Case Nos: 3311587/2020
3310691/2021

EMPLOYMENT TRIBUNALS

Claimant: **Ms R Barton-Wolfe**

Respondent: **The Chief Constable of Surrey Police**

Heard at: **Reading Employment Tribunal**

On: **5th to 9th and 12th to 14th December 2022 (and in Chambers 4th to 6th January 2023)**

Before: **Employment Judge Eeley**
Ms C Baggs
Ms C Whitehouse

Representation
Claimant: Mr D Stephenson, counsel
Respondent: Mr T Dracass, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is:

1. The claimant's claims of disability related harassment pursuant to section 26 of the Equality Act 2010 are dismissed upon withdrawal by the claimant.

2. The claimant's claims of section 15 discrimination arising from disability set out at paragraphs 4.2 and 4.5 of the agreed list of issues are dismissed upon withdrawal by the claimant.

3. The claimant's remaining claims of section 15 discrimination arising from disability are not well founded and are dismissed.

4. The claimant's claims of section 13 direct disability discrimination are not well founded and are dismissed.

5. The claimant's claim of victimisation contrary to section 27 of the Equality Act 2010 is not well founded and is dismissed.

6. The claimant's claims that the respondent breached a duty to make reasonable adjustments pursuant to sections 20 and 21 of the Equality Act 2010 are not well founded and are dismissed.

REASONS

Background

1. The claimant is (and was at all material times) a serving police officer in the respondent's force. She pursued claims of disability discrimination contrary to sections 13, 15, 20/21, 26 and 27 of the Equality Act 2010. The specific issues for determination are set out in the case management order of Employment Judge Kurrein as discussed and agreed with the parties' representatives at a telephone preliminary hearing on 19 August 2021 [105].

2. The disability impairment relied upon by the claimant is Post Traumatic Stress Disorder ("PTSD"). The respondent concedes that the claimant was so disabled within the meaning of Equality Act 2010 at all relevant times.

3. For purposes of determining the case we received written and oral evidence from:
   - The claimant Rhiannon Barton-Wolfe, Police Constable (formerly in HHPU.) ("High Harms Protection Unit")
   - Detective Sergeant (DS) Matthew Moores.
   - Detective Inspector (DI) Gemma Scott.
   - Detective Sergeant (DS) Hilary Squire.
   - Detective Chief Superintendent (DCS) Carwyn Hughes.
   - Detective Chief Inspector (DCI) Rebecca Molyneux.
   - Mr Chris Evans, Assistant HR Business Partner in the respondent's People Services Team.

4. We read the documents to which we were referred within the agreed hearing bundle, which contained 651 pages. We had the benefit of a chronology and cast list prepared by claimant's counsel. We were assisted by the written and oral submissions of counsel on behalf of both parties. Numbers within square brackets are references to pages within the hearing bundle, unless otherwise indicated.

Findings of fact

5. The claimant transferred to the respondent's police force from Essex police in September 2002. In early 2012 she was diagnosed with PTSD following the death of a colleague. The claimant's colleague was murdered by her partner, who was also a serving police officer and known to the claimant.

6. Only a few weeks after the death of the claimant's colleague the claimant was issued with an Action Plan under the respondent's performance management procedures. That Action Plan was subsequently quashed.

7. In March 2013 further tragedy hit when the claimant's daughter's boyfriend was murdered at a railway station. Unsurprisingly, the claimant was referred for trauma treatment by Dr Noreen Tehrani (the Force Psychologist) and was diagnosed with complex PTSD.

8. The claimant had been working in "SOIT" (The Sexual Offences Investigation Team (Rape Offences). In July 2018 she was moved to "Visor" (Management of Sex Offenders) working in the West Team which was based in Guildford. She was working with sex offenders.

9. In September 2019 Visor amalgamated with "IOM" (The Integrated Offender Management Team) to form the High Harm Prevention Unit ("HHPU"). The HHPU was responsible for identifying and managing the risks associated with registered sex offenders (and the other offenders that the respondent manages who pose a risk to the community). HHPU takes steps to mitigate identified risks, thereby protecting vulnerable people. The offenders dealt with by the team could include offenders released from custody with a conviction for murder, serial domestic abusers, violent offenders, stalkers and child sex offenders.

10. The department carries considerable risk and this requires scrutiny and clear visibility of the work undertaken. The work in the department involves officers in the team undertaking risk assessments of offenders, monitoring identified risks and putting together risk management plans to deal with such risks. Officers are required to visit offenders at home, unannounced, at regular intervals in order to ensure that the offenders have not breached their notification requirements and that they comply with any orders that apply to them, for example, Sexual Harm Prevention Orders, Sexual Risk Orders, or Serious Crime Prevention Orders. Officers visit in pairs so they are required to visit offenders managed by their colleagues. Officers often attend meetings regarding their offenders, for example, "MAPPA" meetings (Multi-agency Public Protection Arrangements), professionals' meetings and those arranged to discuss the safeguarding of children. The role is fully operational and officers may be required to make arrests, deal with suspects in custody, and compile case files. The HHPU office is a restricted environment due to the security of the computer systems and the confidentiality of the information to which the officers have access. Officers work closely together as a team and it is commonplace for details of an offender's history of presentation to be discussed in the office amongst colleagues. The team manages the MAPPA arrangements on behalf of Surrey police.

11. Detective Chief Inspector Molyneux joined HHPU in October 2019. The HHPU team is divided into three areas: North; East; and West. DCI Molyneux was responsible for overseeing all three areas. When DCI Molineux joined

the team she recognised that the West unit (based in Guildford) was seriously underperforming compared to the other two teams. A peer review had been carried out by another force which identified the difference in performance between the teams but recognised that the workload and processes were similar. Management recognised that maintaining the status quo was unacceptable as it would put the public at risk from offenders who were not being adequately managed.

12. When HHPU was set up and the claimant transferred to work within it she was directly line managed by Detective Sergeant Nettleton and her second line manager was Detective Inspector Parry. Higher management decided to swap leadership of the team as part of improving the performance of the department. Detective Inspector Flis Burns was appointed to supervise the West team and was to be supported by Detective Sergeant Moores.

13. Work from the West team had been distributed to the North and East teams prior to DCI Molyneux's arrival because West had fallen behind in their management of offenders. There were also cultural issues in the West team in terms of resistance to the newly implemented HHPU model. The respondent found that poor performance issues had not been addressed. Higher management decided to disband the culture that existed as it was preventing change which would improve the management of offenders and the identification of risk. Four officers were identified as being key to disbanding this culture. The claimant was one of those officers.

14. During the course of the review of the West unit it became clear that there were a number of issues. Questions were raised about how well the West team had been managed during the period prior to DCI Molyneux's arrival. Steps were to be taken to improve the management of the team. Secondly, there were issues concerning the dynamics of the team of officers doing the substantive work of the department. These were, in a sense, the "frontline officers" and the dynamics of this team were problematic. These two issues (effective line management of officers and team dynamics within the team of frontline officers) were interlinked and needed to be addressed.

15. During the course of the relevant chronology of events in this case DS Nettleton and DCI Parry were asked to do reports to explain the context of the management of the department including identifying any inadequacies in their line management of the team. They were also asked to provide details of the problems within the team itself. This was requested with a view to documenting evidence about what happened within the department on a day-to-day basis and what was going wrong in the department. This would allow higher management to carry out an analysis of why the team was not performing adequately, who/what the problems were, whether there were management issues, and what changes were required in order to address the inadequacies of the department. The end goal was to ensure that the team in the West was working at the same level as those in the North and

East. The purpose of these reports was not to single the claimant out or to carry out a disciplinary/performance investigation into the claimant's work as an individual. The reports were intended to be more holistic and deal with the issues within the department as a whole rather than collating evidence to be addressed with each individual officer (for example as part of performance management proceedings.) This explains the style of those reports and why they do not deal with specific allegations against individuals in the same way as one would expect, for example, in a disciplinary or capability investigation into an individual officer. In any event, DCI Molyneux went back to the authors of those reports and asked for more detail, largely because it was felt that DS Nettleton and DCI Parry had skated over their own involvement in (and responsibility for) the problems of the department and any inadequacies in their line management of the team.

16. We note that it is core to the role of the department that there needed to be a well-documented paper trail for each offender that the department was managing. The record needed to show that the offender had been thoroughly and regularly reviewed and that this had been completed and recorded in a timely fashion.

17. When the line management in the team changed this meant that the claimant was to be line managed by DS Moores (with DI Burns next up in the chain of command.) Parry and Nettleton no longer managed the claimant or her colleagues.

18. The Tribunal was directed to the email from DI Burns to the claimant dated 3 April 2020 [160]. It was a record of a discussion which had taken place between the two women earlier that day. It documents some of the issues with the performance of the department in relation to ARMs and visits. Importantly, for the purposes of the claimant's tribunal claim, it records that the claimant had informed DI Burns of her PTSD and that she had previously had issues with line managers. DI Burns indicates that if the claimant feels that she has too much work or pressure on her then she should speak to her line managers or DI Burns and she would do everything she could to support the claimant's well-being as well as that of the rest of the team. It is clear from this that there had been previous issues with line managers. However, the email does not go into detail as to what those issues with line managers consisted of. Nor can we discern how much detail the claimant gave about the triggers for her PTSD. We note that Occupational Health had last been involved in the claimant's case some considerable time beforehand. The claimant maintains that adjustments had been worked out by agreement on an informal basis with her previous line management. We were not directed to any written record of said adjustments or the reasons for them. Nor had the claimant been referred for an up-to-date occupational health report at this point. We note that the tribunal bundle did not contain any of the earlier occupational health evidence covering the period since the first murder (in 2012.) The earliest document in time provided to the Tribunal regarding the claimant's own particular capabilities and limitations was a "Capability Officer Assessment" dated May 2018 [140]. This was not an occupational health

report, as such and did not set out details of her medical condition or the background to it. It indicated that she did have an ongoing medical condition which was not currently stable. It set out any limitations on the claimant's ability to work at certain times of the day or certain shift patterns. It stated that the claimant was able to have full operational contact with the public/suspects/witnesses/victims but should not be involved in traumatic situations due to previous medical history and treatment. In terms of adjustments in relation to responding to incidents and emergency calls, taking control of the scene, directing and controlling persons, attending RTA/collisions and directing traffic it was recorded that a reasonable adjustment was in place that the claimant was not suitable for "APT" or traumatic incidents. The claimant was still permitted to carry out arrests and searches and could apply handcuffs but should not do so alone and should attend with a colleague. There was some restriction on driving. She was not fit to 'scene guard' in view of her physical medical condition rather than because of the PTSD. So, whilst this document did provide some information on the limitations applicable to the claimant, it did not provide explanations for them nor did it deal with the limitations arising from her PTSD in any clear or explicit way. It was no substitute for an up-to-date occupational health report and associated detailed guidance from a clinician.

