micro breaks when necessary. Mr Kempster argued that the wording of 29 November 2018 occupational health report suggested that the Claimant was in fact able to take such micro breaks. He points towards an absence of any contemporary complaint as evidence of this.

268. The Claimant told us that, whilst she was permitted to take micro breaks, in practice this was difficult. Ordinarily there would be to supervisors on duty and she might expect a colleague to cover her when on a break. That is the way that ordinary breaks were dealt with. The Claimant's evidence was that she could not always find somebody to cover her breaks and that in practice she was not able to take breaks as often as had been recommended. We accept her evidence in that regard.

269. The adjustment contended for is 'permitting the Claimant to take micro breaks'. We find that simply instructing the Claimant that she was allowed to take micro breaks was not by itself adequate to alleviate the disadvantage experienced by the Claimant. We find it was necessary for the respondent to put some formal system in place to relieve the Claimant on a regular basis. We do not think there would have been any great difficulty in that. All that was required was for those supervisors working with the Claimant to be notified that they should relieve the Claimant on a regular basis. They would not need to know the reason why although it might have been obvious.

270. Whilst we would accept that the Respondent did take some steps to alleviate the substantial disadvantage we find that without the formal approach the good intentions did not translate into sufficient steps to meet the duty to make reasonable adjustments.

Paragraph 9 (d) Requirement to adhere to attendance expectations.

Adjustment contended for – allowing the Claimant to take disability leave.

271. This allegation concerns the initial response of Ronnie Jones to the Claimant's request take disability leave to attend a physiotherapy appointment on 18 August 2018. As we have set out in our findings of fact, by 31 July 2018 Ronnie Jones had agreed to the Claimant's request.

272. This allegation substantially overlaps with the same allegation brought as a claim under section 15. We have set out above our conclusion is that Ronnie Jones did not have actual or constructive knowledge of the Claimant's relevant disability – arthritis. The same reasons as in the section 15 claim that is fatal to the present claim.

273. The way in which the claim is put in written submissions is that the initial 'refusal' placed the Claimant at a substantial disadvantage. That appears to be a departure from the PCP set out in the list of issues. We find that there was no refusal. There was a suggestion that the Claimant ask another manager. That could have been done in plenty of time before the appointment and in fact was done. The Claimant was permitted to take the time off as disability leave. In those circumstances we do not find that the Claimant has established the was any failure to make a reasonable adjustment to the PCP of requiring her to attend work.

The claims under Sections 27 and 39 of the Equality Act 2010 – victimisation

274. The protected acts relied upon by the Claimant were initially:

274.1. The Claimant's grievance of 11 August 2018; and

274.2. Her second grievance of 17 December 2018; and

274.3. Her first tribunal claim presented on 6 January 2019.

275. We permitted the Claimant to amend her claim to include 2 further alleged protected acts. These were:

276. Her e-mail sent to Mr Cook in February 2017 where she referred to allegations of racism by Jo Wood and other members of the Senior Leadership Team; and

277. Her e-mail to Gordon Ifil of 2 December 2018 where she complained that she had been victimised for sending the e-mail referred to above.

278. It was not disputed that in each document relied upon as a protected act the Claimant expressly or implicitly suggested that another person had infringed the Equality Act 2010. We did not understand it to be disputed that the Claimant's correspondence qualified as a protected act pursuant to Sub-section 27(2)(d) and that her first ET1 qualified as a protected act pursuant to Sub-section 27(2)(a).

279. The issue for us is in each case are whether the Claimant has established as a matter of fact that the treatment she complains of took place and is a detriment. Thereafter we are concerned with the issue of whether any protected act was any part in the reasons for that treatment. As Ms Owusu-Agyei reminds us, the reasons for an action need not be conscious they may be unconscious. There may be a number of competing reasons for any action. An act will be unlawful if a protected act amounts to any part of the reasons for the treatment.

12(a) Repeatedly questioning the Claimant's status when accompanying a colleague to a case conference on 28 November 2018.

280. We have found that the Claimant was asked, twice, about the capacity in which she attended the absence review meeting that took place on 28 November 2018. We find that those questions were innocuous. Any subjective sensitivity felt by the Claimant was not objectively justified. We are not satisfied that the Claimant could reasonably consider those two questions to have been a disadvantage. It follows that we are not satisfied that she has established a detriment. That would be sufficient to dispose of this claim.

281. We have found that Inspector Douglas Fyfe had no knowledge of the Claimant's grievance. It would follow that his reasons for asking about the Claimant's capacity were not influenced in any way by a grievance he knew nothing about.

