



# EMPLOYMENT TRIBUNALS

**Claimant:** John Butcher

**Respondents:** The Chief Constable of Lancashire Police

## RESERVED JUDGMENT

**Heard at:** Manchester and by CVP      **On:** 23 – 25 August 2022;  
4 November 2022 (In Chambers)

**Before:** Employment Judge Holmes  
Mrs J Pennie  
Ms C Titherington

### Representatives

For the claimant: Mr S Proffitt, Counsel  
For the respondent: Ms C Brooke - Ward, Counsel

## RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The respondent discriminated against the claimant because of something arising in consequence of his disability, by withdrawing the offer of a civilian post as a PND operator , which the respondent has not justified.
2. The respondent did not directly discriminate against the claimant on the grounds of his disability by withdrawing the offer of a civilian post.
3. The claimant is entitled to a remedy. The parties are to seek to agree remedy, and, in default, to narrow and define the issues that the Tribunal will be required to determine on remedy. In the event that a remedy hearing is required, they are to notify the Tribunal by **6 February 2023** that a remedy hearing is required, what the issues to be determined will be, and are to provide an estimated length of hearing, and dates to avoid. They are also to make suggested, and if possible agreed, case management orders for the remedy hearing.

## REASONS

1. By a claim form presented on 27 April 2021 the claimant brings claims of disability discrimination. The disability discrimination claims take two forms, a discrimination arising in consequence of disability, a s.15 claim, and a direct discrimination claim, s.13 claim. The disability claims are based on the disabilities of anxiety/depression and back pain, which are conceded.

2. The claims arise out of the claimant, who was formerly a serving Police Officer, who retired on ill health grounds on 20 October 2020, then applying for a civilian post with the respondent as a Police National Database (“PND”) Operator. He was successful in that application, and was made a conditional offer of the post on 8 December 2020. On February 2021, however, that offer was withdrawn, on the grounds that the claimant would not be medically suitable for the role that he applied for.

3. The parties have agreed the issues as follows:

### **Direct discrimination**

1. *Was the Claimant treated less favourably than the Respondent would have treated others because of his disability pursuant to section 13 EqA 2010?*
  - (ii) *the alleged less favourable treatment was the withdrawing of his job offer/ not appointing him to the role of PND Operator);*
  - (iii) *the Claimant relies upon a hypothetical comparator.*

### **Section 15**

2. *Was the Claimant treated unfavourably in the withdrawal of his job offer / not being appointed to the role of PND Operator?*
3. *Was that treatment because of something arising in consequence of his disability arising from either his ability to carry out his role as a police officer and/or a PND operator (the Claimant understands that it was because of the Respondent’s perceptions around the fact that he was a disabled person)?*
4. *If so, did the Respondent have a legitimate aim in treating him in that way? If so, what was that legitimate aim?*

*The Respondent relies upon:*

*6.1 - Not undermining the ill health retirement process; and/or*

*6.2 – Ensuring that they employed staff with an ability to undertake the role and duties required, so that the service a PND operators provided was not effected; and/or*

*6.3 – Ensuring that the proposed employee/applicant was medically suitable for the role so that the services a PND officer provided was not effected.*

5. *If so, was the treatment a proportionate means of achieving that legitimate aim?*

4.The Tribunal has, with the agreement of the parties, only considered liability at this stage.

5.The hearing started on 23 August 2022 , and evidence was heard on 24 and 25 August 2022, with closing submissions being made on that last day. The Tribunal re-convened in Chambers on 4 November 2022 to deliberate. The Tribunal apologises for the delay in promulgation of this judgment, occasioned by pressure of judicial business.

6.The claimant was represented by Mr Proffitt, of counsel, and the respondent by Ms Brooke – Ward , also of counsel. The claimant gave evidence . The respondent called Sarah Scott and Joanne Kane as witnesses. The Tribunal accordingly did not hear evidence from any witness who carried out the appeal . There was an agreed bundle, and references to page numbers are accordingly references to pages of that bundle.

7.Having heard the witnesses, read the documents and considered the submissions of both parties, the Tribunal unanimously finds the following relevant facts:

7.1 The claimant joined the force as a trainee on 26 September 2005, and was then deployed as a Police Constable.

7.2 Around December 2011 the claimant injured his shoulder during training. As a temporary consequence of that injury, he was reallocated to light duties on a desk job at Police HQ at Hutton. That desk job was in the Force Intelligence Unit. This was desk work, using computers. The role of the team was to carry out Police National Computer and Police National Database enquiries. The PND Database was created as a response to the Soham case. It holds intelligence data. During rehabilitation he returned to light duties on multi agency safeguarding work which involved some travelling.

7.3 On 29 October 2018, the claimant had a serious accident , when he was injured in a fall from height. He fractured eight ribs , had a haemothorax and damaged a vertebral disc. After that accident, he did not return to any form of work with the respondent and was on sick leave continuously until his employment ended on 20th October 2020. During his sickness absence, the Police Federation to assisted him in his dealings with the respondent.

7.4 Before the accident, the claimant had no history of mental illness. After discharge from hospital, however, he gradually made some physical recovery, though significantly short of how he had been before the accident, but he developed depression .

7.5 At the end of the first six months of his sickness absence , there was a Management Referral to Health Services by the respondent.

7.6 There ensued adjustments to the claimant's pay, with him being maintained on half pay despite having reached the trigger for reduction to no pay.

- 7.7 At that time, the claimant was finding it very difficult to manage. He was focused on his physical injuries, his pain and discomfort, and was depressed. He was taking prescription medications for depression. Through 2019 his GP tried to help him with various antidepressants but none of them were really very effective. He was referred to a NHS mental health service (Minds Matter) but that did not really help either.
- 7.8 There was also an added complication with regard to his mental health, namely a needlestick injury at work not long before his accident, and, a further one, the death of his father in March 2018.
- 7.9 A Divisional Support Meeting was called for 17 October 2019. In which the possibility of ill health retirement was discussed. As a result of that meeting, an appointment was made for the claimant to have a consultation with the respondent's doctor, Dr Bayman on 14 November 2019. The claimant saw Dr Bayman on 14 November 2019 [see pages 120-121, 127 of the bundle]. She concluded that the claimant was not fit for work, and that, in respect of his physical injuries "it is likely that he would not be able to carry out the full range of ordinary duties required of a police officer and this is likely to be the case for the foreseeable future" [page 126 of the bundle].
- 7.10 On the same date, Dr Bayman wrote to the claimant's GP, Dr Tobin at Kirkham Health Centre, explaining that he was considering early retirement on health grounds and that she needed to advise the respondent as to his fitness for work, reasonable adjustments and whether he would meet the criteria for early retirement on health grounds. She asked for a report in respect of his physical and psychological conditions [page 122 of the bundle].
- 7.11 Dr Tobin replied by letter dated 20 November 2019 [pages 130-131 of the bundle]. He described the claimant's physical and mental conditions and said it was hard to assess any long-term prognosis.
- 7.12 On 3 December 2019, the claimant saw Susan Brockbank, a counsellor and psychotherapist to whom he was referred through Red Arc (a contributory health insurance scheme for Police officers). He saw her for seven one-hour sessions including treatment for post-traumatic stress, counselling for cognitive problems and the like. After treatment she provided a summary letter dated 23 April 2020 [page 196 of the bundle].
- 7.13 Amongst other things, she said that the claimant not knowing about his employment situation made him worse.
- 7.14 On 5 December 2019 the claimant attended a full case conference with ACC Lawson, Inspector Hannon (the claimant's line manager), Stuart Parry (his Federation representative) and Sarah Scott and Jo Kane. He was told that the purpose of the meeting was to decide whether he should be referred for medical examination by the SMP (Specified Medical Officer) This would be the commencement of a formal process to determine whether he should be retired for reasons of ill health. The outcome of that meeting was that there would be a

referral to the SMP for an opinion about his health and future capacity to serve as a Police Officer . The question of alternative employment or roles or duties was not discussed at that meeting.