19. When DS Moores joined the department he spoke to the claimant on a couple of occasions on the telephone but his first meet face-to-face meeting with her was on 5 May 2020. The contents of the meeting were set out in the summary email written by DS Moores [170] which he sent to the claimant the next day (6th May). During the course of the conversation DS Moores enquired about the claimant's welfare and she confirmed that she felt under pressure and did not feel she had enough time to do the work required of her. She gave examples of the sorts of things she was talking about. Upon hearing the claimant's concerns DS Moores told her that if she felt she was 'spinning too many plates' then she should come to him or DI Burns for support. He confirmed that it was their role to support the claimant and at times 'gatekeep' the work that she held. He reiterated that they were both part of the team on HHPU and that colleagues were available for help and support. He stated that she must inform him or another manager if she felt under pressure or if she felt that something she was doing was not a requirement of the role. If the claimant was in any doubt as to whether the onus was on the department or another service (in any given scenario) she must go to the line manager for guidance.

20. There was a discussion about workloads and "non-recognition" for good work done. The claimant had stated that she was concerned about her workload and the offenders she managed, especially those who were high risk and very high risk. DS Moores responded that the department's core business was to manage risk and that this element of the role would not go away. He confirmed that the claimant's workload of offenders (including their risk levels) was comparable to other members of the team. Secondly, he clarified that the intrusive management of the core business of assessing risk was not micromanagement. He pointed out that safeguarding was the department's

business and that the ARMS and visits were a vital tool in assessing the risk that subjects posed. He made it clear that intrusive management into these visits, including their timely execution, would not be going away. DS Moores asked the claimant directly if she felt stressed. She told him that she was not. He tried to clarify with her what "pressure" she felt under but she could not clarify it. As DS Moores was concerned about the claimant's welfare, he said that he would complete a stress risk assessment with her on Tuesday 12 May, her next working day in the office. This would enable him to establish whether her role was affecting her health and well-being. He made a point of confirming that management recognised the good work that the claimant was doing. He commented, "from my short time in the unit I can see you are a caring and conscientious officer who is patently aware of our requirement to safeguard." He confirmed that he did not want to detract from this but in focusing on the department's core tasks and allowing partners to complete their statutory obligations the department would be able to strike the balance between completing their ARMS and visits and assisting other agencies with their work.

21. DS Moores enquired as to the claimant's future aspirations within the force. The claimant confirmed that she would continue until she was able to retire. She felt that the role she had joined the unit for was not the same and the merger of IOM and Visor was a bad idea, poorly executed. He asked the claimant if she had any suggestions to help improve the unit and how it was run but she told him that she did not. He asked if she had any specific examples of problems with the unit. She told him that she did not specifically but that it was "shit" now. DS Moores pointed out that DI Burns had sent an email wanting feedback from every member of the team in order to improve the unit and the claimant had not responded to it. The claimant told him that she had no suggestions to improve the department. DS Moores wanted clarity about this as she had previously mentioned that the unit was 'shit' but could not come up with any suggestions on how to improve it. He said that she should at least respond to the DI's email and that it was expected of her. She said that she still did not want to. He stated that it was a direction from the DI and '*could* be considered a lawful order.' The claimant scoffed and said, "I don't think it's a lawful order." She then went on to say that she felt bullied but immediately clarified "well, I don't feel bullied; it's bordering on bullying." DS Moores asked who was bullying her and if she felt bullied. She confirmed that no one was bullying her and that she did not feel bullied. At the end of the meeting she agreed to send the DI an email.

22. DS Moores concluded the email thus: "As I have already said, you are a hard-working and conscientious officer, and it is clear you have an interest in your role with Visor subjects. As I have already said, this passion should also be applied to the other cohorts, as it is an area of the business we as a unit now deal with, and is an area of the business that carries an equal amount of risk to the community. I recognise your good work in assisting other agencies to safeguard, but a balance must be struck; the lead agency is there to ask for assistance but you should not begin to "lead" yourself to the detriment of your other HHPU workload. If any doubt speak to me or one of the other

supervisors/managers at the time. Thanks for taking the time out of your day yesterday to meet with me. If there is any part of this record that you do not believe to be an accurate representation of our meeting, or if you would like to further discuss it with me, please get in contact."

23. The claimant critiqued the format of DS Moores' email and asserted that it should have been set out on a particular template but she did not challenge the accuracy of the record of the meeting itself. The claimant thought that this was a "Focus" meeting and that it should have been recorded on a particular template setting out her targets etc. Having heard the evidence on this the Tribunal finds that one-to-one meetings had become referred to as 'Focus' meetings. There was a template available for such meetings but there was no requirement for the manager to use it. The template itself was more appropriate for annual appraisals as it would set out the assessment of the officer's work to date and set specific targets for the following period. The meeting which the claimant and DS Moores had on 5 May was *not* an annual appraisal. It was the first one-to-one meeting between an officer and the new line manager. DS Moores explained to us that his practice was to do a narrative email following such meetings. The claimant was surprised by this but we find that there was nothing wrong with this approach. It was a valid option which was open to DS Moores.

24. When DS Moores joined the department he had a handover from DS Nettleton. As a result of this he knew that the claimant suffered from PTSD. He was told not to call her into ad hoc meetings without making her aware of the likely nature of the discussion as this would make her uneasy and provoke an adverse reaction. However, we find that he was not told that this was a trigger for the claimant's PTSD or that the adverse reaction referred to would be an escalation of her PTSD symptoms. In relation to adjustments for the claimant and her PTSD, DS Moores was just informed about the kinds of offender that the claimant could and could not manage. She was to avoid managing cases involving murder, offences of violence, and domestic abuse. This meant that her caseload within the department focused more on sexual offences than offences of violence even though the department as a whole had to manage both categories of offender. Her work was effectively triaged to avoid exposure to offenders whose core offence was violence. This was to avoid a trigger of the PTSD symptoms because of the two traumatic events which had originally caused the onset of the condition.

25. The claimant says that it is not credible for DS Moores to suggest that he did not know that ad hoc meetings were a PTSD trigger for her. She effectively asks the Tribunal to conclude that this undermines his credibility as a witness before the Tribunal. We understand why the claimant questions this part of DS Moores' evidence given her point of view. However, we note that DS Moores had only just arrived in the department. He had a wider task to do in managing the "failing" department. Whilst the claimant was his direct line report, she was one of twelve such direct reports within the team. In those circumstances it is quite conceivable that DS Moores never asked why it was

that ad hoc meetings were to be avoided. He had not asked why the measure was in place. If DS Moores had had a longer period of time to get to grips with the department as a whole he might have had the opportunity to ask more questions and to ask this particular question about the reason for avoiding ad hoc meetings with the claimant. We also note that there was a lack of formal documentation in relation to this. Nobody had written down why such ad hoc meetings should be avoided. There was nothing on paper to forewarn him about this. The reasoning behind the adjustment 'got lost' in a short period of intense change within the department. It would be easy to criticise DS Moores for this after the event but, looking at it in context, the Tribunal can well see how this might happen. The fault does not lie with DS Moores for not asking the question but with the previous management in not properly documenting the claimant's needs arising from her PTSD and any adjustments which had been agreed to accommodate and assist her in managing the condition.

26. The claimant did not challenge the accuracy of DS Moores' note of the meeting. We find that it is an accurate reflection of what was said and what was discussed. The discussions ranged across a number of topics including the amount of pressure the claimant felt she was under, problems with workload, wider structural problems with the department, the claimant's view of the structural changes within the department and, the claimant's health and well-being. It is apparent that DS Moores tried to examine the pressure which the claimant said she was under and to find out what support was required. He tried to get her view on the organisation as a whole and her reasons for that view. He wanted to get concrete examples of the problems together with any suggestions she might have for improving the situation.

27. In her witness statement to the Tribunal the claimant described the meeting in quite general terms and described it as a difficult and antagonistic meeting. She felt that she was being bullied out of HHPU by DS Moores. She indicated that DS Moores was passive-aggressive on each subject including stating that she was being given a lawful order and that she had to reply to DI Burns' email. She said that DS Moores also wanted to know if she would rather work somewhere else or did she want to stay (which she thought was really strange.) She felt that at no point did DS Moores raise any performance issues.

28. The Tribunal has reflected upon the claimant's perception of this meeting. Whilst we can understand that the claimant may genuinely have felt that this was a difficult meeting, viewed objectively we are satisfied that DS Moores was not aggressive or antagonistic towards her and wanted to hear what she had to say about the issues. She was encouraged to give full and frank answers to the questions. He did not tell her that she had been given a lawful order and that she had to reply to the email, rather that it "could be viewed" as a lawful order. The point was that the claimant displayed a pretty negative attitude towards the department and the way it was operating. Rather than passing over these views, DS Moores attempted to engage with the claimant

about them and obtain concrete examples so that he could act upon them. Far from writing the claimant off, DS Moores was taking her seriously.

29. We do not accept that DS Moores did not raise performance issues. The text of the email indicates that the performance of the department was the issue (or certainly one of the issues.) Whilst subjectively the claimant may not have realised that she was included within the critique of the work of the department, in fact she was part of the group that was being looked at. In her evidence the claimant thought it strange that she should be asked if she wanted to work somewhere else. She construes this as evidence that DS Moores wanted to "get rid of her." We do not consider this to be an accurate construction. The claimant had clearly expressed a degree of frustration with the changes in the department which she described as "shit now." If the claimant was genuinely unhappy in her work it was entirely reasonable of her line manager to enquire firstly, whether there were any changes that should be made and, secondly, whether she would prefer to work elsewhere. He was in essence asking: "if you are unhappy with the department you are in would you like to move?" This does not disclose an intention to get rid of the claimant or a desire that she should no longer work in HHPU. Rather, it responds to the claimant's own views on the matter.

30. After the meeting the claimant went straight to her Police Federation representative DS Paul Campbell as she felt that the minutes of the meeting confirmed her suspicion that DS Moores wanted her to leave HHPU.

31. The Tribunal finds that the claimant was distrustful of the meeting. She was extremely wary about it. She was worried by the changes in the department and concerned at being managed by someone new. In the circumstances this was understandable. Both the claimant and DS Moores went into the meeting warily. They were essentially trying to get to know each other and work out the 'rules of engagement.' We also find that, as a result of her long-standing experience within the respondent organisation, the claimant had a somewhat 'world weary' attitude towards structural changes and department mergers. She felt, based on her previous experience, that mergers would 'come and go' and that it was just a matter of 'sitting tight' and waiting until higher management decided to revert to the original structure. We do accept that this meeting was not a pleasant one. It was never going to be, given the subject matter. DS Moores was not objectively bullying or passive aggressive. He was not intending to bully her out of HHPU. However, the agenda for the meeting partially related to organisational change. The subject matter of the meeting was, therefore, always going to be difficult for the claimant given that she was happy with the previous structure. She was not looking for change and did not see herself as benefiting by any change. Therefore, we conclude that this was a difficult meeting by its very nature and subject matter, not because DS Moores did anything objectively wrong or blameworthy.