282. We have found that Ronnie Jones knew that the Claimant had complained about him. It is therefore possible that he was influenced by the Claimant's grievance of 11 August 2018.

283. It was not suggested that either Inspector Douglas Fyfe or Ronnie Jones had any knowledge of the Claimant's e-mail of February 2017. The other protected acts postdate the allegation and cannot have been a reason for the treatment.

284. Approaching the matter on the basis that the Claimant needs to prove facts from which we could infer victimisation we find that the Claimant has not made out a case from which we could draw inferences that her grievance was the reason for the enquiry about her status. We accept that it is necessary for us to look at the evidence as a whole and we have done so. However, assuming we are wrong about that we shall assume that the Respondent bears the burden of showing that the grievance played no part whatsoever in the reasons for asking the Claimant about her capacity.

285. We have found that Ronnie Jones asked the Claimant about her capacity during the introductions. He was taking notes to be used for the production of minutes. We are satisfied that the only reason he asked about the Claimant's capacity was to ensure that he had accurately recorded the capacity she attended in. We find that he asked because he was not sure. We find that that had nothing whatsoever to do with the fact that the Claimant had brought a grievance.

286. It follows that this allegation of victimisation fails.

12(b) Being issued with a Notice of Investigation on 1 December 2018

287. We are satisfied that being issued with a notice of investigation citing matters which could reasonably be viewed as having the potential to lead to a dismissal is a matter which the Claimant could reasonably regard as being to her disadvantage. We find that the fact that it was later withdrawn is neither here nor there. Until withdrawn the Claimant's employment was insecure.

288. We have set out above in our findings of fact there were considerable delays between the complaint by Jo Wood and the eventual decision to ask Inspector Andrew Inglis to investigate the complaint. It appears that a great deal of delay was caused by concerns that the Claimant had been acting as a trade union representative when she attended meetings and sent her e-mail in February 2017 containing criticisms of Jo Wood. We consider the approach of the Professional Standards unit to have been very poor. Jo Wood became increasingly frustrated which was entirely understandable.

289. We are concerned with the reason for issuing the Notice of Investigation. The parties spent some time on the question of who decided to issue the Notice of Investigation. That is because the Claimant relies not only on her e-mail of February 2017 but also on her grievance of 11 August 2018. She says that Amanda Wixon must have been aware of that. We have found above that she was not. In any event in the light of our findings below the point is academic.

290. We find that the Notice of Investigation was issued because of the complaint by Jo Wood who had taken offence when she had read what the Claimant had said about her including what was said in the Claimant's e-mail sent in February 2017.

291. There was no dispute before us that the Claimant's e-mail of February 2017 amounted to a protected act. The Notice of Investigation says in terms that *'This allegation is based on e mails sent to the grievance team alleging [Jo Wood] are a bully and racist'*.

292. We would accept that in some circumstances an employer can take action not in response to a protected act but because of the manner in which that protected act is done or because of the effect that the protected act has on the working relationships or reputation of the organisation see ***Martin v Devonshires Solicitors*** **UKEAT/0086/10/DA** and in a different context ***Page v NHS Trust Development Authority*** **[2021] EWCA Civ 255**.The question is whether the reason for the treatment is separate from the fact that a protected act was done. Whether it is a matter of fact for the tribunal.

293. We would accept that the Claimant's comments in her e-mails might be thought to be wide ranging and somewhat blunt. If false they may well have been damaging to working relationships. However, then need to be seen in their context. The Claimant's e-mail was sent in her capacity as a trade union representative on behalf of a member bringing a grievance.

294. We find that the Claimant has proved facts from which we could infer that she has been victimised contrary to Section 27 of the Equality Act 2010. On its face the Notice of Investigation says that the Claimant is being investigated because of what she said in an e-mail which is a protected act. We have no hesitation in concluding that that is sufficient that the burden shifts to the Respondent.

295. Mr Kempster in his written submissions suggested that the reason for the treatment was that content of the Claimant's e-mails amounted to *'unreasonable and unsubstantiated criticism'*. In order to amount to a protected act an employee does not have to be reasonable nor do they have to be correct about the allegations that they make. The fact that an allegation turns out to be false is immaterial unless the allegation was made in bad faith. The Respondent has not sought to suggest that that test of bad faith was, or could ever have been, met in this case.