- 7.15 Dr Bayman referred the case to the SMP on 10 December 2019 [pages 141-142 of the bundle], for consideration of permanent disablement.
- 7.16 The claimant saw the Respondent's SMP , Dr David Gidlow , an independent consultant in occupational health on 19 February 2020 and issued his preliminary report the same day [pages 152-155 of the bundle]. Dr Gidlow did not ask the claimant what duties he could perform for the respondent, as an alternative to being a full-time Police Officer.
- 7.17 In his report, Dr Gidlow was unable to give a final opinion and requested further information.
- 7.18 On 20 March 2020, the Federation section manager, John Ainsworth, requested a meeting with Dr Bayman to try to make some progress through the delays with the medical evidence [page 166 of the bundle].
- 7.19 On 20 March 2020, a one-month extension of salary payment was agreed [page 168 of the bundle]. On 9 April 2020, a one-month extension of pay was granted "based on ongoing financial difficulty".
- 7.20 On 21 April 2020, the claimant was examined by way of a video consultation by Mr Paul Dunkow a consultant orthopaedic surgeon, at the request of the Federation[ pages 183-195 of the bundle].
- 7.21 On 23 April 2020, Susan Brockbank wrote a "to whom it may concern" letter explaining her findings and treatment [page 196 of the bundle] Towards the end of April 2020, the Federation sent Mr Dunkow 's report and Ms Brockbank's letter to Dr Bayman for her opinion, prior to being sent on to the SMP for further consideration of the ill health retirement referral [pages 199-203 of the bundle], but matters were then further delayed because the Federation decided to obtain a psychiatric report on the claimant . Dr Bayman suggested that this should accompany other material to be sent to the SMP, Dr Gidlow [page 205 of the bundle].The claimant had a video consultation with Dr Tang, a psychiatrist appointed by the Federation, on 11 May 2020 and her report followed on 13 May 2020 [pages 208-213 of the bundle].
- 7.22 In that report, having summarised the ordinary duties of a Police Officer, the inability to carry out any of which would render an Officer disabled from those ordinary duties, she summarised these , and her findings in respect of the claimant as follows [page 212 of the bundle]:

*"Taking each of these duties in turn, inability, due to infirmity as defined by the Police Pension Regulations in respect of ANY of the above capabilities render an officer disabled from the ordinary duties. To complete the above duties they should be able to undertake the following activities:-*

- *The ability to sit for reasonable periods, to write, to read, use a telephone and or to use or learn to use IT*
- *The ability to run, walk reasonable distances, and stand for reasonable periods*
- *The ability to make decisions and report situations to others*
- *The ability to evaluate information and to record details*
- *The ability to exercise reasonable physical force and restraint in custody*
- *The ability to understand, retain, and explain facts and procedures.*

*John would be unable to sit or read or concentrate on IT for any length of time.*

*He would be unable to run, walk for longer than 15-20 minute or stand longer than the same period of time.*

*Decision making would be slow and ponderous, reporting would be slow and possibly not succinct and to the point.*

*He would find it difficult to evaluate information due to poor concentration, indecisiveness, and slowness.*

*He would not be able to restrain and use any force.*

*He would find it difficult to retain information as concentration is poor therefore making it difficult to report information.*

*Therefore in my opinion he is suffering very long term disability from his injury with little improvement in both his physical and mental state rendering him unable to continue working in the police force as defined above.”*

7.23 On 22nd May, Dr Tang’s report was sent on to Dr Bayman [page 215 of the bundle]. On 3 June 2020, Dr Bayman responded suggesting that Dr Gidlow should be able to review the case as a paper exercise [pages 217-218 of the bundle]. On 4 June, Dr Gidlow requested the orthopaedic report [page 219 of the bundle]. That was sent to Dr Gidlow on 9 June 2020 [page 221 of the bundle].

7.24 On 9 June 2020, Dr Gidlow responded [pages 223-224 of the bundle] giving his opinion that the claimant was permanently incapable of carrying out the normal duties of police officer. The position as at 9 June 2020 was that, in order to advance the ill-health process, Dr Gidlow would have to issue a specific form, as part of the procedure, setting out his conclusions. After some delay with forms it was not until 29 September 2020 that the correct form was finally received by the respondent [pages 299-302 of the bundle].

7.25 On or around 15 July 2020 the claimant received a form [pages 236-239 of the bundle, a clearer version is also at page 235] which was part of the ill-health retirement process . The form asked him to make some choices as part of the ill-health retirement. The claimant believed, on advice from his Federation representative , that if he chose Option 1 under Question 1 , or Option 1 of the 2nd Question, his future position would be insecure, there would be no certainty of a job, his pension benefits might be compromised and the respondent could make life very difficult for him. He could be posted anywhere in the County . There was

no offer of alternative employment as a staff job or re-deployment. He was advised to take the pension and avoid any future uncertainty or anxiety.

7.26 On the form, in which the preamble recites that the claimant had now been found to be “ Permanently Disabled by the Selected Medical Practitioner under Police Pension Regulation H1”, the Options set out were:

*Question 1*

*I wish to [ ] be retained in service*

*[ ] retire on the grounds of ill-health*

*Question 2*

*I wish to [ ] resign from the role of Police Officer and seek a role as a member of Police Staff*

*[ ] Refuse the offer to resign from the role of a Police Officer and I do not wish to seek a role as a member of police staff*

The claimant ticked the second option under each Question.

7.27 On 15 July 2020 the claimant completed the form. The Federation’s representative counter-signed and submitted it.

7.28 ACC Lawson, made a recommendation to the Chief Constable on 23 July 2020 and signed by him on 29 July 2020 [page 249 of the bundle]. A second Case Conference was held, [page 250 of the bundle], but the claimant was not present at that meeting. Graham Houston , a Federation representative, however, was present.

7.29 The Chief Constable formally accepted that recommendation on 20 October 2020 [page 323 of the bundle]. ACC Lawson’s recommendation to the Chief Constable was that the claimant should be retired on the grounds of ill-health. This was on the basis of the SMP’s decision that the claimant was permanently disabled due to persistent low back pain, depression and PTSD.

7.30 ACC Lawson stated *“the Selected Medical Practitioner has now considered the case and decided that the officer is permanently disabled due to persistent low back pain, depression and PTSD. Following due consideration of potential suitable roles, development opportunities and whether satisfactory attendance can be maintained , I recommend that the officer should be retired on the grounds of ill-health”*.

7.31 The claimant communicated his pension decisions on 10 September 2020 [pages 266-269 of the bundle]. The Chief Constable’s formal consideration of the matter and decision were still required , and on 13 October 2020, the claimant’s final date was confirmed as 20 October 2020 [page 318 of the bundle]. On 20

October 2020, the respondent issued a formal medical retirement notification [page 323 of the bundle].