32. A further incident took place in the office on 12 May. This was in the middle of the Covid 19 pandemic. DS Moores overheard a conversation between the

claimant and her colleague PC O'Hara. The subject matter related to going into offenders' homes during the Covid pandemic. DS Moores felt that a clear directive had already been given by higher management that, given the nature of the work that the team were doing, and given the nature of the risks posed by the offenders under their management, it was not appropriate to stand on the doorstep of the offenders' homes and carry out visits from that position. This process of "doorstepping" the offenders was inadequate. A thorough and effective visit and assessment could not be carried out in this way. Given the importance of protecting the public and given the core nature of this part of the job it was felt that the risk of contracting Covid was overridden by the need to carry out the task from within the home environment. As with many things during the pandemic, there had been a developing policy but this had already been clarified by 12 May. DS Moores felt that the policy requirement was clear to the team and that the matter was no longer open for debate and discussion. Orders had been given from higher up the chain of command and it was for the team to carry out those orders. However, on the day in question he overheard the conversation and felt that the two officers were deliberately speaking in loud tones hoping that he would overhear them. He felt that they were deliberately bating him for a reaction. He interpreted what they were saying as suggesting that the rules were still unclear and that he (DS Moores) should be challenging the decision that had been made higher up the chain of command. Mention was apparently made of looking at online policies for guidance.

33. Upon hearing the comments, DS Moores felt that he needed to reiterate to the two officers what the rules were and what was expected of them. He felt that he needed to make it clear that this was not open for debate and that they should not be discussing it further. They should just get on and implement the proper procedure. As a result of this the Tribunal accepts that he was somewhat exasperated. He spoke to both of the officers and called them individually into a separate discussion in a side office. He did not think it appropriate to address the matter on the "shopfloor" within earshot of other officers.

34. DS Moores accepts that he called the claimant into the meeting in the side office without prior notification of the subject matter of the discussion. He felt that it was obvious (in the context of what had just taken place) that this was what he would be discussing with her. To that extent, it was an ad hoc meeting without pre-notification of the subject matter. DS Moores told her that there was no need to question the directive from above. DS Moores also accepts that he raised his voice but maintains that he did give the claimant 5 to 10 minutes' 'breathing space' before speaking to her on her own about this issue. That is to say, she was not called straight into the meeting. There was a short gap between the incident and the meeting to discuss it.

35. This issue was raised as part of a subsequent grievance and the grievance findings were recorded [568]. The investigating officer had tried to triangulate the accounts of the incident and also what DS Moores knew at that point in time about the specifics of the claimant's PTSD. DS Moores had indicated

that there had been ongoing dialogue and disruption which was circumventing the direction given by the DCI and command and he needed to close down that dialogue. He had said that he raised his voice to be heard and was assertive and he felt that he was goaded into reacting. From the other witnesses to the events there was mixed perception about whether this "shouting" across the room was in fact shouting or just loud speech. There were also differing opinions about whether it was aggressive or not. The investigating officer concluded that it seemed to have been an isolated incident and not usual behaviour. The grievance investigator noted that the claimant had believed that she was not overheard correctly by DS Moores. She believed that he thought she was going to make direct contact with the Superintendent in Sussex police when she was not. The claimant had described DS Moores as "exploding like Mount Vesuvius" across the office and ordering her into the private connected office. By contrast, DS Moores had said that he had asked the claimant to send him the Sussex policy (as he was not aware of its content) but that she and her colleague had carried on talking about it for what he considered to be an extended period of time. Other witnesses in the investigation reported that they appreciated that the dialogue was shut down and that the situation was handled outside of the open plan office but the claimant perceived this differently. The investigator concluded that without direct mediation it was challenging to see how it was best to settle this point. DS Moores is recorded as being clear that in the handover he received from previous line management he was advised that it was best to avoid asking Rhiannon into impromptu meetings if possible, but not to the extent that the claimant has articulated the impact on her PTSD within the grievance. He recorded that on that occasion he felt that it was necessary to address the issue straightaway but also said that it was about 5 to 10 minutes after this that he stood up to intervene. This was confirmed by others who were present. The investigating officer conceded that the timescale may have felt different to the claimant. The investigating officer had also been told that the claimant had previously said "no" to being called into an impromptu meeting by previous line management but did not do so on this occasion. The other colleague involved in the incident went into the office after the claimant's meeting had finished and elected to take someone with them. DS Moores had confirmed to the investigator that he did not think the claimant was visibly upset and seemed okay following their meeting in the office. She then left work for the day shortly afterwards as it was the end of her shift. The investigating officer's conclusion was that DS Moores was certainly assertive on this occasion but overall acted reasonably in trying to restore productivity in the office. He asked for the policy, paused, then held meetings and allowed accompaniment into the meeting if requested.

36. Having reflected on the oral evidence that we heard and the documents available in the bundle, we conclude that DS Moores did act in an assertive way and did raise his voice, not least to ensure that he was heard. He clearly wanted to get the message across quickly and effectively. Subjectively, the claimant may well have felt that she was being shouted at. The opinions of objective observers would differ. In cross-examination DS Moores accepted that, with hindsight, he could have waited half an hour before having the

individual meeting with the claimant. The question is whether he *should* have waited rather than whether he *could* have waited. He was in a difficult situation. He could well have dealt with it differently but he is not to be criticised in the circumstances for wanting to deal with the issue as and when it arose. It would have been better for him to have articulated and explained what he wanted to speak to the claimant about but he did give her 5 to 10 minutes breathing space before actually speaking to her. He did not call her immediately into a one-to-one meeting.

37. Following on from this, on 13 May, DS Moores sent the claimant a further email at lunchtime. The subject matter of the email was the offender that the claimant had visited recently. As per the discussion the day before (with regard to visiting the addresses of high-risk offenders and actually going into the address rather than doorstepping them) DS Moores wanted the claimant to visit the offender in question again by close of business on Monday 18 May. He set out his rationale for wanting the visit to be conducted again. In particular, he wanted to be sure that the offender's devices had been checked for images. He also noted that this ARMS was due by May 25th.

38. This email quickly prompted a written response from the claimant, who was clearly upset and offended by DS Moores' message. She noted that she had found his email extremely stressful and she said, *"There has been no discussion just a dictate with 'you will do this by this date.' This is intolerable pressure."* She continued, *"Following the being shouted at and ordered into an office of yesterday, when I had done absolutely nothing wrong, I am finding it hard to focus on the multiple repeated demands made of me. As a work environment this situation and you are directly affecting my mental health."* She set out her position in relation to the offender visit under discussion and pushed back on his characterisation of what she had done and its adequacy. She indicated that she did not have time prior to annual leave to carry out a revisit of the offender: "*To clarify I am not able to do what you ask in the timeframe that you have sent. If your treatment of me is to "break me" somehow I can only ask… why would you do that??? I don't expect any support from my management however to be continuously under attack isn't just unprofessional it's actually really cruel. I have had no acknowledgement of the good work done just a repeated "get this done by this date." I can also advise you that I am not able to continue working today and if I still feel unwell tomorrow they then I will of course notify myself as sick. I will await the "you will be disciplined" tidal wave in return designed to make me feel more shit than I do now if that's possible…"*

39. It is clear, therefore that the claimant reported sick partway through her tour of duty and went home. We heard that she had in fact completed the majority of her shift before reporting sick. DS Moores responded to the message by email at 1451 and stated*, "Thank you for your email. I am sorry you feel this way. I believe this to be a lawful and reasonable direction in the circumstances, delivered in a polite and appropriate manner. I shall not discuss this further by email as I do not feel it appropriate given what you*

have discussed below. I shall email duties to inform them you have reported sick during your tour of duty. I shall call tomorrow to check on your welfare."

40. Following on from this DS Moores did as indicated and reported the claimant sick. He sent an email to "!Duties and Resourcing Western (Surrey)" at 1514 which stated, *"Hello Duties. Could you please show the above officer… Barton-Wolfe, as reporting sick at 14:42 hours during her TOD. She describes herself as being "unwell" at this time and unable to continue her TOD."* This email was factually correct. It prompted a response from Noel in the Duties department who said that this needed to go to the "!report sick team" and he had copied them in. Apparently, the !report sick team recorded the claimant as absent for the entirety of her tour of duty rather than noting down that she had completed the majority of the shift and had left sick partway through the day. This instruction was not given to them by DS Moores and he would not have been aware of this recording error at the time. DS Moores did not do what the claimant accuses him of in the course of these proceedings. He reported the situation in the factually correct manner to the relevant record keepers but it was recorded by someone else as a full day's absence. The claimant says that this could have had adverse implications for her. Discrepancies in recording episodes of sickness absence might cause her to reach the sickness absence procedure trigger points more quickly than would otherwise have been the case. However, this was a *potential* problem rather than *actual* problem-it did not actually happen. Furthermore, the claimant alleged that an inaccurate record of sickness absence could cause her to lose fringe benefits (such as her fuel card.) However, once again, this did not actually happen to the claimant in this case.

41. Overall, there is no evidence to support any assertion by the claimant that DS Moores intentionally subjected her to a detriment or wanted to put some form of 'black mark' against her name or record. We accept that DS Moores needed to report the sickness absence of his officers accurately. He explained to us why it was important that there should be accurate records of who was and was not in work at any given time. Management would need to know what resource was available to them and who could be called upon to assist (e.g. in the event of an emergency.) Notwithstanding the claimant's own view (that there was no need to keep a record of sick leave of less than a whole shift's duration), we accept that the respondent organisation had good and substantial reasons for wanting a complete and accurate record of officers' sickness absence. DS Moores had every good reason for doing what he did and had no intention to disadvantage the claimant. As things transpired the claimant was not subjected to any substantive detriment as a result of the mis-recording.

42. The claimant asked us to consider the sickness absence policy [128]. We were directed to the contents of paragraph 3.1 which concerned the reporting of a sickness absence. At Surrey police it was recorded that "individuals should email: !reportsick (Surrey) no later than the expected start time at work. The individual should follow this up by contacting their line manager directly.… Sickness absence details will then be recorded on People

Solutions." It is apparent that this part of the policy deals with the reporting obligations of the individual who is actually taking sick leave rather than the record keeping or reporting obligations of their line manager. Furthermore, it seems to deal solely with those situations where an individual reports sick before the start of their tour of duty (rather than someone going off work sick partway through the shift.) It is therefore helpful so far as it goes but not directly applicable in this case. It does not suggest, contrary to the claimant's assertion, that there was no obligation on DS Moores to record partial days of sickness absence. The claimant also indicated that it was written down in a policy somewhere that there was no obligation to record a partial day's sickness absence. However, she was unable to direct us to where that policy was set out and we are unable to accept her assertion in this regard. On balance, DS Moores' evidence is to be preferred: he had to report a partial day's absence so that an accurate snapshot of the available resource was available to management.

43. In the meantime the respondent was pursuing plans to improve the performance of the department. It had been identified that there was a group of officers who were resistant to change and who hampered changes to improve the performance of the department. The claimant was identified as being one of those individuals. DCS Hughes, DCI Molyneux and DI Burns had a meeting to discuss the claimant and the other individuals who were considered to be at the heart of the issues. It was decided that they would treat the cases as performance related as opposed to misconduct. In doing so (and to resolve the immediate problems) a decision was taken to separate the four individuals in question. One of the four was leaving the unit in any event so the decision was taken for the three remaining officers to be separated across three teams: one to remain in the West, one to move to North and the claimant to move to the East. All of these locations remained under the command of DCI Molyneux, reporting to DCS Hughes as Head of Department. The decision as to who to move to which team was based on geography. DCS Hughes planned to meet with each of the individuals concerned and the meetings were planned for 15 and 18 May [176].