296. We do not consider that the Respondent has shown that the reason for the treatment complained of was in any way separate from doing the protected act itself. We were not provided with any evidence to suggest that some separate reason existed. The Respondent has failed to discharge the burden of establishing that the reason for the treatment complained of was not materially influenced by the fact that the Claimant did a protected act.

12(c) Gordon Ifil advising the Claimant on 17 December 2018 that the Notice of Investigation restricted his ability to continue with his assessment and review of her grievance of 11 August 2018

297. We have found above that Gordon Ifil did inform the Claimant that his investigation into her grievance would be placed on hold pending any advice he received about the effect of the Claimant being served with a Notice of Investigation. Grievances should be dealt with as quickly as possible to avoid employment disputes festering. We are satisfied that a delay in the process was a matter the Claimant could reasonably regard as a disadvantage. The fact that Gordon Ifil acted as he did to protect the Claimant does not lessen that conclusion.

298. We listened carefully to Gordon Ifil's evidence. We find he was fair and objective. He is independent of the Respondent. His role is investigating serious complaints

often including discrimination. He has a good working knowledge of the legal principles. Whilst we have disagreed with one of his conclusions in respect of the Claimant's grievance we found him a thoughtful and measured witness.

299. The suggestion is made by the Claimant that the grievance investigation was paused because of a protected act. Ms Owusu-Agyei says in her written submissions that the protected acts relied upon is primarily the protected act of sending Gordon an e-mail on 2 December 2018 complaining that serving the Notice of Investigation was an act of victimisation. She also says that Gordon Ifil believed that she would raise a further grievance, which she did on 17 December 2018. That latter point was not pleaded in those precise terms but it makes no difference to the outcome and we shall proceed on the basis that there were two protected acts.

300. The Claimant is correct that 'but for' the fact that she notified Gordon Ifil of the Notice of Investigation the grievance process would not have been paused. That does not necessarily mean that the Claimant's e-mail or 2 December 2018 or any anticipated grievance was the reason for the treatment.

301. This is not a borderline case and we have no need to resort to the reversal of the burden of proof. We shall assume that the Respondent needs to show a that the protected acts in no sense whatsoever influenced the decision to pause the grievance.

302. Gordon Ifil sets out his explanation of why he acted as he did in his grievance report. What he says is that when he learned of the Notice of Investigation and of the Claimant's assertion that this was victimisation he thought it appropriate to refer the matter to the DPD Discrimination Investigation Unit for a 'gravity assessment'. We find that his reasons for doing so was his view that there were serious questions raised by the Claimant and that he was inviting the Discrimination Investigation Unlt to assess whether disciplinary action against the senior managers – also involved in the Claimant's grievance, was merited. If it was then that would probably be dealt with before the grievance was investigated. We find that he regarded it as unlikely that he would be able to interview people about the Claimant's grievance with disciplinary charges pending.

303. We are satisfied that Gordon Ifil's decision to refer what he regarded as a potential act of victimisation to the Discrimination Investigation Unit was not because of any protected disclosures. The reason for the treatment was to address what Gordon Ifil regarded as potentially serious misconduct in the proper manner. We are satisfied that that reason is nothing to do with the fact that the Claimant made any protected disclosure. The disclosure was the background but not the reason for the treatment.

<u>12(d) Failure to provide the notes of the case conference of 28 November 2018, on 3 February 2019.</u>

304. In our findings of fact we have accepted that the Claimant was not sent a copy of the minutes of the meeting of 28 November 2018 when they were finally typed by Ronnie Jones on 3 February 2019. We have accepted that the Claimant wanted those minutes as she felt the need to make changes to them. She could have asked Patrick Hallessey for the minutes but she expected them to be sent directly to her. That is what happened within a very short space of time. We find that this is on the very border of what a reasonable person might consider to be a

disadvantage. What perhaps just tips it over to being something a reasonable person might consider to be a disadvantage is that Ronnie Jones left the Claimant with an impression that she would be sent the minutes.

305. We repeat our findings about Douglas Fyfe's knowledge of the Claimant's grievance of 11 August 2018 and her subsequent correspondence in December with Gordon Ifil. We further find that Douglas Fyfe had no knowledge that the Claimant had presented her first ET1 at this date.

306. We have set out the correspondence between Ronnie Jones and Douglas Fyfe above. We find that it was Douglas Fyfe who took the decision that the Claimant should not be sent the minutes of the meeting of 28 November 2018.We find that Ronnie Jones had no part in that decision although he was asked to implement it.