- 7.32 Between the ending of his employment on 20 October 2020 and 6 January 2021, the claimant was not employed. He applied for employment online and to some agencies, without success.
- 7.33 The claimant saw an Internet advertisement by the respondent for a position as a PND Operator [the role profile is at pages 332-335 of the bundle], which seemed to be much the same as the work he had done in about 2012 when he was off front-line duties because of a shoulder injury. He understood that the job was within the Crime Unit, at Hutton HQ. The role was a sedentary, part-time, desk-based, job which was largely administrative, and did not, in his view, involve any of the typical functions of the Police Constable role which had been his job prior to retirement. He considered that the role would have been well within his ability and competency. He had done it entirely satisfactorily before, and the retirement decision and process having been brought to an end, he was starting to improve mentally, and felt he could do that sort of work.
- 7.34 Shortly before actually retiring he asked Katherine Edwards from HR if, in the future, in principle, he would be able to apply for staff jobs and she said there was no reason why not, as long as he could do the job.
- 7.35 He applied online for the job. The application form was quite detailed, asking not only for formal details, but also asking how he would, or had, responded to certain scenarios.
- 7.36 The claimant was asked to interview remotely by video, on 3 November 2020 [pages 336-339 of the bundle], and was interviewed by the Staff Team Leader and the Manager of the Unit. The claimant thought the interview went well, and he was told that the next step would be routine pre-employment checks, and some form of medical appointment.
- 7.37 By email dated 8 December 2020 [pages 341-355 of the bundle], the respondent made the claimant an offer of employment. The offer was subject to Acceptable Levels of Attendance, Risk Assessment Based Medical Examination, Satisfactory Security Checks and Satisfactory References. The respondent sent the claimant vetting, medical and attendance check forms, which he completed and returned on or about 13 December 2020 [pages 356- 357, and 361 of the bundle].
- 7.38 In relation to the attendance check form, he disclosed his 2018 injury [page 361 of the bundle]. He stated *"I have recovered from the injuries. I have also worked as a PND operator in the past. My health will not be a problem for this role and I won't be a risk to the organisation"*. He completed a "Medical In Confidence" form [pages 356-357 of the bundle] on 13 December 2020. It asked for absence details, and he filled in "reasons for absence" as the accident and needle stick injury. The form asked about illness or disability at the present time, and he answered in relation to the job he was applying for. He disclosed that he was taking prescription analgesics and anti-depressants. He also disclosed that he had suffered from mental health conditions. He gave further details of the accident which involved life



threatening injuries, that he was treated for depression following the accident, that he had undertaken therapies and medication that had helped him considerably. He also said that his ability to work was not limited and that he did not require adjustments or adaptations to carry out the job .

7.39 He later received a call from a nurse asking if he would consent to his GP providing a medical report on him, to which he consented. He was also asked to attend a medical at Hutton HQ.

7.40 He duly did so, on 26 January 2021. A nurse saw him, but there was no medical examination, whether physically or by questioning or discussion.

7.41 On 17 December 2020 the respondent wrote to the claimant's GP, Dr J Tobin, asking for a medical report [page 364 of the bundle]. The letter explained that the author, an Occupational Nurse Health Adviser required to advise management and HR about the claimant's fitness for work and any adjustments that may be required.

7.42 Dr Tobin duly produced a report dated 29 December 2020. [pages 365-366 of the bundle]. Dr Tobin stated that while the claimant was not well enough to return to frontline duties, from a mental perspective, he was "*currently well and stable, and there was no reason why he should have any issues with work that does not involve frontline duties*". His opinion was that he fully expected the claimant to be able to maintain a good standard of work away from the front line.

7.43 He also said this:

*"The pain from this injury eventual settled but unfortunately John was left with taking high doses of analgesia a lot of it addictive in nature. He has slowly been weaning himself off this and I am glad to say this has been relatively successful. His medication is now down to quite minimal levels, I enclose a copy of his current medication, and this has been reduced as pan of an ongoing gradual reduction. I envisage no problems with him completing this process.*

*The second part is the depression. This was triggered in part by the injury above, there were other issues, some work related and some non-work related around that time. His father died and he also suffered a needle stick injury. I believe there were also the pressures of working on the frontline Following his injury, he became very depressed with low mood. He was tried on various medications and has been stabilised on Mirtazapine which he has been on for some time. I am glad to say that his mental health has improved, he is currently well and stable.*

*Over the last year or so whenever we have discussed returning to frontline duties it has caused him significant anxiety, this anxiety however is focused mainly on the frontline activities and there is no reason why he should have any issues with work that doesn't involves those duties that were triggering his anxiety. I fully expect him to be able maintain a good standard of work away from the frontline as it is unlikely to trigger a deterioration in his mental health, although that can never be ruled out.*

*The plan is to bring his pain medication down to a bare minimum or ideally completely stopped, once he is settled in his new role to look at reducing the*

*Mirtazapine. There is no rush with this however, and he is able to function perfectly well on the current level of medication even if it wasn't to go down at all.*

*If there is any further information you need please do not hesitate to contact me.”*

- 7.44 Having completed the Respondent's Illegal Substance Misuse Form [page 369 of the bundle], the claimant disclosed his continuing use of analgesia and anti-depressants.
- 7.45 On 20 January 2021 the claimant made enquiries about the progress of his application. Alayna Grover of HR replied that she had passed his query on to the Occupational Health Team for an update [page 368 of the bundle].
- 7.46 Some time between 20 January 2021 and 29 January 2021 Sarah Scott, the Occupational Health and Wellbeing Manager, noticed the claimant's name within the Nurse Technician's diary and saw that he had applied for the NPD role. She had had some involvement in the claimant's ill health retirement, having sat on the Panel which considered it.
- 7.47 Whilst Sarah Scott subsequently did explore the claimant's fitness for the role, and the Tribunal accepts that she had some concerns about it, the Tribunal finds that her pre-dominant concern was that fact that the claimant had been granted ill health retirement, and had then , within less than two weeks, applied for a civilian post with the respondent. She feared that this would undermine the IHR process, and also, we find , harboured fears that the claimant may have obtained the ill health retirement dishonestly, deliberately exaggerating his health issues when he was in fact much less disabled than he had presented as being. To that end, we find, she then set about looking for reasons which might justify the withdrawal of the conditional offer that had been made.
- 7.48 Sarah Scott has a background in Headquarters Crime and therefore considered that she was very familiar with the PND role and its requirements. She called Recruitment to see at what stage the application was. She was informed that it was at the pre-employment stage, awaiting vetting clearance and medical clearance.
- 7.49 Sarah Scott therefore reviewed the application and noted that the claimant did not make mention of the fact that he had just been through the IHR process . She noted that on the attendance and sickness form he was asked to complete the claimant stated that "he had recovered from injuries" [page 361 of the bundle]. This caused her concern and she did not believe the suggestion that he had suddenly recovered, particularly in light of the background and the expert opinions during the IHR process that she was aware of , which she considered were to the contrary. At that stage, she felt that he was saying that he was recovered so that he could get the role. The claimant therefore, to her mind, had either dishonestly obtained IHR, or was now seeking, dishonestly , to obtain a post for which he was not medically fit.
- 7.50 In assessing the claimant's application and looking at the background to the matter, and the fact that the claimant had been absent for over 700 days prior to

his retirement, she was concerned that this matter alone had not been adequately considered by Recruitment.