44. In the course of the meeting (between Hughes, Molyneux and Burns) DCS Hughes was shown a copy of the claimant's email to DS Moores of 13 May (referred to above). He felt that this exacerbated the position regarding the claimant. He found the claimant's email to be unacceptable. During the course of the meeting they discussed what the appropriate response to performance concerns would be. DCS Hughes considered that the email from the claimant to DS Moores showed that he needed support to rectify the performance issues. DCS Hughes indicated to the Tribunal that this email was a 'tipping point' in his mind which indicated that the claimant's case should go straight to Unsatisfactory Performance Procedure (UPP) Stage I, namely an "Action Plan." He understood he had the option of using the informal part of the procedure first but he felt that the claimant's email was an aggravating factor which necessitated going straight to Stage I of the formal process. As things transpired (and for reasons which are set out below) DCS Hughes' decision to take the case straight to Stage 1 UPP was never

communicated to the claimant. She is now aware (from reading the Tribunal documents) that he had decided to put her on an Action Plan but that message was not communicated by the respondent to the claimant at the time. Furthermore, although the claimant thought her three colleagues had been given Action Plans (see below) this is not, in fact, what happened. One of her colleagues was given an Action Plan and the other two were given Support Plans (which is part of the *informal* performance management procedure).

45. DCS Hughes gave evidence that he met with the officer who was leaving and said to her that he was unhappy with her performance and would be speaking to her new line management to warn them of concerns (which he subsequently did.) He met with the other two colleagues to explain his concerns regarding their poor performance and to remind them of the Code of Ethics and what the duties of police officers entailed. He called these meetings "Code of Ethics" meetings and reminded those concerned that their role was to protect the public and that this was crucially important in HHPU. DCS Hughes would have met the claimant too but this did not happen as she had already started sick leave. This meant that DCS Hughes in fact never spoke to the claimant about his concerns in relation to her performance or about her move to the East. He indicated to the Tribunal that he did not know that the claimant had PTSD when he made the decision to move her. He had no personal knowledge of her, largely due to the fact that she was on sick leave and he had been seconded into the Head of Public Protection role in the Surrey force from his substantive position in Sussex Police.

46. On 14 May the claimant had her first full day of sick leave from work.

47. On 15 May an incident occurred during which the claimant was detained under the Mental Health Act or, in common parlance, 'sectioned.' At the time of the episode in question the claimant was driving. The claimant's evidence at the Tribunal hearing was that the trigger for this escalation in her symptoms (and the requirement to detain her) was not DS Moores' discussions with her at the meeting on the 12 May but rather some communications that she had with one of her other colleagues in the department. It appears that her colleague spoke to her in a state of some distress because she could not locate the third officer in the group. She told the claimant that all three colleagues had been called into meetings at short notice and had been given Action Plans by DCS Hughes. As previously stated, this is not what had actually happened (albeit there was an intention to put at least one of the individuals on an Action Plan.) Nevertheless, this is what was reported to the claimant and it is this message which had a detrimental impact upon her mental health. She was worried about her colleagues. She was informed that one of them could not be located and she was concerned for her welfare. More pertinently, she concluded (as a result of what she thought had happened to her colleagues) that she too was going to be given an Action Plan at short notice because she was associated with the other three as one of the "troublemakers" within the department. The comments about the Action Plan caused what she described as a "severe and life-threatening PTSD

episode which led to her being sectioned." It was the fear of being given the Action Plan which triggered the PTSD episode. The claimant had not (as far as we could see) anticipated that a message of this sort would affect her in this way. It was only once it had actually happened that she realised the serious repercussions for her of such a message. The important thing for this Tribunal to note is that, in the run-up to the PTSD episode, the respondent had not invited the claimant to a meeting or communicated any intention to issue her with an Action Plan or to put her on some form of performance management procedure. The respondent had not spoken to the claimant about this. All her "knowledge" about what was going to happen was derived from the comments of third parties and colleagues behind-the-scenes. She inferred that she would be treated in the same way as (she thought) her colleagues had been. As genuine as this reaction was, it was not triggered by the actions or communications of the respondent. The respondent organisation could not be held responsible for the comments and discussions between the colleagues on 15 May and the misreporting of the colleagues' situation to the claimant. Her inferences may not have been unreasonable given the fact that she had been grouped together with the other three colleagues but the train of events itself cannot really be blamed on the respondent (who would not have realised what the colleagues were going to say to the claimant.)

48. Following this exacerbation of the claimant's PTSD the respondent opened an individual Duty of Care Risk Assessment in relation to the claimant (known hereafter as a "DOCRA"). The DOCRA procedure was part of the respondent discharging his duty of care towards his officers to ensure their continued welfare. It allows the respondent to create a working document (to be updated and reviewed) which assesses the degree of likelihood and the degree of severity of any risk of harm to the claimant at any given point in time (dependent on the prevailing circumstances and the state of her medical condition.) As part of this process the claimant was assigned a welfare officer from a different department (in this case CID.) The claimant's Welfare Officer was DCI Haycock. The nominated SMT lead for welfare on this case was Detective Superintendent Sailesh Limbachia. The secondary SMT lead was Tamara Cooper. The claimant's Police Federation representative was DS Paul Campbell and the assigned HR officer was Chris Evans.

49. The initial DOCRA assessment recorded that the claimant had a complex history of trauma. It recorded that any and all communication and action should only be taken in consideration of the effect this will or may have against this background history. DCI Haycock advised against taking action without having a comprehensive briefing. He recorded that the claimant has diagnosed complex PTSD and summarised the two catastrophic events which had led to the diagnosis. He recorded that, *"a significant PTSD trigger for RBW can be events such as being called into an office or being given an Action Plan. To RBW these events will have a serious effect which cannot be overstated and any plans to take such action should be seriously considered and strategies put in place to mitigate any trigger effect this may have. RBW*

is passionate about and assesses herself as very good at working with sex offenders and this is an area of business she seeks. She cannot work with violent offenders such as murderers as this triggers her PTSD. The amalgamation of Visor and IOM and the challenges of these two areas of business have therefore been difficult for RBW.… Recent events within the HHPU environment have led to a number of officers being subject to a number of interactions and interventions and this has been a stressful and unpleasant experience for RBW. RBW describes from her perspective very stressful and unhappy situation at work and relationships with her DS, DI, DCI and DCS. RBW describes feeling under attack, bullied and hounded with unreasonable requests and demands. This culminated at the end of last week when it seems there were plans by the DCS to hold personal meetings with four members of staff in which they were told variously that they were being moved and/or being given action plans. RBW had such a meeting described to her from a colleague subject to one of the meetings. RBW then was left in no doubt that such a meeting was planned for her. To RBW this was intolerable. The prospect and anticipation of being called into an office and being given an action plan by the DCS has been a serious and significant trigger. The unexplained seniority of the officer concerned is also a contributory factor which added to her worry and unease. This resulted in an episode of concern for safety and the subsequent detention under the MHA for RBW who suffered a significant PTSD response. To underline the seriousness of the effect of carrying out such actions in this way with RBW she states if she were given an action plan she would kill herself-this position remains current. RBW now describes a complete and catastrophic breakdown with all of her line management from DS through to DCS (accepting the DCS is not cited but leaves the organisation today in any case). Any contact currently from any of these managers is likely to have significant negative consequences. RBW presents a real and serious threat to herself when suffering a PTSD episode."

50. At this stage the risk assessment risk matrix score applied to the claimant was six. This increased to a score of 10 on 1 July, 20 on 16 July, 10 again on 30 July and 8 on 11 August. Thereafter scores reduced to 6 and 4 and the Docra was closed on 24 November.

51. On 21 May DI Parry and DS Moores completed their reports into the situation within HHPU.

52. On 28 May DS Squire opened communications with the claimant with a view to making an occupational health referral. This resulted in the occupational health report from Dr Ramaswamy dated 9 June 2020 [193]. In the course of the report the doctor noted that the claimant is not able to deal with murderers but has no problem with sex offenders. He went on to note that a significant trigger for the claimant is confrontational management and this should be avoided. He recorded that, *"she can be called into an office, be visited or given an action plan but it needs to be done in a non-confrontational manner. I consider that she will be able to return to work when her current fit note expires. I would recommend a further assessment with the Force*

Psychologist." Dr Ramaswamy then went on to recommend a return to work with 4 hour shifts increasing over time. He also recommended that she should not be allocated cases involving murderers and should be managed in a non-confrontational manner to have the best chance of avoiding triggering of PTSD. He was asked whether it was safe for the claimant to return to a role within HHPU and confirmed that it was, provided that the cases she is allocated are risk assessed. He reiterated that she should not be allocated work involving murderers.

53. The referral form which produced this report had a number of 'tick box' questions on it. The referring officer (in this case DS Squire) was unable to alter the questions or use free text to ask specific questions but was limited to ticking the box on the question which was closest to what she wanted to ask. In those circumstances DS Squire ticked the box to ask the following question: "Is there a medical reason that would affect the employee's ability to participate in formal management processes? [e.g. meetings investigatory of disciplinary hearings]." Dr Ramaswamy answered this question: "No-if it is done in a non-confrontational manner." He also confirmed that the claimant's performance at work was likely to be affected by her health in that she was not able to deal with certain cases. At this stage he did not consider that she should be considered for any employment changes such as ill-health retirement or medical redeployment.

54. We examined the referral form questionnaire which DS Squire had completed in order to obtain a report. She was able to provide a 'free text' narrative to set out the reasons for the referral and how it was impacting on the claimant's ability to work. Most of the form involved checking boxes on pre-populated questions. There was one further 'free text' box in which the sergeant could provide free text details. In that box DS Squire asked: "the reasons for this referral are to seek advice and guidance as follows 1. Is it safe for Rhiannon to return to a role in Surrey police 2. Is it safe for Rhiannon to return to a role within HHPU 3. Are the range of duties required of an HHPU officer likely to trigger her PTSD 4. If Rhiannon were to return to work for Surrey Police, how could her managers deal with any performance matters, bearing in mind the above triggers of her PTSD. 5. Can an up-to-date assessment of Rhiannon's mental health be completed by Noreen Tehrani (or another suitably qualified practitioner) prior to her return to work in any capacity? 6. Managers consider there to be an active risk to RBW returning without medical advice and advice from OH concerning the impact of her potential complex PTSD triggers. We would therefore be grateful for an urgent review, ideally before 22nd June (Rhiannon's anticipated return to duty).