307. We are therefore concerned only with Douglas Fyfe's reasons for the decision not to include the Claimant in the circulation of the minutes. We find that he had no knowledge at all about any protected act relied upon by the Claimant. It follows that the Claimant has not proved facts from which we could infer that the decision was an unlawful act. In case we are wrong about that we shall assume that the burden of proof passed to the Respondent.

308. We are satisfied that Douglas Fyfe's explanation for not asking Ronnie Jones to copy in the Claimant when the e-mails were circulated was the reason he set out in his e-mail to Ronnie Jones. The reason was his belief that it would not be appropriate to send minutes directly to a person who had accompanied a fellow employee to a meeting in the capacity of a colleague rather than a trade union representative. We are not concerned with whether that reason was appropriate but with whether it was the reason and what is more the entirety of the reasons. Whether it was appropriate or sensible might be relevant to that question. We do find that it was rational to distinguish between a formally appointed representative from a trade union and a lay representative. The former can be assumed to remain as a representative on an ongoing basis whereas a colleague might be asked to attend on an ad hoc basis or a continuing basis as the employee invited to the meeting elects. That distinction was recognised by Inspector Douglas Fyfe who, rightly, pointed out that Patrick Hallessey could pass on the minutes if he wished to have the Claimant assist him on an ongoing basis. That was a perfectly sensible approach. Given that Patrick Hallessey could do that if he wanted, and there was unlikely to be more than a minor inconvenience for the Claimant this is very unlikely to have been done in retaliation or as an act of victimisation. We find that it was not. We find that the entirety of the reasons for taking this step were those set out in the e-mail. The Claimant was not included because she was not acting as a trade union representative. That had nothing to do with her protected acts.

<u>12(e) Ronnie Jones advising that he had been instructed by Inspector Fyfe not to provide copies of the case conference notes on 3 February 2019</u>

309. Ronnie Jones told the Claimant the truth. We find that he did so politely and with an attempt at humour. We are not satisfied that this amounted to a detriment.

310. If, being told of Inspector Douglas Fyfe's instruction was a detriment we find that Ronnie Jones reasons for telling the Claimant the truth were that he believed she

should know. This had nothing whatsoever to do with any protected act. Whilst we have accepted that Ronnie Jones had some knowledge that the Claimant had brought her grievance of 11 August 2018 he had no knowledge of any later or earlier protected act. None of these acts had any bearing on his decision to inform the Claimant (by hinting) of what Inspector Fyfe had told him to do. The protected acts played no part whatsoever in his decision making.

12(f) Ronnie Jones' aggressive and unnecessary behaviour towards the Claimant on 3 February 2019.

311. In our findings of fact above we have concluded that there was a disagreement during which Ronnie Jones said words to the effect of *'I am done with this'*. He accused the Claimant of being rude, undermining and bullying him. This was a brief but heated exchange. Whoever was 'to blame' the result was an unpleasant exchange which we find left both participants upset. We find that the Claimant could regard this as a detriment.

312. We have accepted that Ronnie Jones knew that the Claimant had brought a grievance or at least that she had complained about him. Correspondence sent by Ronnie Jones on 31 July 2028 following the request for disability leave suggests that Ronnie Jones was becoming fed up with the Claimant raising complaints about decisions that he made. We find that those facts taken together would be sufficient that, disregarding any explanation from the Respondent, we could infer that the reason for Ronnie Jones' outburst was that the Claimant had complained about him in her grievance of 11 August 2018. We repeat that he had no knowledge of any other protected act.

313. The burden therefore passes to the Respondent to show that the protected act formed no part of the reasons for the treatment complained of. We have looked carefully at the evidence. In the early stages of the Claimant raising the issue of the minutes and why she had not been supplied them directly she and Ronnie Jones had a conversation in which Ronnie Jones displayed no irritation and fairly hinted to the Claimant in good humour that the decision not to include her in the e-mail circulating the minutes was not his doing. That is not to say that Ronnie Jones was impressed with the Claimant's behaviour about the minutes up to that point. He was alive to the fact that the Claimant was disgruntled by a matter which was of no significance. We find that he viewed this as typical of the Claimant's behaviour.

314. We find that what changed the atmosphere was the Claimant's e-mail of 17:37. In that e-mail the Claimant accused Ronnie Jones of a lack of impartiality and made the strong, and in our view misguided, suggestion that the meeting of 28 November 2018 would have to be repeated. We find that it was that e-mail that was the prompt for the heated exchange that ensued.

315. We have found above that Ronnie Jones had a poor relationship with the Claimant that pre-dated any of the protected acts the Claimant relies upon. We also find that Ronnie Jones was fed up with the Claimant for making what he regarded as baseless complaints about matters such as premium pay and disability leave.