7.51 She made the decision at stage to assess the medical aspect of the application and she took over the decision making. The reason for this was that she felt that the application had not been looked at properly during the recruitment stage.

7.52 At that stage, she escalated the matter to the FMA, Dr Bayman, who then looked at his file and the medical evidence. The FMA was provided with the role capabilities and requirements, and she and Dr Bayman jointly decided that the claimant was not medically fit to carry out the duties required of the PND Operator. Precisely when this occurred is unclear.

7.53 There is no note or other record of any discussion between Sarah Scott and Dr Bayman. Before making the decision, other than Dr Bayman, there was no reference back by Sarah Scott to any of the medical experts who had provided reports in the course of the claimant's IHR application, nor to his GP, despite his offer to provide further information if requested.

7.54 Sarah Scott's view was that the capabilities for the PND Operator role are designed around some of the same capabilities required for a Police Officer role, namely the capabilities which the psychiatric experts (in her words, there was in fact only one with this specialty) who provided medical evidence in the IHR process above had said he was permanently impaired in which were:

- The ability to make decisions and report to others
- The ability to evaluate information and to record details
- The ability to understand, retain and explain facts and procedures

7.55 Dr Bayman the FMA did not produce a report, and Sarah Scott relied upon purely oral discussions with her. She claims that they spoke at great length on a couple of occasions. She claims that they discussed the cognitive abilities required for the role and how they could not be met by the claimant. There is no documentary evidence to support this contention.

7.56 Sarah Scott was the ultimate decision maker in the application. She decided that the claimant was not medically fit for the PND role, and withdrew his conditional offer.

7.57 Whilst Sarah Scott had said in her witness statement that she rang the claimant and explained the situation to him, that she was unable to pass him medically fit for the role after considering all the capabilities and the advice given, she accepted that she had not in fact done so.

7.58 She did send a letter detailing why the offer had been withdrawn [page 371 of the bundle]. The pertinent parts read as follows:

*"A review of a medical report, provided by your GP, together with your previous occupational health records, have been used to assist us in our assessment.*

*As a result of a combination of reported persistent backpain, depression and PTSD, it was determined by the SMP that a number of your cognitive abilities would be permanently affected. These are noted below:*

- ability to make decisions and report situations to others*
- evaluate Information and record details*
- understand, retain and explain facts and procedures*

*Therefore, this unfortunately means that you would not be medically suitable for the role that you have applied for. I realise that you will be disappointed with this decision.*

7.59 The claimant was offered the opportunity to appeal against this decision, and told that in order to do so, he must submit new medical evidence , which was not previously known. This would then be considered at a Case Conference.

7.60 The claimant did appeal, by email on 11 February 2021, which was acknowledged the same day [page 373 of the bundle].

7.61 The claimant followed this up by a substantive letter of complaint about the rejection by letter dated 17 February 2021 [pages 374-376 of the bundle]. This was, however, to Professional Standards, and was accordingly rejected as being a decision that it could not overturn , by letter dated 16 April 2021 [pages 380-381 of the bundle].

7.62 There was no further communication about the appeal until 22 April 2021, when the claimant was informed by letter of that date [page 384 of the bundle] that a Case Conference had been convened for 5 May 2021 .

7.63 The claimant instructed solicitors, Snipelaw , and on 27 April 2021 they wrote to the respondent [pages 385 and 386 of the bundle] in relation to the forthcoming appeal. In their letter they said this:

*We note that he is not invited to appear, or be represented, at the Case Conference. Please confirm that is your intention.*

*We also note the penultimate paragraph of your decision letter dated 2nd February in relation to submission of new medical evidence.*

*Mr Butcher has no more medical evidence, because his case is that*

*(1) No, or no proper, consideration was given to Dr J Tobin's report to you dated 29<sup>th</sup> December 2020*

*(2) You relied, or over relied, on Dr Gidlow's reports when they were prepared for completely different purposes and for the different job as a front line Police Constable that Mr Butcher held at that time - not for a prospective job as a PND Operator*

*(3) you did not consider properly, or at all, Dr Gidlow's opinion as to the work which was within Mr Butcher's capabilities*

*(4) You failed to consider properly, or at all, Mr Butcher's declaration on your Attendance Sickness Record Form (dated and signed by him on 13\* December 2020)*

7.64 The respondent replied by email of 27 April 2021 [page 387 of the bundle] confirming that the claimant was not invited to the Case Conference , nor was he permitted a representative.

7.65 The Case Conference was accordingly held on 5 May 2021 without any attendance by or on behalf of the claimant . It was chaired by Tony Wilkinson , HR Service Centre Manager.

7.66 Notes of the conference are at pages 390 to 394 of the bundle. Dr Bayman attended, as a presenting officer, not as part of the Panel, which comprised in addition to Tony Wilkinson Dr Hameed, the Force Medical Adviser, Supt. Neil Drummond, Head of Public Protection, John Bradshaw, H & S Officer, and Fiona Atherton, from Occupation Health and Wellbeing.

7.67 Dr Bayman had prepared a Case Conference Summary for this Conference [pages 395 to 399 of the bundle, and replicated elsewhere]. The first two pages are little more than a recital of the claimant's medical history up to and including his application for IHR. Reference is briefly made to the claimant's application for the PND role, and all Dr Bayman says is:

*Having reviewed his previous OH records and based on all the information available, he was considered medically unsuitable for the PND role and advised as follows:*

She then quotes the letter that was sent to the claimant.

7.68 There ensued some specific questions , which Dr Bayman answered thus:

*Is the applicant likely to be able to sustain work (undertaking all core capabilities) for a reasonable period (5 years)?*

*Details:*

*Not known. Had had a period of around 2 years sickness absence prior to IHR. N/K*

*Are there Health and Safety considerations? (Duty of care of organisation and risk of harming the Individual, risk posed to colleagues / public? Yes*

*Details;*

*Possible risks given the nature of the role and need to make decisions and report situations to others, evaluate information, record details, understand retain and explain facts and procedures.*

*Could the medical condition impact employment? (I.e. ability to sustain regular attendance, are there any existing adjustments required, etc. Yes*

*Details:*

*The medical condition impacted his former employment as a police officer, including his ability to make decisions and report situations to others, evaluate information, record details, understand retain and explain facts and procedures. It also affected his ability to attend work.*

*It is likely that these capabilities would also be required to carry out the PND role.*

*It is likely that adjustments could be made for the physical symptoms including workstation risk assessment, sit/stand desk, regular breaks etc. It may be more difficult to make reasonable adjustments for the cognitive symptoms and this will need to be considered by the panel.*

*Is the applicant likely to have a disability within the definition in the Equality Act 2010? Yes*

*(Although applicant declared 'no disability' on PND application form)*

*Other recommended adjustments/ comments*

*The solicitor has made the following points in relation to the appeal:*

*She then sets out the extract referred to above, but makes no further comment upon the contentions in that letter.*

7.69 This document makes no mention of any discussions with Sarah Scott.

7.70 The notes reveal the points that were made and discussed in the Case Conference. Dr Bayman, who left after her presentation and questions, made the observation that adjustments could be made for the claimant's physical condition but it might be more difficult for the cognitive issues.