55. Questions were raised in evidence about the 'tick box' question at [194] of the bundle. It was suggested to DS Squire that by ticking the box for the question "is there a medical reason that would affect the employee's ability to participate in formal management processes? [e.g. meetings investigatory of disciplinary hearings]," DS Squire was indicating that a decision had been made that the claimant *would* be subjected to a formal management process. We were asked to infer from this that the decision had been taken that the

claimant would be going to a formal stage of the performance management process. However, given that the phraseology of the question was not chosen by DS Squire and was just the closest approximation to what she wanted to ask, we do not accept that this is a fair inference to draw. Asking this question did not indicate that the claimant was going to go to the formal stage of the management process. We are fortified in that conclusion as the example given in the pre-drafted question is of investigatory meetings for disciplinary processes. The disciplinary process was clearly not being applied to this claimant. This demonstrates that the question could not be amended and was a generic 'tick box' question. It would therefore be wrong to read too much into the phrases used in the question and to 'read across' from that and conclude that the claimant was being told that a formal performance management process was the next stage. Rather, the respondent was doing its best to gauge the claimant's fitness to attend any meetings with the respondent going forward so as to avoid unnecessarily triggering or exacerbating the PTSD. The choice of this question does not imply that DS Squire thought there was going to be a formal capability procedure pursued against the claimant.

56. DS Squire had a telephone call with the claimant on 16 June [530]. During the call the claimant advised DS Squire that she was happy to go to HHPU East but said that *"if they hit me with anything shitty it can't happen to me at Reigate cos I won't be able to get home…. If it's just come into work all normal and nice, fine to come to Reigate.… I know Lou Davidson's getting an action plan, even with everything that happened to her, so sure as heck it's going to happen to me."* DS Squire attempted to reassure the claimant.

57. On 18 June a management meeting took place to decide the next steps regarding the claimant. The attendees at the meeting included D/Supt Colin Pirie, DS Squire and DI Burns. In the course of discussions the attendees decided that the current occupational health evidence was insufficient. They decided that it would be necessary to re-refer the claimant to Occupational Health for more detailed guidance. It was decided that the claimant should remain on special leave at this time to facilitate obtaining the further occupational health evidence so that the respondent would know how to re-introduce her into the workplace in a safe manner. The managers decided that a further report was required from Dr Tehrani so that they had an informed capability assessment based on the claimant's current PTSD diagnosis, rather than the physical capability assessment that Occupational Health would normally carry out. In particular, they wanted to know whether there were any restrictions on the claimant's ability to work in HHPU as well as her wider ability to carry out the roles involved in being a police officer. They also wanted confirmation as to whether all the previous restrictions dating back to 2011 were still valid with the claimant's then current diagnosis (e.g. the restrictions on her ability to drive.) The managers concluded that the extant occupational health evidence did not give sufficient guidance to support the claimant to mitigate risk to herself or managers re-triggering an episode. In addition, managers were going to update the claimant's Welfare Officer (DCI Haycock) so that he was aware of what was intended (and why.)

DS Squire was given the job of communicating directly with the claimant to explain what was happening and why.

58. DS Squire phoned the claimant on 18 June and was on the call for about 35 minutes. Initially the claimant argued against the decision but, in the end, accepted what DS Squire said. She made it clear that this was not what she wanted and said that she would be much better being at work. She confirmed that she wanted to return to work at Guildford and wanted this to be guaranteed. The claimant also asked whether she could do some work from home, saying that she had some ongoing written work which she wanted to complete. DS Squire confirmed that the claimant was not expected to complete any work but that if she chose to write up her visit then DS Squire could not stop her. From Squire's point of view the key issue was to ensure that the claimant was safe from harm bearing in mind that she had had a life-threatening event in May. During the conversation the claimant made it clear that she was not happy with being on special leave and wanted to go back to work at Guildford.

59. The next day the claimant's Welfare Officer DCI Haycock sent an email [249] and advised the respondent that the claimant was fine and understood why she would be on special leave. She had communicated that she would engage with Dr Tehrani to progress the psychological assessment and treatment process.

60. Dr Tehrani's updated report was received on 22 June 2020 [251-255]. In summary the advice given was that the claimant was fit to start her return to work on a gradual programme as agreed with the FMA. Dr Tehrani confirmed that the restriction of not dealing with offenders of violent attacks or murder (agreed some years ago) was to be retained on a permanent basis. She confirmed that, apart from not being able to take cases involving physical violence or murder, the claimant was able to carry out all other duties. Dr Tehrani confirmed that a temporary or permanent change of role was not required at that time. Dr Tehrani noted that the claimant's opinion was that she had been treated harshly and unfairly. Dr Tehrani was of the view that there was a need for the claimant's concerns to be examined if further distress to all concerned was to be avoided. In response to the question as to whether treatment options have been exhausted Dr Tehrani said, that whilst the claimant's reaction to trauma triggers from earlier incidents was extreme, it was Dr Tehrani's belief that these were unlikely to occur again providing that the claimant's concerns regarding her need for protection from dealing with the cases already specified were maintained. She noted that the claimant's recent trauma reactions were not related to the work she was currently undertaking but rather her reaction to her feelings of being treated unfairly by management. Dr Tehrani considered how the claimant's managers could deal with any performance matters bearing in mind the triggers for her PTSD. She noted that the trigger to the claimant's recent response was being put into a situation where she was in a room alone with a man who was speaking to her in what she described as an

aggressive/bullying manner. The claimant's response in the car was brought about when she imagined herself being called into such a meeting. The doctor stated that she did not believe there were any triggers in the work the claimant undertakes providing that they are appropriately risk assessed, as recommended. Dr Tehrani suggested that 'this' situation could be avoided if:

- Due consideration is given to the approved ACAS standards for dealing with disciplinary meetings
- The performance meeting is fair and held in a neutral location
- The claimant has an opportunity to bring a colleague for support
- The claimant is provided with an outline of the issues to be addressed before the meeting together with time to present her responses
- The meeting is carried out in a way that allows both sides to be heard.

61. In the narrative section of the report Dr Tehrani noted that, "whilst in most circumstances Rhiannon is resilient, she has a problem dealing with cases involving violence, particularly when the victim is a woman. Rhiannon is vulnerable to the reactivation of her traumatic stress and some of the events over the past weeks have parallels in earlier traumatic events and triggered a major traumatic response." Dr Tehrani continued: "in my opinion Rhiannon:

- Is fit to start a rehabilitation programme.
- Should be given the opportunity to work from home, attending the Guildford office to input her reports during the rehabilitation period.
- Can work four hour shifts increasing by an hour each week as recommended by the FMA.
- Cannot be given any cases which involve offenders with a history of physical violence and/or murder.
- Can have her performance assessed if the assessment is undertaken fairly and against recognised performance criteria.
- Can take part in a formal grievance or disciplinary hearing providing these are undertaken with appropriate HR and ACAS guidance (in order to protect Rhiannon and Surrey police it is recommended that should there be a need for any formal process advice should be sought from OH on ways to reduce the risk of harm.)"

62. On 30 June a further took meeting took place. Present at the meeting were DSupt Colin Pirie, Chris Evans, DCI Molyneux, DS Squire, DI Scott, Martin Goodwin (DI in the Paedophile Online Investigation Team) and Mel Warnes (from the Police Federation). The up-to-date evidence was considered and discussed. It was decided that nothing in the occupational health report suggested that performance issues could not, in principle, be managed with the claimant. Therefore, performance should be discussed with appropriate measures in place. These measures included notification in advance about the issues to be discussed and allowing the claimant to attend with a friend/companion. The participants decided that the claimant would not be returning to HHPU West. It was possible that she would be moved to HHPU East but the respondent would need confirmation as to whether the HHPU role was suitable. It was noted that HHPU deals with a number of violent

offenders including MAPPA subjects. The managers concluded that there was a high risk in enabling the claimant to work in a department where violent offenders will be discussed. They therefore took the view that reasonable restrictions under the Disability Discrimination Act needed to be considered. The managers agreed that they needed to prioritise keeping the claimant safe and well in the correct environment, as well as ensuring the safety of colleagues and officers. They wanted to bring her back into the workplace until they could resolve the HHPU issue. Potential options for achieving this were noted. It was also agreed that second line manager responsibility would be passed to DI Scott from Martin Goodwin now that she had returned from maternity leave.

63. In the meantime, the claimant had a discussion with her Welfare Officer DCI Haycock. He communicated the contents of this discussion to various managers via email on 30 June [258]. He confirmed that the claimant was suffering with a degree of anxiety and had been informed that there was a management meeting that day to discuss what was going to happen. The claimant argued that she needed continuity and pointed out that she was worried about the prospect of disciplinary action although she maintained that she had done nothing wrong. She was worried that the meeting would happen and she would not be able to find out what was going on. She stated that nobody had explained what special leave was all about. The claimant had noted that the special leave was due to be coming to an end on Thursday and she did not know what was supposed to happen next. She was concerned that she had no voice in the meeting and that her questions had not been answered.

64. In light of this email from DCI Haycock, the respondent took the view that they needed to talk to the claimant as soon as possible. It was decided that a senior officer needed to make first contact with the claimant. Therefore, D/Supt Pirie made the first call [218]. He called the claimant and explained that everybody was agreed that her welfare was paramount. The delay had been because the organisation and management wanted to do the right thing. They were concerned about the claimant but also needed to consider the needs of colleagues. He intended to convey his personal assurance that the claimant's welfare was at the centre of their considerations. In answer to a question from the claimant, D/Supt Pirie did advise the claimant that some performance issues had been identified. The claimant asked him to go through them with her. He advised that he did not have them in front of him and that going through them over the phone would not be the best thing to do. He told her that she and her Welfare Officer would be given details of the performance concerns in advance before any meeting (where she would be appropriately supported.) He indicated that this would be better for her. The claimant confirmed that, in her view, the matter had not been dealt with well in any way. The claimant asked D/Supt Pirie whether she was being given a punishment posting to East Surrey. He advised her that nobody was being punished for anything but measures had to be put into place as a result of the

issues in HHPU West. The claimant was clearly not happy with what was happening.

65. Following on from D/Supt Pirie's call to the claimant DI Scott tried to call the claimant. The claimant was distressed and unable to speak to DI Scott personally on the telephone. With the claimant's agreement and authority, DI Scott spoke instead to her wife, Jan. This conversation was not conducted on speakerphone. This means that the claimant was not able to hear directly what DI Scott said to her wife. She was sitting next to her wife and could hear Jan's half of the conversation.