316. We are alive to the possibility that amongst the matters that caused Ronnie Jones to confront the Claimant was her criticism of his decisions in July which formed

part of her grievance. Unless we are satisfied that these matters played no part in the reasons for the outburst we should uphold this claim. A matter which we have in mind is that a great deal of time had passed since those incidents. Ronnie Jones had not been criticised for the decisions he took. His decisions were in fact perfectly proper. He knew that. He had no reason for any concern about complaints by the Claimant.

317. We have assessed all the evidence in the round. We are satisfied that the reason for the outburst was the fact that the Claimant sent Ronnie Jones her e-mail at 17:37 on 3 February 2019 which was blunt verging on rude. We find that it was that e-mail that changed the tone of the exchanges between these two individuals from grudging professionalism to unpleasantness. We find that the reason for the outburst was solely because of the criticisms made by the Claimant in her e-mail. We find that whilst Ronnie Jones referred to the Claimant *'constantly undermining and bullying me'* he was not thinking about the fact that the Claimant had brought a grievance.

318. The Respondent has satisfied us that the protected acts were not any part of the reasons for the treatment complained of.

12(g) Ronnie Jones failing to arrange Duty Officer shadowing for the Claimant on 11, 12 or 13 February 2019.

319. In our findings of fact set out above we have accepted that Ronnie Jones failed to organise for the Claimant to shadow him or another Acting Duty Officer. We are satisfied that this is something the Claimant could reasonably regard as a disadvantage.

320. We have no need to rely on the reverse burden of proof. We move directly to the explanation given by the Respondent. We assume that the burden is on the Respondent to satisfy us that the treatment was in no sense at all because of any protected act.

321. We have made a finding of fact above that Ronnie Jones simply forgot to organise this shadowing opportunity. It is quite clear from the fact that Ronnie Jones sent an e-mail to 'duties' on 5 February 2019 that he intended to provide the Claimant with the opportunity she had asked for. He did that after a significant disagreement. We are satisfied that the reason given by Ronnie Jones 'I forgot' is the entirety of the reasons for the treatment complained of. It had nothing whatsoever to do with the Claimant's grievance of 11 August 2018 or any subsequent protected act.

The claims brought under Section 13 and 23 of the Employment Rights Act 1996.

322. In order to establish that there has been an unlawful deduction from wages it is necessary for the Claimant to establish that the wages were, 'payable to the worker in connection with his employment'. As Ms Owusu-Agyei rightly acknowledges in her skeleton argument *'in order to determine what wages are properly payable to the worker, the tribunal must construe the contract between the parties'*.

323. It is necessary for us to identify whether or not the policy documents we were referred to were intended to have any contractual effect. We were not provided

with a copy of the Claimant's individual contract of employment. We were referred to 3 documents on this question these were:

323.1. the Claimant's payslips; and

323.2. the Police Staff pay and allowances manual; and

323.3. the What you need to Know policy on Recuperative Duties.

324. We have set out the relevant passages from the policy on Recuperative Duties above. It is the Claimant's case that the phrase normal salary should be taken to include the premium payments attributable to shifts rostered but not worked.

325. The Police Staff Pay and allowances manual sets out the entitlement to Premium Pay. Under a heading, 'Definition' it is explained that premium pay is paid to those staff other than staff who are exempt from premium payments. The reference to exempt staff is we were told a reference to staff recruited subsequently to the Claimant for whom the entitlement to Premium Pay has been removed. Premium pay is pay which is available to staff, including part-time staff, who work at the weekend or on a bank holiday. Premium pay is payable whether or not the hours were worked as part of rostered hours or overtime. The manual then sets out circumstances where premium pay may be paid to people who were rostered to work but he did not attend. , Special constable duties, jury service, maternity leave, suspension, pregnancy related sickness absence and training courses. When Daniel Pickett gave evidence he accepted that in addition to those matters listed in the manual people seconded to another role might continue to receive Premium Payments.

326. The manual goes on to explain the rates of premium pay. In short the premium pay enhances basic pay by 50% the time worked on a Saturday and by 100% for time worked on a Sunday or bank holiday. The enhancements are expressed as a multiplier of the 'plain time rate'. Plain time rate is the hourly rate of pay which the employee is entitled to on a weekday.