7.71 The following are extracts of comments made in the course of the discussion during the Case Conference [pages 390 to 394 of the bundle], "TW" being Tony Wilkinson. "ND" being Neil Drummond, "PB" being Dr Bayman. "AH" being Dr Adnan Hameed, and "FA" being Fiona Atherton.

*TW :Noted that the Occ Health Adviser stated that the applicant is like~ to be considered disabled under the Equality Act but the candidate hasn't declared this? Asks if this is an honesty and integrity issue or does he have the right not to declare this.*

*PB : The applicant is within his rights not to declare it on the form but the solicitor refers to disability in the application to the Tribunal I.e. 'at all material times, he was a disabled person for the purposes of section 6 of the Equality Act 2020, suffering from anxiety/depression and back pain*

*ND: Asks what would the procedure be where there are different opinions between Consultant Psychiatrist and the candidates GP. They seem to be very different.*

*PB: The GP is an advocate of the patient so will support them - so when retiring, he was supported in that. Now he wishes to work, again, the GP is supporting it. GP's can be in a difficult position and will do what is in the patients interests. The Orthopaedic opinion and the Psychiatrists opinions were independent. The Psychiatrist will have seen once for an assessment, taken history and formed an opinion. The GP will have seen them more often over time.*

*ND: In short, PND came into being following the Ian Huntley case and subsequent Bichard enquiry. There was a lack of information sharing and the recommendation was for an intelligence structure to be implemented and this is how PND came into being. The purpose is for officers to share and request data/information An application for data is Risk Assessed The data is Risk Assessed and response must be proportionate Decision making must be documented in line with a criteria There are a lot of requests e.g from Vetting, officers dealing with criminal activity e.g. protection of life and property, domestic abuse, modern day slavery etc. In conducting a request, it is submitted to PNO who sit within Force Intelligence. It is call centre style in that it is desk bound, 8am-6pm with a rota covering 7 days a week. There are standard checks to be processed and then urgent checks which may come in for example when there is a prisoner in custody and these require sharp decision making. The retrieval of data could be from over a number of years and quite old and this would require the operator to be able to review, analyse and share the relevant data. Risks around danger of harm if not done accurately.*

*We see the Psychiatrists report and see comments regarding decision making being slow and ponderous, indecisiveness, slowness in reporting etc and that these are permanently affected and render him unable to continue to work. Appreciates this was a snapshot at the time but where is he now? Other than what the GP says In letter we only have that information to go on, hence the earlier question around differing opinions.*

*ND : Yes, Reasonable Adjustments can be considered but in the PND role, there are no 'conveyor belt' admin elements. All of the work requires cognitive work around risk, making links, decision making around disclosure etc. A supervisor would have to look at whether the Reasonable Adjustments would effectively create a whole new role by taking out all of the cognitive elements of the role. Asks if candidate has improved since his Psychiatrists report Highlights he knows the Force Intelligence world well but doesn't supervise the PND team so hard to say if it was possible.*

*AH : In Occupational Health and Primary care, we are often asked about the prognosis. A reasonable way of looking at it, especially with contrasting reports*

*is that the best Indicator of future occurrence is past history. We use this approach when looking at Recruits e.g. if someone has seen their GP twice for mental health Issues in the last few years over say a divorce, as opposed to someone who has had many consultations over the years, this helps us from history form a prognosis.*

*I'm not undermining the GP but the Psychiatrists report seems alarming given the job. He was offered a recuperative role working a few hours per day but physically and mentally could not do it. Mental health seems to be the main issue. On P2, 4 th Para, 4 th line of the summary, it states he is unable to sit etc for any length of time, unlikely he could sit for lengthy periods of time*

*AH : Noted that it was extremely unusual to see such a miraculous recovery and appears to be a completely different man. There were only a matter of days between date of retirement and date of his application. This makes me question the rate of recovery.*

*FA : Believes it was approx. 13 days between the two dates.*

*TW:This is a key piece. In the report of May 20, TW had noted that the Psychiatrist was of the opinion that it was a long term disability which would render him unable to work in the police force. There was no challenge from the officer and he assumes that this is because that would have jeopardised his ill health retirement. The 13 day time frame between retirement and application is significant and he either seems to have had a miraculous recovery or the retirement process is flawed.*

*TW : Thanks all parties. In summary, we have considered all of the documents and Information and had full discussion today. History is a good indicator of the future. There were only a matter of days (13) where there was a change in his recovery. In the absence of the solicitor providing further evidence, no other conclusion can be made and that the appeal is not upheld.*

*ND : When we talk about the candidate being fit and healthy to perform the role 13 days after retirement he suggests that the candidate could have spoken up could have raised his during the retirement process and asked to remain in service.*

7.72 Following the Case Conference Tony Wilkinson wrote to the claimant [page 426 of the bundle] on 20 May 2021 and informed him that the Panel had upheld the original decision that he was medically unsuitable for the role , and could not reasonably be accommodated with adjustments. He was also of a further right of appeal, but again would have to submit new medical evidence. He was not provided with any notes of the Case Conference.

7.73 Whilst his solicitors did on 25 May 2021 write to enquire whether there was any time limit for a further appeal, and were subsequently advised (page 429 of the bundle) that there was not, the role for which he had applied was no longer vacant. The claimant did not pursue any further appeal.



7.74 The claimant continues to take antidepressants. He tried to come off them earlier, but this did not work and the current prescription is for an anti-depressant which also works as an analgesic. The uncertainty about his future started to resolve following ACC Lawson's recommendation to the Chief Constable dated 23 July 2021, and gradually his outlook started to brighten. He considers that he is still not 100% fit, but has managed well with analgesics and anti-depressants.

7.75 At the end of 2021, the claimant's former employer in Lancaster contacted him, and, after an interview, offered him full-time employment in his former role as a senior rubber technologist. His work has been satisfactory and his probationary period was passed. His job is partly sedentary and partly standing. It involves walking on the factory floor (the company makes rubber products) to take samples for analysis, and working in a laboratory doing testing and some research and development work. He has managed the job physically, and has not had any time off for sickness. Mentally, being back in some form of work has restored his self-esteem to an extent.

7.76 The terms of the respondent's Ill Health Retirement Process are at pages 462 to 4634 of the bundle.

7.77 Whilst Dr Gidlow did certify at Annex C of his assessment of the claimant, under section C1, "Assessment of disablement from performing the ordinary duties of a member of the police force", that the claimant was disabled in respect of the conditions of persistent low back pain, depression and PTSD, he only identified the back pain as likely to be permanent [page 244 of the bundle]. He also [page 247 of the bundle] stated that he did not consider the claimant to satisfy the test for severe ill health, as he was not unlikely to be capable of taking on any paid work in any capacity until he reached State Retirement Age. He did, however, [at page 248 of the bundle] state that the claimant was permanently affected in his ability to make decisions and report situations to others, evaluate information and record details, and understand, retain and explain facts and procedures.

7.78 In another document, dated 25 September 2020, Dr Gidlow stated [pages 292 to 295, and replicated at pages 299 to 302 of the bundle], under the heading "Capability for types of work", that although the claimant was currently unfit for light manual work, or mainly office – based work, this was not likely to be permanent.

7.79 It was accepted by the respondent that the claimant had done nothing wrong in applying for the PND role after his retirement, and there was nothing in the terms of the scheme or the Regulations that precluded him from seeking such employment with the respondent.