66. The claimant's own handwritten records [435] indicate that, even before the phone call from DI Scott, the claimant was concerned about the possibility of getting an Action Plan. She had raised those concerns with DCI Haycock before she spoke to either Pirie or Scott on 30 June. On balance, having heard evidence from the claimant and from DI Scott the Tribunal finds that during the course of this telephone conversation DI Scott did not say or indicate to the claimant that the claimant would be getting an Action Plan. We make this finding taking various circumstances into account. Firstly, the other direct participant to the telephone conversation (Jan) could have given evidence to the Tribunal as to what was said. She did not do so and therefore did not explain what was said to her on the phone by DI Scott. The only direct participant in the conversation to give evidence to the Tribunal was DI Scott. The claimant's evidence was based on her observations of the conversation (whilst only being able to hear one side of it) and her subsequent discussions with Jan (and perhaps others.) She did not directly hear what DI Scott said or the terminology that Scott used. On the other hand, DI Scott was consistent, both in her witness statement and during cross examination, that she did not say that the claimant was going to be put on an Action Plan. Furthermore, DI Scott confirmed that she had not seen the earlier document from DCS Hughes which referred to the Action Plan (Stage I UPP). Consequently, that earlier decision by DCS Hughes (to send the claimant to Stage I of the formal process) was not within DI Scott's knowledge at the time she made the phone call to the claimant. In fact, DI Scott had only just returned to work from maternity leave and consequently had limited knowledge of the background to the claimant's case. As far as DI Scott was concerned, the agenda for the phone call was quite limited. The primary purpose of the call was to let the claimant know what was going on (i.e. that the claimant would be moved to work in the East of the region, subject to occupational health confirmation that this was appropriate, and that the claimant would be left on special leave in the meantime.) DI Scott had literally just returned to work (the day beforehand) and had no background with the claimant's case and had received no formal briefing. She had not seen all of the documents. She confirmed, and we accept, that she was careful not to say more than she knew or was authorised to say. It was better for her to err on the side of caution and say less rather than more, rather than make comments which turned out to be incorrect or in some way misleading. By this stage the claimant was already focused on what she perceived to be the risk of an Action Plan. This was mainly because of the comments her colleagues had

made (on 15 May) and what had happened on 15 May. Her concerns had not been allayed because D/Supt Pirie had confirmed that there were indeed performance issues which the respondent would need to address. (He was being truthful about this.) The claimant had already spoken to her Welfare Officer (Haycock) and had confirmed to him that she was worried about the risk of an Action Plan. The impression given by all the contemporaneous communications and documents is that the claimant was already fixated on the potential Action Plan without DI Scott saying anything to her about it during this phone call. The Tribunal also notes the evidence that we heard that the particular significance of an Action Plan for this claimant was that she had been given an Action Plan very shortly after her friend Heather had been murdered. This meant that an Action Plan would, emotionally and mentally, take her straight back to how she felt at that point in time with the murder of her friend and colleague still very fresh in her mind. As a result she was worried that any subsequent Action Plan in 2020 would reopen these wounds and reactivate this psychological response. These factors were very much on the claimant's mind during the conversations on 30 June. It explains why an Action Plan would be at the front and centre of the claimant's considerations even if the respondent did not tell her that she was going to be put on an Action Plan.

67. In the course of the telephone conversation between Jan and DI Scott we accept, on balance of probability, that it was in fact Jan who raised the issue of an Action Plan with DI Scott. Jan initiated this topic of conversation. Once the matter had been raised we accept that the terminology of "Action Plan" may have been uttered by DI Scott, even if only to confirm to the claimant that she had misunderstood and she was not going to get an Action Plan. However, this is not evidence that DI Scott was saying that the claimant was at risk of receiving an Action Plan. It is functionally quite different. It was DI Scott attempting to remove the claimant's misunderstanding, clarify that an Action Plan was not on the agenda for her, and thereby allay her concerns.

68. Following on from this telephone conversation it became apparent to DI Scott that the claimant was still worried about the risk of an Action Plan. On that basis she rang the claimant back on 1 July and made it doubly clear to her that she was <u>not</u> being given an Action Plan. The appropriate terminology would be a Support Plan. This forms part of the <u>informal</u> stage of performance management rather than (formal) Stage I UPP.

69. We were taken, in the course of the evidence, to a handwritten note made by the claimant at [435-436]. The problem with this evidence is that, by definition, given that the claimant was not listening on speakerphone and could not hear the other participant (Scott), she did not know exactly what DI Scott had said. Taken at its highest it can only be a note written shortly after the conversation following a discussion with the claimant's wife. On the other hand we have an email from DI Scott [269]. This confirmed that she spoke to the claimant on 1 July and that the claimant had confirmed that 30 June had been a PTSD trigger for her so that she could not speak but she did feel able to speak now (1 July). She confirmed that she did not feel she was able to drive to East at

that time so any return to work would involve working from home. DI Scott indicated that she would call the claimant later on with some options for when she could collect her things from Guildford at a time when nobody else was there. DI Scott also confirmed that she would confirm when the claimant would receive the performance issues in writing as this was causing her anxiety. They agreed that they would arrange a meeting for the week after at Woking Police Station. The claimant wanted either Richard (Haycock) or Paul (Campbell) present. During the course of this conversation the claimant stated that she did not understand why the respondent could not speak to previous managers about how things were managed and make reasonable adjustments which she was entitled to under the Disability Act. The claimant made the point that she had worked in the department fine for two and a half years without incident and restrictions have not changed. The claimant stated that Occupational Health and Dr Tehrani had both stated that she was fit to work in the department.

70. DI Scott also received a phone call from DCI Haycock. In the course of that conversation he stated that the claimant had confirmed that she was being given an Action Plan which he would be delivering. DI Scott clarified that she the claimant had been told that there were performance issues but had not been told that this would be in the form of an Action Plan as, at that stage, DI Scott was unsure what it would look like. DI Scott confirmed that there was a role for the claimant on Eastern HHPU but there was a delay due to looking at the suitability of the role for her. She explained to DCI Haycock that the only mention of his name was in relation to asking if either he or Paul could be there when the claimant has the performance meeting. DI Scott had told the claimant that she would be able to have a 'friend' there.

71. After this phone call DI Scott rang the claimant again and updated her that the performance details would be sent by Friday at the latest, that Jan would be made aware and Paul would receive this too. They would then look to have a meeting the week afterwards in order to discuss it in person. DI Scott records in her email that she reiterated that she had not said to the claimant that it would be an Action Plan, that they don't use them anymore and that DI Scott did not know what form it would take. The claimant was also told that an occupational health referral would be submitted and that she would receive a copy of it. DI Scott also attempted to reassure the claimant about the claimant working with DI Scott and DS Squire. She confirmed that she had no issue with the claimant joining her team and knew that Hillary was of the same mind. What they needed was to be certain that it was safe and was not going to trigger any episodes. DI Scott advised that if the claimant did come to work with them she should not have any anxiety about it, Squire and Scott had both worked with her before and had got along. They certainly did not feel that they had been "landed" with her, as the claimant described it.

72. So, as stated above, we do not find that the respondent told the claimant that she was going to be put on an Action Plan. This was a concern that the claimant already had and which she raised with the respondent. Once she did so the respondent's managers attempted to reassure her that, although

there were performance issues, they would not be dealt with via an Action Plan and that she would have advance notice of the issues in writing before they were discussed with her. We find that once the claimant introduced the language of 'Action Plans,' the respondent could not avoid using that terminology to in order to clarify the true position and try and communicate that an Action Plan was not going to be issued to the claimant. The trigger for this conversation topic came from the claimant and not from the respondent.

73. As a result of these developments a further occupational health referral was made on 2 July [296]. Specific questions were asked in the referral. The reason for the referral was the respondent's duty of care. The referral stated: "following on from the previous referral a case conference has been held and the following needs to be ascertained in order to move forward with Rhiannon's return to work. 1) Can you please provide an informed capability assessment of Rhiannon's psychiatric ability to work in her role in HHPU [including driving, dealing with Domestic Abuse incidents, managing all offenders etc] based on her current PTSD diagnosis [rather than a physical capability assessment]. 2) Can you please list all previous restrictions in relation to Rhiannon [back to 2011] and whether they remain valid [including driving]. This information will aid us in managing Rhiannon's return to the workplace and is required in order to assess whether she is fit to return to work prior to making any decisions around the suitability of her role. Unfortunately the reports received to date do not give sufficient guidance with which to support Rhiannon and mitigate the risk to herself or her supervisors in triggering a PTSD episode." The referral contains the following information (emphasis added by the Tribunal) "Rhiannon has now been informed that she will not be returning to Guildford HHPU office, and there is a potential vacancy for her at Reigate HHPU. The HHPU role involves managing both sex offenders and other high harm offenders, which includes violent offenders. This is why the below specific questions are very important, to know the exact types of offenders that Rhiannon may not be involved with, and to ensure that the HHPU is actually suitable.… No discipline process is involved. However Rhiannon has been informed that there are some performance matters which need to be discussed." The following specific questions were asked: "is Rhiannon able to drive to work, if placed at Reigate Police Station approximately 23.5 miles/35 minutes. Is Rhiannon able to drive whilst at work, unmarked car nonresponse role. Is Rhiannon able to hear about conversations involving violent offenders who have perpetrated violent offences, domestic abuse, and murder or assaults. Is Rhiannon able to work on cases where the offenders have previous convictions for murder, violent offences or domestic abuse offences. Is Rhiannon able to work on cases where the offenders have used violence to perpetrate another offence e.g. aggravated burglary or robbery, rape. Is Rhiannon still unable to complete work with the following elements [named in 2018 capability assessment as not suitable: nights, "on-call" duty, respond to emergency calls, attend RTAs/direct traffic, response drive. Are Rhiannon's managers able to have spontaneous conversations about her work, and actions that she has taken, without triggering a PTSD episode."

74. On 10 July a draft support plan was sent to the claimant so that it could be considered before she discussed it with the respondent's managers [336]. The document was entitled "Unsatisfactory performance informal support/development plan." It noted that whilst the aim of the plan was to assist individuals to achieve acceptable performance standards, if standards were not achieved or maintained line managers might progress to the formal stages of the performance and attendance management policy. It also noted that the formulation of the plan should be discussed between the line manager and the individual and the specific improvement/development/action points recorded below. In compliance with the proposed adjustments, rather than following the usual process of having a discussion with the officer in order to formulate the plan, the respondent sent the proposed draft plan to the claimant in advance of discussing the contents with her. This was a departure from standard practice which was intended to assist the claimant by ensuring that she had advance warning of the topics for discussion at any meeting together with time to prepare, if required.

75. The draft plan outlined five areas of concern: "Effective handling of confidential folders and material;" "VISOR administration;" "Examination of devices;" "Taking direction and engagement with line managers;" and "IOM and HHP cohorts." Alongside each topic it set out how the improvement was going to be achieved. It was proposed that the plan would be in place for six months.

76. It should be noted that this was a *draft* support plan. The claimant was not issued with a finalized support plan. It is also important to note that a support plan is part of the *informal* section of the performance management process. It is not a *formal* stage of the performance management process. This is evident from the face of the document as well as from the other evidence heard by the Tribunal.

77. On 14 July 2020 the claimant's special leave was extended until further notice. (It actually remained in place until 17 August.) The claimant had initially alleged that DS Squire extended the special leave but she later withdrew this allegation. The email from DCI Haycock to various line managers dated 10 July [345] indicates that, in fact, the claimant was concerned that her special leave was due to end and she made the request that it was extended to cover the period until the meeting to discuss the support plan could take place. The extension of special leave was not imposed on the claimant, she requested it.

78. Dr Tehrani responded to the further questions which management had posed [355]. Rather than directly authoring a further document, it seems that Dr Tehrani discussed her responses with Louise Waghorn (Clinical Lead) who set out the responses in the body of a letter/email.