327. We are satisfied that the terms in which the Police Staff Pay and Allowance Manual are written are sufficient that any part of the manual which sets out an entitlement to pay or allowances are intended to have contractual effect. Daniel Pickett told us that the contents of the manual were the subject of consultation with recognised trade unions and that the manual was amended from time to time. It is available for police officers and members of staff to look at. Whilst some language is inapt for a contract of employment it includes clear statements of entitlement which we find were intended to be binding.

328. The manner in which the case is put by the Claimant is that the phrase normal salary used in the HR manual dealing with recuperative duties is sufficient to include premium pay for periods where the Claimant might have been expected to work had she not been on reduced hours. We note that the policy includes the following passage:

'Unless expressly advised otherwise by OH, an individual should not work overtime as it could delay the return to full duties. No loss of earning will be paid e.g. from potential overtime they could have worked.'

329. We have had regard to the language in the HR manual. We note that there are some passages in the manual which describe benefits for the staff member. An example will be the entitlement to normal salary (whatever that may mean) and also the fact that the annual leave entitlement is expressed as not being affected by any recuperative duties. We find that such rights once declared were intended to be binding and those passages were intended to have contractual effect. That conclusion is supported by the fact that the manual was made available to staff members. We therefore conclude that the right to normal salary during periods of recuperative duties is a contractual right.

330. We need to ask ourselves whether the phrase normal salary includes premium pay for part of a shift falling on a weekend or bank holiday which was not worked but which might have been worked had the employee not been on recuperative duties.

331. On behalf of the Claimant it is suggested that the fact that the policy has been amended to be slightly more favourable because of what is described as the 'very real discrimination arising from disability' because of the previous 'erroneous interpretation' favours an interpretation of the phrase normal salary which with include such payments. We disagree. The very fact that the policy required to be changed does not support the suggestion that the policy already included the benefit contended for.

332. The ordinary definition of the word 'salary' would suggest that it is a fixed regular payment. The premium payments are more akin to overtime than they are to a fixed regular salary. They are a reward for working on days traditionally set aside as holidays. Whilst the roster system may well have meant that premium payments were made on a relatively regular basis that would not necessarily mean they were payable as 'normal salary'.

333. The Pay and Allowance Manual expressly sets out circumstances where premium payments will be made despite the person not attending the workplace. It may be that the list is not exhaustive but the fact that it is necessary to spell out circumstances where the payment has been agreed would suggest that unless there has been some agreement no premium pay will be paid unless there is attendance.

334. The fact that the Claimant has been able to point to an agreement that employees on secondment are entitled to premium pay does not assist. It is for the Claimant to demonstrate that the has been some agreement that in the circumstances she found herself in she is entitled, as of right, to premium payments. The Claimant suggested that she had appeared before an employment tribunal as an advocate and persuaded a tribunal that the was a right to payment. We have not seen that decision and in any event it would not have been binding on us. The Claimant says that payment has been made in the past. The Respondent does not dispute the possibility of that but says that would have been an error.

335. We find the existence of negotiations to improve the package of premium payments tend to indicate that the trade unions accept that there was no contractual right to premium payment. Had there been, there would be no need to negotiate.

336. In her skeleton argument Ms Owusu-Agyei says that the Respondent is unable to point to any written definition of normal salary. That may be so but in that case the words bear their ordinary meaning of a regular recurring payment. The Claimant has been unable to show that there was any agreement that premium pay for hours not worked whilst on recuperative duties would be paid outside of the policy documents that we have seen. She must bear the burden of proof of that. We find that on the plain reading of the policy documents which we accept are contractual premium pay is only payable whether is actual attendance. We find that that means that if a person works a part of a shift I weekend or bank holiday in circumstances where they would normally work the full shift they are entitled to their normal salary plus a premium payment for the hours that they worked. That is what the Respondent paid the Claimant.

337. It follows that the Claimant has not shown any contractual entitlement to be paid premium pay for hours that she did not work. We therefore dismiss the claim.

An apology

338. The Tribunal concluded its deliberations and reduced its reasons to note form on the last day of the hearing shown above. It has taken me, the Employment judge, many months to find the time to complete the task of writing up these reasons. Whilst I have tried to inform the parties of progress I have indicated a few false dawns. I can only point to the pressure of work in the tribunals as the reason for this. I had one extremely long and difficult decision to write up and have heard numerous cases since. I do understand how anxious the parties must have been. I am very sorry that they have had to wait.

339. I invite the parties to write to me making suggestions as to how to deal with remedy. Given there is other litigation between the parties the parties might seriously consider mediation.

Employment Judge Crosfill
Dated: 20 December 2022