7.80 Further, had the claimant been accepted in the role he applied for, any remuneration he earned would not have affected his pension entitlements under the scheme, which he would have continued to receive in full

8. Those then are the relevant material facts found by the Tribunal. It has to be observed that much of the claimant's witness statement dwells over – much on the ill health retirement process, and the claimant's financial concerns over his family's future. The claimant seems almost to be suggesting that he was forced into taking ill

health retirement. He may feel that, but it is irrelevant to these claims. Much of this evidence is, with respect, irrelevant , and it could have been pared down considerably.

9. Although the Tribunal has been invited to question the credibility of the respondent's witness, Sarah Scott, the Tribunal is quite satisfied that all the witnesses from whom it heard gave honest and reliable evidence. Whilst there may have been some after the event justification, the Tribunal does not go so far as to find that this was dishonest. The Tribunal, of course, did not hear from Tony Wilkinson, or any other member of the Panel that carried out the Case Conference which reviewed the decision of Sarah Scott, so was unable to form any view as to his honesty or reliability. The best evidence therefore available are the notes of the discussion that was held. Finally, whilst the Tribunal heard evidence from Joanne Kane, a Senior Employee Relations Manager, she was not involved in the decision making process, and her evidence added very little , other than to agree with the decision made by Sarah Scott.

### **The Submissions.**

10. Both parties' representatives had prepared substantial closing submissions which they spoke to. It is not intended to rehearse them here, as they are available for examination on the Tribunal file. The respective submissions will be considered in context when the specific issues are examined below. In summary, however, the claimant's submissions seek to demonstrate how the respondent's defence of justification cannot succeed. The deficiencies in the process are highlighted, and the Tribunal is also invited to find that the treatment of the claimant amounted to direct discrimination. The respondent's submissions highlight the justification grounds advanced , emphasising how the respondent, as a public funded organisation, with duties of care in carrying out its functions, acted perfectly proportionately in seeking to achieve the legitimate aims identified of ensuring that the claimant was in fact fit to carry out the important role that he had applied for, and not undermining the IHR process.

### **The Law.**

11. The relevant statutory provisions are set out in the Annexe to this judgment. The applicable caselaw has been cited largely in the submissions of both parties. The claimant has referred to **Allonby v Accrington & Rossendale College and ors [2001] EWCA Civ 520**, **Ali v Torrosian (t/a Bedford Hill Family Practice [2018] WLUK 25** , and **O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145**. In the context of direct discrimination **James v Eastleigh Borough Council [1990] ICR 554** is also referred to. Additionally, the respondent has cited **Ministry of Justice v McCloud and ors [2018] EWCA Civ 2844** , **Air Products Plc v Cockram [2018] EWCA Civ 346** , **Cadman v Health and Safety Executive [2006] ICR 1623** , **Birtenshaw v Oldfield [2019] IRLR 946** , **Harrod and ors v Chief Constable of West Midlands Police [2017] EWCA Civ 191** and **Allen v GMB [2008] 1470** .

12. That said, whilst neither party has referred to it in their submissions, the Tribunal has also considered the case of **Paisner v NHS England [2016] IRLR 170** , and the judgment of Simler J., This was a case in which an employee had a significant amount of disability-related sickness absence. She was offered a job with NHS England subject to satisfactory references; after the telephone conversation between

her previous line manager and prospective employer, in which her attendance record was discussed, the job offer was withdrawn. In light of the relevant authorities, the following guidance as to the correct approach to a claim under s. 15 was given, at para. 31:

*'(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 s.15 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 s.15 of the Act (described comprehensively by Elisabeth Laing J in **Hall**), the statutory purpose which appears from the wording of s.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, [2015] All ER (D) 284 (Feb)** 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 s.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 26–34 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 s.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 s.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 s.13 and a discrimination arising from disability claim under s.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.”

### **Discussion and Findings.**

#### **The s.15 claims – “arising in consequence of the disability..”**

##### **a) What was the reason for the treatment, is the first limb of s.15 satisfied?**

13. The List of Issues defines this issue as follows, at para. 5:

*Was that treatment because of something arising in consequence of his disability arising from either his ability to carry out his role as a police officer and/or a PND operator (the Claimant understands that it was because of the Respondent’s perceptions around the fact that he was a disabled person)?*

Thus the fact that the claimant had successfully applied for IHR is not, as such, identified as the “something arising in consequence of” the claimant’s disability. Rather, what is identified, in an amended List following the preliminary hearing on 5 January 2022, is, with respect, the somewhat inelegant wording set out above, which defines the “something arising” by further reference to something “arising from” the claimant’s ability (or lack of it) to carry out two specific roles. The claimant sought to add the qualification of perception of his ability, although the respondent resists this.

14. There has, it seems to the Tribunal, possibly been in this formulation some conflation of one the elements relied upon as justification, i.e the claimant's fitness to carry out the role he had applied for, with what the "something arising from" his disability was. The respondent has, the Tribunal accepts, relied upon the claimant's fitness for the new role as part of its justification defence, but whether such concerns where the reasons for his treatment, or the only reasons for his treatment, or were originally the reasons for his treatment , is open to question.

15. The claimant's primary case, it had seemed to the Tribunal, is that his rejection from the post for which he had successfully applied was because of something arising in consequence of his disability , that "something" being his previous IHR application.

16. The Tribunal has to determine what the reason for the claimant's rejection was, and whether it was something arising in consequence of his disability. The Tribunal accepts that claimant's gloss upon the issue as formulated , namely that the respondent's perception can be the "something arising from". A state of belief in the mind of the respondent which is based on his understanding (indeed, correct understanding) that the claimant was a person with a disability , and therefore had certain limitations upon his ability to carry out certain roles does not, in the view of the Tribunal make this a claim of direct discrimination by perception, but it is not precluded from falling within the meaning of the first limb of s.15.

17. The Tribunal does find that the reason for rejection of the claimant's application at the Panel stage was that the respondent believed that he would not be fit to carry out the role, but that belief was strongly influenced by the claimant's recent IHR application, and the amount of sickness absence (700 days or so) that he had experienced whilst still a police constable, all of which arose in consequence of the claimant's disability. As the judgment in *Pnaiser* makes clear, there may be more than one "something arising".

18. The Tribunal, however, considers that the genesis of this treatment was the claimant's IHR application. Sarah Scott noticed his application for the new post, and was immediately struck by the fact that the claimant had only recently been through the IHR process, of which she was personally aware. But for that, the Tribunal is quite satisfied that she would have been unlikely to have intervened in his application, and, indeed, would have had no reason to do so, as she would not have been likely to have been aware of his relevant medical history. The fact that the claimant had taken IHR was, in the Tribunal's judgment, inextricably linked to, and was overwhelmingly the reason for, Sarah Scott's intervention in this process. The claimant's IHR application, of course, was also "something arising from" his disability.

19. Indeed, the need to maintain confidence in the respondent's IHR scheme is identified as one of the legitimate aims argued, in the alternative , as part of the respondent's justification defence to the s.15 claim. The respondent cannot on the one hand deny that this was a reason for the claimant's treatment, but on the other seek to justify it for the same reason.

20. Whilst the respondent, through Sarah Scott , has sought also to rely upon his concerns as to the claimant's fitness for the role he was applying for, the Tribunal

considers that this is an after the event justification, the initial rejection being based pre-dominantly on the fact that the claimant had so recently taken IHR.