79. Dr Tehrani had been asked whether the claimant was able to hear conversations that others are having involving violent offenders who have

perpetrated violent offences, domestic abuse and murder or assaults. Dr Tehrani's opinion was that this could cause problems in some situations. The triggers appear to be domestic violence and violent assaults, particularly ones involving knives and blood. The problem appeared to be a violent attack and/or murder of a woman. Dr Tehrani suggested that there was a 70% risk of a trigger. Dr Tehrani had been asked whether the claimant was able to work on cases where the offenders have previous convictions for murder, violent offences or domestic abuse offences. Dr Tehrani responded that, again, the issue is the murder of a woman particularly in a domestic situation. The claimant is less affected by violence if it is not relating to a woman. However, there is also the possibility that she would be affected by the murder of young men. Depending on the crime and circumstances Dr Tehrani estimated a 50-70% risk. Dr Tehrani was asked whether the claimant was able to work on cases where the offenders have used violence to perpetrate another offence (e.g. aggravated burglary or robbery or rape.) The response was that the claimant had told Dr Tehrani that she is able to work with rape cases but not with sexual or physical violence against women. Dr Tehrani would suggest 80% risk if exposed to sexual or physical violence against women. In relation to the ability to work night shifts in relation to mental health Dr Tehrani was not aware of any reason that the claimant could not work night shifts but she noted that the claimant had advised that she cannot go into Guildford station or take a train that goes through the station due to the death of her stepdaughter's partner at that station. Dr Tehrani also advised, "The problem a psychologist faces in giving opinions is that everything depends on the circumstances of the exposure and the triggers involved. My advice is for HR or Management to be open with RBW and ask her to provide a list of the roles, situations and circumstances she believes will cause her to have adverse reactions. This should be accompanied by a similar list of the roles, situations and circumstances which she believes she could handle safely. That would allow HR to create a role profile which RBW has identified as being safe. The task for Operations/HR is to identify any roles that can allow RBW to work safely. If there are no roles available then to see what reasonable adjustments could be taken to enable her to work."

80. On 17 July a meeting took place with D/Supt Pirie, DI Scott, Chris Evans and Mel Warnes (from the Police Federation.) The most recent responses from Dr Tehrani had been shared with the participants prior to the meeting. The participants agreed that, although it would be reasonable to give the claimant a workload of specific non-triggering offenders, it would be less straightforward to manage the 70% risk that discussion of cases in the office (involving the stated violent elements) would be a trigger. The only means of managing this would be to adopt measures which would not be reasonable adjustments and which would not be operationally viable for the department. The record of the meeting noted that for the team to be unable to talk about cases they are dealing with or incidents that are occurring is key to team learning, developing, managing risks effectively and for their own welfare, as well as forming daily business within a department managing significant risk. There is often more than one member of the team working on the larger

cases. If the claimant was required to leave the room if a triggering conversation is occurring this could lead to isolation for the claimant and/or result in her walking away when an episode has already been triggered and leaving her with no support. The times when this could happen would not be infrequent. The increased risk rating of 20 in the DOCRA was also discussed, along with an update around the claimant's then current mental state and the update from DCI Haycock that the claimant had been looking at 'suicide prevention apps' online. On the basis of the medical advice and the absence of the possibility of adequate reasonable adjustments being put in place, the decision was made by D/Supt Pirie, with the support of all attendees, that an ongoing role in HHPU would not be suitable due to the high potential risk of triggering a PTSD episode that could lead to harm for the claimant. A number of action points arose from the decision including deciding how to safely update the claimant about the decision and also considering what role might be suitable for the claimant.

81. Following Dr Tehrani's most recent report the respondent was on notice of the potentially very serious risks facing the claimant on a return to work if she was allocated to the wrong work. A 70% risk is a high one and it could not be ignored by the respondent. The respondent had a duty to consider the claimant's welfare together with that of her colleagues, the public and the obligation to ensure adequate and effective management of dangerous offenders. Whilst the claimant's managers in HHPU would have been willing to triage the claimant's own caseload, Dr Tehrani's latest opinion really took that off the table as a viable option. The risks arose not only from the claimant's own work but also from the work that others were doing in the vicinity of the claimant and which she might be indirectly exposed to (e.g. through overhearing conversations.) Triaging the claimant's workload would not remove those risks. Irrespective of the claimant's own personal wishes, when taking into account the impact on all interested parties, the respondent decided that it could not keep her on HHPU. The Tribunal is satisfied that, faced with the evidence which was available at the time, this was a decision that the respondent was entitled to make. Although Dr Tehrani's opinion is couched in terms of 'risks' rather than certainties, a risk of 70% could certainly be seen as a 'likelihood', 'more likely than not,'. The types of harms to the claimant which were being discussed were serious. So, the size of the risk and the severity of the impact/harm if it came to pass, meant that the respondent was entitled to take steps to avoid that risk. They did not have to wait until the risk became a certainty before acting. Indeed, they would have been open to significant criticism if they had decided to accommodate that level of risk of serious harm. Given the severity of the claimant's reaction on 15 May, all the respondent's managers were mindful that they did not want to find themselves attending a coroner's inquest because they had taken the risk and the worst had happened. Many of the respondent's witnesses said this, in clear terms, to the Tribunal at the hearing.

82. Although Dr Tehrani suggested asking the claimant to come up with a list of jobs she felt that she could and could not do, the respondent would not be bound to accept the claimant's wishes if they contradicted the medical

evidence. If the medical evidence recommended that the claimant should be kept away from overhearing harmful conversations and this meant a move away from HHPU, the fact that the claimant did not want to move and was prepared to take the risk does not mean that the respondent was obliged to accommodate her wishes and take the risk too. The respondent had wider, legitimate concerns aside from the claimant's personal wishes.

83. The claimant had received Dr Tehrani's most recent report/opinion before it was released to the respondent. She knew what had been said. She did not challenge the contents of that opinion until two months later when, she says, she realised its significance. Thus, the respondent was taking Tehrani's opinion into consideration without any apparent objection from the claimant.

84. On 22 July Dr Ramaswami completed a capability assessment which focused on the claimant's physical (as opposed to psychological) needs [374]. He does not refer to Dr Tehrani's most recent advice (regarding the 70% risk etc). His report does not take matters any further in relation to the claimant's psychological limitations. He added in some physical restrictions on the location and time of work. He recommended that she should not be posted away from Guildford in order to minimize driving. It was not recommended that she be required to drive as far as 35 miles.

85. In parallel with the developing medical picture, DI Scott (and others) were trying to work out whether the support plan still needed to be pursued. If the support plan became irrelevant (e.g. because of a move away from HHPU) then there was no point potentially inflaming the situation by discussing it with the claimant, only to discard it soon afterwards. This meant that the claimant had the opportunity to respond to the draft support plan at a point in time when she did not know what use the respondent was making of Dr Tehrani's 70% risk report and what the practical implications of that report would be. The respondent's prior intention (as noted above) was that the draft support plan would be issued to the claimant and she would be able to discuss it verbally with the respondent at a follow-up meeting. It was not anticipated that the claimant would respond in writing *prior* to any such meeting. However, that is what the claimant did on 26 July [378]. She clearly felt that this was what she needed to do. It is fair to say that the claimant was critical of the respondent's approach in the draft support plan. She alleged that the performance issues had not been raised before and that the support plan looked very much like an Action Plan (i.e. part of the formal process). She dealt with the five areas of concern and made it clear that she felt that the plan was not a proportionate response to the concerns, which could be addressed more informally. For example, she explained why she had left confidential information unsecured in the office when she had been ordered into an office by DS Moores (a PTSD trigger). She questioned the accuracy of the plan and the representation of her prior performance. She challenged whether the criticisms of her performance were justified or accurate.

86. The draft support plan was the first time that some of the examples of the claimant's underperformance had been raised with the claimant. The Tribunal does not criticise the respondent for this. There has to be a first point in time when concerns are raised and, in light of the medical evidence, the respondent took the decision to put it in writing first and discuss it verbally later. That is a reversal of its normal procedure but is borne out of the claimant's need for reasonable adjustments and to not be taken by surprise at meetings with critical content or which could be received by the claimant as confrontational. The draft support plan was, therefore, the respondent's way of giving the claimant notice of the concerns so she could respond in the face-to-face discussion. It was not intended to be 'proof' of underperformance, as such. It is not, in itself, intended to be the evidence in support of the conclusion that there were performance concerns. That was not the purpose of the document. Furthermore, it is important to note that some of the concerns could not have been raised with the claimant any earlier as they were only discovered after the claimant went on sick leave. The claimant had a DOCRA score of 20 at this time and it is evident that she was struggling with the process.

87. In the meantime, DI Scott informed DS Squire of the respondent's decision to medically redeploy the claimant [376]. The respondent was looking at ways of communicating this to the claimant in a safe manner. They were also considering where the claimant could work in the meantime before a longer-term role was identified.

88. DCI Haycock spoke to the claimant on 28 July [380]. He planned to meet her with her Federation Representative, Paul Campbell, in an informal setting. The claimant had indicated that a meeting with her managers would be a significant mental challenge. DCI Haycock noted that this meeting would need to be handled with care and the first meeting would need to be informal and non-confrontational. It is evident that DCI Haycock was trying to pave the way for a face-to-face conversation between the claimant and her managers.

89. It appears that in the meeting between Haycock, Campbell and the claimant it was unofficially communicated to the claimant that she would be moving out of HHPU [383]. As far as the Tribunal can see, the claimant's line managers had not asked for this to be communicated to the claimant. In her witness evidence to the Tribunal (paragraph 43) the claimant challenged the justification for this decision. She thought the decision had been made as a direct result of her being sectioned so they 'wanted rid of' her. She says they achieved this through constant reworking of occupational health referrals. The tenor of the claimant's evidence in this regard indicated to the Tribunal that the respondent was not able to rely 100% on the claimant's own assessment of the best way forward. The claimant was not necessarily the best judge of her own circumstances at this time. She saw the respondent's use of occupational health evidence as malign, a 'tool' to 'get rid' of her. She does not appear to accept that the respondent may genuinely have felt the need for more detailed guidance from occupational health experts. The claimant evidently feels very strongly that she is best placed to assess what

she can and cannot do. Where there is a difference of opinion between Occupational Health and the claimant's own assessment she feels strongly that the respondent is bound to disregard the occupational health evidence in favour of the claimant's own assessment. The claimant had a tendency to disregard any objective evidence which contradicted her own subjective experience. She is perfectly entitled to do this. However, the respondent is in a different position and is required to look at matters more holistically and take into account various sources of evidence and guidance, including those which may differ from the claimant's stated preferences.

90. The claimant views the obtaining of further occupational health evidence as an attempt to 'rework' the evidence i.e. to change it to suit the respondent's preferences. The Tribunal disagrees. The respondent was asking for specific, granular, and practical occupational health guidance. When the respondent asks further questions of the occupational health expert, that expert is entitled to 'stick to their guns' as a medical professional. Just because the respondent asks a question of the expert, does not mean that the expert is bound to accept the premise of the question or to agree with any underlying preferences the respondent may hold. (For the avoidance of doubt, the Tribunal does not accept that the respondent's questions to Occupational Health did attempt to 'lead' the clinician in line with any preferences allegedly held by the respondent. They were direct questions which the clinician was free to answer in line with their genuinely held professional opinions.)