**b.Has the respondent shown that the treatment is justified as a proportionate means of achieving a legitimate aim?**

21. The first limb of s.15 is thus satisfied, so the respondent, upon whom the burden rests, can only avoid liability if he can show that the treatment complained of was a proportionate means of achieving a legitimate aim. In examining this issue, the Tribunal considers that it is entitled to look at the whole of the process, and not just the decision. The Act requires us to consider the “treatment”, which is more than just the decision, it is the process as a whole, and when we consider “means”, this too, we consider imports the need to examine the process whereby the achieving of the aim is carried out. We appreciate, however, that we are not assessing reasonableness, as we would in an unfair dismissal, but we can form our own view, and are not confined to a consideration of whether the respondent considered that the treatment was justified. The justification has to be established by the respondent as a matter of fact. The Tribunal, however, accepts, as submitted by the respondent, that the justification relied upon need not be identified at the time of the treatment, *ex post facto* justification is permissible (**Cadman v Health and Safety Executive [2006] ICR 1623**)

22. The starting point, therefore, has to be the legitimate aim(s) relied upon. They are threefold, although two elements the claimant contends are but facets of the same aim. They are:

- i. Not undermining the ill-health retirement (“IHR”) process;
- ii. Ensuring that PND operators were capable of performing the duties of the role; and
- iii. Ensuring that a proposed applicant was medically suitable for the PND operator role

**i) Legitimate aim i – undermining IHR process**

23. The claimant argues, firstly, that in order for an aim to be legitimate and therefore capable of the statutory defence, it cannot be discriminatory. The claimant submits that this aim in context is inherently discriminatory, and therefore cannot be legitimate in the first place.

24. As will be observed below, the Tribunal disagrees that the IHR scheme is such that it will apply only to disabled persons, and therefore any reliance upon it is inherently discriminatory. The respondent’s position does not necessarily create a barrier purely applicable to disabled people to re-entering its employment. It may do in many cases, but it is not axiomatic that it could only apply to disabled people, as it would be possible, in the Tribunal’s view, whatever the evidence of Sarah Scott, for someone to be medically retired but not meet the threshold of disability. This is particularly so when a person is deemed unfit under IHR of performing the duties of a police constable, but not totally unfit for any other future employment.

25. In terms of proportionality in not undermining IHR process , the claimant asks what is undermined by awarding a totally different role to an ex-employee in any circumstances? The respondent has not produced any evidence of any risk to undermining its IHR process, nor any objective evidence as to how giving the claimant the new role would have done so. The EHRC Employment Code requires the respondent to adduce evidence and not rely on mere generalisations.

26. The point is made that this concern is based on Sarah Scott's personal ethical objection, which would apply irrespective of whether someone was capable for the role or not. It is not, however, mentioned as being a risk in its IHR process , there was never any indication to the claimant that he could not reapply at any time, and it has no effect on his IHR pension.

27. No other person other than Sarah Scott has mentioned this as being part of the reason for the withdrawal of the offer, whether valid or not.

28. What the Tribunal has noted, in the Panel discussions, is an undercurrent of suspicion that the claimant may have improperly obtained his IHR benefits. The (understandable) concern was that if he had been so unwell so as to qualify for the IHR benefits, how was he now, weeks later, well enough to apply for the PND role? His "miraculous recovery" was questioned, and some on the Panel clearly considered that the two positions were inconsistent, and that he should not now be allowed to have a new role in these circumstances.

29. If, of course, the respondent did have suspicions that the claimant had improperly obtained his IHR package, by exaggerating , or otherwise falsifying his medical conditions, which would, the Tribunal accepts, potentially undermine the IHR process, then the proportionate way to deal with it would have been to address those issues directly, put them to the claimant ,and further medically investigate them.

30. The respondent did not do that, it was never put to the claimant that he may have improperly obtained his IHR, and that he was in fact not medically unfit enough to qualify for it, he was rejected from the new role on the grounds that he was medically unfit for that.

31. This was despite the claimant producing medical evidence of his own, from his GP, to the effect that he considered that he was likely to be able to carry out the new role. This was, however, dismissed by the respondent. Rather than carry out any further medical examination of its own, or require the claimant to under go any further examinations, the respondent, through the Panel, dismissed the evidence of the claimant's GP as likely to be partial, and overlooked totally the passage of time from the last relevant medical psychiatric examination relied upon for the IHR process, and the claimant's application. The Panel also dismissed out of hand the possibility that the conclusion of the IHR process itself, and the certainty that this provided to the claimant could well have had a beneficial effect upon his mental health.

32. The Panel's reliance upon past performance being a good indicator of future performance , when the relevant period of absence had been from a role as a serving police officer, was misplaced. The sceptical views expressed about "miracle recovery" in the face of the claimant's medical evidence, based on at best some further

discussion with Dr Bayman, without holding a meeting with the claimant , or seeking more medical evidence , are all not proportionate means of achieving this aim.

33. The Tribunal has to have regard to whether any less discriminatory alternatives, could have achieved the same aim. Had the respondent been open , and sincere, in its approach it could have re-referred the claimant, or required him to re-refer himself, to the medical professionals, instructed a new assessment specific to the PND duties, and/or simply given him the role (which he had already been awarded following interview), and assessed his capability by way of probation, bringing it to an end if he was not capable. Whilst this latter suggestion was rejected , the Tribunal has heard no evidence from anyone with the relevant knowledge and expertise on the role of a PND operative. Indeed, it is to be noted that Supt. Drummond in the meeting said that although he knew the Force Intelligence world well , he did not supervise the PND team, so it was hard for him to say if some probationary period was possible.

34. This is the only evidence as to the practicability of the claimant having a probationary period, and it is second hand, and inconclusive.

35. In short, the respondent has fallen short establishing that the rejection of the claimant's application , when he had been successful in it, was the only way in which the legitimate aims that he was seeking to achieve could be achieved.

Legitimate aims (ii) Ensuring that PND operators were capable of performing the duties of the role; and

(iii) Ensuring that a proposed applicant was medically suitable for the PND operator role.

36. As the claimant submits, these are really two aspects of the same thing. They are the Tribunal accepts , and the claimant has not really challenged, legitimate aims, so the Tribunal needs to assess the justification of the claimant's treatment against these aims. For these purposes, the Tribunal will discount the fact of the claimant having been awarded IHR, but will focus instead solely upon what could be termed the medical capability issues.

37. Even here, however, whilst the fact of IHR is not , *per se*, relevant, the claimant's medical history was. The something arising in this context was his long period of absence, itself a consequence of his disability, and the medical evidence that the respondent had in his possession, again, a consequence of his disability (which would have been the case whether the claimant's application for IHR had succeeded or not). The respondent was in possession of medical evidence about the claimant , and was aware of his sickness absence in a way that he would not have been had the claimant been an applicant "off the street".

38. The Tribunal accordingly has considered the justification advanced by the respondent in respect of these aims as well.

39. The Tribunal finds that for largely the same reasons as set out above in respect of the other legitimate aim discussed at (i) above , this defence also fails.



40. The respondent, faced with an applicant for a post who claimed that he was fit enough to carry out that role, and produced a GP's report which supported that contention, made no further current and up to date medical assessment of his fitness, but fell back on what was out of date medical evidence. He ignored the possible change in the claimant's condition that may have (and indeed probably did) occurred since Dr Tang's assessment of his mental health carried out in May 2020.

41. The subsequent reports and certification by Dr Gidlow, with respect, were no more than acknowledgement and acceptance by him of her expert medical opinion. He formed none of his own, any more than Dr Bayman carried out anything other than a paper review of the medical reports of others.

42. Her role in the Case Conference meeting is instructive, as she attended initially, but then left. On what could be seen to be a crucial issue as to whether any adjustments to the PND role to accommodate any cognitive issues that the claimant may have, she expressed no opinion, leaving it to the others in the meeting to determine this. As we have seen, the person who might have been expected to be in the best position to know, Supt. Drummond, said that he was not sure.

43. That was, however, as far as the respondent went. No further enquiries were made, no further medical evidence was sought, it apparently being the claimant's responsibility to do so, notwithstanding that he had already done so. No follow up with the claimant's GP was attempted, perhaps because of the expressed (but not to the claimant or the GP) concerns at his partiality.

44. The Tribunal does not consider that the respondent has established that the claimant's treatment in these circumstances, taken as a whole, was a proportionate means of achieving these legitimate aims.

45. It is hard to avoid the conclusion that the respondent's approach to the claimant's application was informed and motivated by a strong, but unexpressed to him, suspicion that he had tried to have his cake and eat it – he had secured IHR on the basis that he was very ill, and unlikely to get better, but within weeks was applying for a job which the respondent considered, on the basis of the evidence in his IHR process, he was not in fact fit to do. The respondent, or some of his agents, took the view that he had either been dishonest in obtaining the IHR, or was being dishonest in this application.

46. The proportionate thing to have done in those circumstances would have been to put that to the claimant, and to have investigated the medical issues further. Instead the respondent simply held these deliberations, with no right of any input, save what had been advanced by way of appeal, on the part of the claimant. He, of course, would not know until disclosure in these proceedings what matters had influenced the decision, both as originally taken, and on "appeal". Indeed, the outcome letter of 20 May 2021 (page 426 of the bundle) is very terse, and the notes were not disclosed until these proceedings.

47. To the extent that there was concern, again understandable, that the claimant may be, or be seen to be, exploiting a "loophole" in the IHR process, which, as then in place, did not preclude the claimant doing exactly what he did, there are obvious, and

non – discriminatory means of preventing any potential abuse of the process. The disqualification of an IHR recipient from applying for other roles with the respondent, either indefinitely , or for a specified period, or the retention of a power, or discretion, to reduce any pension receivable in the event of further employment with the respondent, are the most obvious, but there are doubtless others.

48. This somewhat “stable – door” means of achieving the legitimate aims, however, was not proportionate, and the respondent’s justification defence fails.

**The s.13, direct discrimination claim.**

49. Whilst the main thrust of the claimant’s case has been that his treatment was unlawful under s.15, Mr Proffitt has also submitted that it also, or alternatively (the Equality Act 2010 does not , unlike harassment under s.26, proscribe a finding that conduct cannot amount to both) amounts to direct discrimination under s.13.

50. The basis upon which he does so is that the respondent’s approach is inherently discriminatory, within the meaning of **James v Eastleigh Borough Council [1990] ICR 554**. That, in and of itself, renders the treatment directly discriminatory. The claimant’s disability means he would always be treated less favourably than a non-disabled person, because his application for re-employment is necessarily looked upon differently and he is disadvantaged for a reason intrinsically linked to his disability.

51. The Tribunal considers that whilst superficially attractive, there is a flaw in the claimant’s submissions. This is revealed by a comparison of the facts in **James** and the facts in the case. The claimant in **James** succeeded because the criterion that was applied to him was itself discriminatory. There were, at the time, two different statutory retirement ages for various purposes for men and women. The claimant in that case was discriminated against because of his age, and because he was a man. The criterion was inherently discriminatory.

52. Whilst Mr Proffitt has sought to argue in this case that IHR retirement was also a discriminatory criterion , because more disabled persons were likely to apply for it and be granted it, that does not , in our view make it , unlike the two different retirement ages in **James** inherently discriminatory. If it could be shown that the application of such a criterion was likely to disadvantage a higher proportion of disabled persons, which it might, then that would be the basis for a potential indirect discrimination claim, but not a direct one.

53. We acknowledge that it may well be the a higher proportion of disabled persons may have applied for and been awarded IHR from the Police , but that is not a given especially as inability to do a certain type of work, in particular, an occupation as a serving Police offer , does not , of course , mean that a person would also satisfy the definition of disability, though doubtless many such persons , like the claimant , in fact do.

54. Thus, whilst , if the necessary evidence were before the Tribunal, it may be possible to show a disproportionate impact upon persons with disabilities, so as to found an indirect discrimination claim, no such claim has been advanced. If were to

be, the Tribunal, if the claimant got past the first required limb of such claims, would then again be considering issues of justification.

55. Mr Proffitt also seeks to advance a contention of further direct discrimination , to be found he submits, in the mind of the decision maker, Sarah Scott. He suggests that she relied upon completely unevidenced and stereotypical assumptions as to how the claimant disability might manifest itself in the PND role , to the effect that he would be “triggered” by the PND work he would have to do , and the respondent would be caused “reputational damage” by his prior disability effects “very easily” leading to court cases “collapsing”.

56. He submits that this a classic case of a person deciding for themselves what someone’s limitations are based on no more than their own prejudice. That is no different to a person making a assumption about capability based on gender or race, for example. Given that it is admitted by Sarah Scott as being part of her thought process, the burden is shifted and there is no defence. He reminds the Tribunal that a defence in this regard requires the treatment to have been “in no sense whatsoever” related to disability; if it was any part of Sarah Scott’s thought process to withdraw the offer, it amounts to direct discrimination.

57. The Tribunal disagrees. Sarah Scott did have grounds, on the basis of the medical evidence submitted for the IHR process, for believing that the claimant’s cognitive abilities were impaired, and therefore that such impairment may well render him unsuitable for the PND role. These were not stereotypical assumptions, they were evidence based, and they were shared, it seems by Dr Bayman, and Dr Hameed, who sat on the Panel for the case conference. Whether by then , or at the time of the claimant’s application, they were ones that were still valid, given the improvement in the claimant’s mental health, is a different matter, but the Tribunal does not accept the claimant’s submissions that this was direct discrimination.

### **Remedy**

58. The claimant is entitled to a remedy. Given that both parties are legally represented, and the claimant was able to mitigate his financial losses, it may well be that a remedy hearing will not be necessary. The parties are encouraged to explore settlement of remedy, or, failing that, to narrow the issues that the Tribunal will be required to determine, in accordance with the directions set out above.

Employment Judge Holmes  
DATE: 30 December 2022

**RESERVED JUDGMENT**

**Case Number: 2403030/2021  
Code V**

RESERVED JUDGMENT SENT TO THE  
PARTIES ON 5 January 2023

FOR THE TRIBUNAL OFFICE

**ANNEXE**

The relevant statutory provisions.

**13 Direct Discrimination:**

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

**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.*

**Comparator:**

Section 23(1) of the Equality Act 2010 provides that:

*“On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material differences between the circumstances relating to each case”.*

**Burden of Proof:**

Section 136 of The Equality Act 2010 provides that:

*“(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.*