91. The Tribunal has examined the evidence and is not satisfied that there was such an agenda, desire or preference on the respondent's part to 'get rid' of the claimant from HHPU. Rather, they were trying to follow the evidence to work out what was safe for all concerned. Indeed, before the last Dr Tehrani opinion was provided, the respondent was clearly supportive of efforts to triage the claimant's work in HHPU in order to allow her to stay there. This shows that the respondent was still looking to support and facilitate what the claimant wanted. The respondent was not plotting against the claimant as alleged. Rather, as the evidence showed that such triaging would not be sufficient, the respondent had to change its plans. When the evidence (including medical evidence) changed, the respondent's approach also had to change.

92. In any event, the contemporaneous record of the 30 July meeting [383] suggests that the claimant was actually quite positive and upbeat at this point. She was made aware of interim options for a return to work and expressed her preferences. She could see the value she would add in the role in question and came across to DCI Haycock as being quite pleased with the prospect. (The claimant says there were other reasons for her positive demeanor, which were not work related.) As a result of the meeting, DCI Haycock reduced the risk matrix score on the DOCRA down to 10. He noted that the revised need for performance management would need to be discussed, taking into account the claimant's views and the fact she would now be moving on from HHPU.

93. The Tribunal pauses to note that the chronology demonstrates high levels of activity on the respondent's part during this time. The claimant was not aware of all of this at the time. The respondent was evidently trying to make progress in a timely manner and not leave the claimant at home, worrying and becoming increasingly anxious. The respondent had parallel processes going on and was trying to co-ordinate different people. For example, there was the DOCRA/welfare thread, the 'direct line manager' thread, operational requirements and oversight at DCS Hughes' level, Police Federation input, redeployment issues, HR input and DI Scott trying to co-ordinate all of these threads.

94. Many of those within the respondent organisation who had input into the process felt that a continued support plan was no longer necessary, given that many of the issues identified were related to work on HHPU and would no longer be applicable once the claimant moved out of HHPU. However, despite this, DCS Hughes concluded that there were wider considerations in the case and the need for organizational consistency was imperative. He accepted that the first three points on the plan were not valid outside HHPU but felt that the remaining two points *were* still relevant, particularly the need to engage and take direction from line managers. As of 28 July his decision was that a support plan remained valid and should still be pursued with the claimant.

95. DS Squire went about trying to organize the meeting with the claimant to discuss the support plan, hear her representations and thereby facilitate her return to work. A meeting was arranged for 10 August. Paul Campbell was due to attend. However, the meeting was cancelled when the claimant sent in a document on 6 August detailing the risks to her that she perceived arising out of the draft support plan which she had previously received. The document included statements such as: "I need to advise Surrey Police yet again that I have PTSD and a significant trigger for multiple trauma experiences to resurface is an Action Plan, or the perception of an Action Plan, or a piece of paper that looks like an Action Plan. The incident on the 15th of May this year clearly demonstrated that the thought of having an Action Plan causes a significant exacerbation of my PTSD symptoms. …I cannot put it more clearly <u>again</u> that potentially this Action Plan could prove fatal to me as I cannot sustain living on a daily basis in this state of heightened levels of triggering trauma symptoms that is so impacting on my daily life at this time."

96. Instead of the proposed 10 August meeting about the support plan, DS Squire arranged to visit the claimant in person at her home and with her wife present. This was effectively a welfare meeting which lasted for around two hours. The claimant recognised that she would not be going back to HHPU. She talked about the way DS Moores had behaved towards her. The support plan was discussed and the claimant suggested that the remaining two points could be handled in a different way. DS Squire said that she would go away and try to arrange a meeting with 'no consequences' to discuss these two points, although there did still need to be a conversation about these two issues.

When the possibility of a further occupational health referral was raised at this meeting both the claimant and her wife were dismayed and frustrated. They did not want a further referral. They felt it would just extend the length of time before the claimant could return to work, for no real reason.

97. The idea of a 'no consequences meeting' gained traction and it was arranged for 18 August . DI Scott and DS Squire met the claimant with Paul Campbell present as Federation Representative. Even though only two points on the draft support plan remained 'live' the claimant was allowed to make her representations about all the points in the draft. The outcome of the meeting was that there would be no steps taken in relation to the 'storing of confidential information' issue as the respondent took the view that there was a plausible and reasonable response to it provided by the claimant (which had not been known before.) However, the point about taking direction from managers remained valid. The decision taken was that this would be addressed by way of reflective practice and behavioural support.

98. The so-called "no consequences meeting" proved to be a productive way forward. It seemed to 'unlock' the problem.

99. DS Squire advised the claimant on 25 August that she would not be receiving a formal plan [459] and that the remaining issue would be dealt with by reflective practice and behavioural support (this having been decided by Tamara Cooper).

100. On 15 August the ACAS Early Conciliation Certificate was issued and on 15 September the first ET1 claim form was presented to the Tribunal.

101. On 17 August the claimant started a temporary role in the Guildford Neighbourhood Policing Support Team.

102. On 24 August the claimant submitted a grievance against various individuals due to what the claimant considered to be serious failures by the leadership team within HHPU.

103. Around the end of September 2020 a new substantive role was identified for the claimant on the Incident Review Team. It was discussed with the claimant who said that she could not do this role as it would be dealing with victims. Alternative areas of work were discussed with the claimant including 'Collision Investigation Officer' and 'Casualty Reduction Officer.' Whilst roles were investigated another position was identified: the 'Enquiry Officer' role. DS Squire told the claimant about this role on 19 October [477] and her response was that it was 'perfect'. The role was subsequently confirmed as suitable and the claimant took up the post.

104. On 16 November the claimant was informed that her grievance had not been upheld.

105. Some time later, on 16 December, the "PSPA" (Police Single Point of Access Unit) put out a request for volunteers for overtime to address the backlog in "SCARF" reports (Single Combined Assessment of Risk Forms.) The claimant responded and volunteered. She copied-in her line manager who apparently had no objections. The claimant therefore undertook some overtime in December 2020.

106. On 4 January 2021 DS Squire became aware that the claimant was doing the PSPA/SCARF overtime because the claimant sent an email providing DS Squire with information in relation to a particular case. In the email she stated that she had obtained that information in the course of working on the MASH (SCARF backlog) overtime. This was of concern to DS Squire as the claimant had previously said that she did not want to go into "MASH" (Multi Agency Safeguarding Hub) because of the negative impact of reading SCARFs. The overtime in question involved opening up SCARF referrals, which were referrals about vulnerable children or adults. DS Squire was concerned given that the claimant had been redeployed from this area to avoid the risks involved with her being exposed to such cases.

107. DS Squire informed DCI Molyneux and Chris Evans in HR about this. Chris Evans became aware of it around 6 January 2021. Mr Evans made some enquiries with other members of staff about the role within PSPA as he was concerned that the respondent would be unable to protect the claimant in line with the medical advice that they had received (when considering whether she should remain in HHPU.) He was told that SCARFs could include information about domestic incidents. Due to the way that SCARFs are submitted there was no way to identify what information would be contained within the SCARF until it was opened and read.

108. Mr Evans says that he took the decision that the claimant should not undertake this sort of work in order to protect the claimant from any further triggering incidents. His email of 7 January [494] sets out his reasoning and asks DS Squire to communicate this to the claimant.

109. DS Squire spoke with the claimant on 8 January to advise her that she could not continue with the overtime in the PSPA team. She told the claimant that the reason for this was because of her wellbeing and to avoid any potential traumatic material which may be detrimental to her health. It was only this specific overtime that was a concern, not other overtime. The claimant was not prevented from doing overtime in principle.

110. On 8 January Chris Evans contacted DI Strugnell at the PSPA but he responded to say that he had been told by DS Squire that the claimant should not be doing any more of that overtime and that she should be taken off that circulation list.

111. Also on 8 January, the claimant contacted Mr Evans querying why she was prevented from doing this overtime. Mr Evans explained that the decision was

due to the respondent's inability to review each SCARF to ensure that it did not contain certain offences that could have a negative impact on the claimant's mental health [503]. There then followed email correspondence between the claimant and Mr Evans whereby the claimant asked questions and challenged the decision and Mr Evans explained his decision. Mr Evans advised that the medical information they had had previously wasn't limited to physical contact with violent offenders or victims but also reading and hearing about them. There was no problem with the claimant doing overtime in her current role.

112. As the claimant was unhappy with the decision, Mr Evans contacted Occupational Health on 27 January to check (after the event) that he was correct in his understanding that the claimant should not be doing SCARF work, especially as she would be unsupervised and working remotely. Louise Waghorn, of Occupational Health, advised that the adjustments to avoid the claimant being exposed to materials that related to violence were permanent adjustments and that because the SCARF forms could contain such information they were unpredictable and could pose a risk to the claimant's health. She advised that, unless there was a significant change to the claimant's health, then the permanent adjustments should not be altered [512].

113. A review of the Tribunal file indicates that the claimant's ET1 claim form was sent to the respondent and the respondent's solicitor on 12 December 2020. The ET3 was filed by the respondent on 11 January 2021.

The law

Section 15: Discrimination arising from disability

114. Section 15 Equality Act 2010 states:

(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.

115. Four elements must be made out in order for the claimant to succeed in a section 15 claim:

(i) There must be unfavourable treatment. No comparison is required.

(ii) There must be something that arises 'in consequence of the claimant's disability.' The consequences of a disability are infinitely varied depending on the particular facts and circumstances of an individual's case and the disability in question. They may include anything that is the result, effect or outcome of a disabled person's disability. Some consequences may be obvious and others less so. It is question of fact for the tribunal to determine whether something does in fact arise in consequence of a claimant's disability.

(iii) The unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability. This involves a consideration of the thought processes of the putative discriminator in order to determine whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, whether consciously or subconsciously, at least to a significant extent.

(iv) The alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

See Secretary of State for Justice and another v Dunn EAT 0234/16.

116. Treatment cannot be 'unfavourable' merely because it is thought that it could have been more advantageous or is insufficiently advantageous (The Trustees of Swansea University Pension & Assurances Scheme and anor v Williams [2015] IRLR 885; [2017] IRLR 882 and [2019] IRLR 306.)

117. The consequences of a disability 'include anything which is the result, effect or outcome of a disabled person's disability.' Some may be obvious, others may not be obvious (paragraph 5.9 EHRC Employment Code 2011).

118. Following the guidance given in Pnaiser v NHS England [2016] IRLR 170 at paragraph 31 the correct approach to a section 15 claim is:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom. No question of comparison arises.

(b) The tribunal must determine what caused that unfavourable treatment. What was the reason for it? An examination of the conscious or unconscious thought processes of A is likely to be required. There may be more than one reason or cause for impugned treatment. 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 irrelevant

(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. The causal link between the something that causes unfavourable treatment and the disability may include more than one link. 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. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) The knowledge that is required is knowledge of the disability only. There is no requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. (See also City of York Council v Grosset [2018] ICR 1492).

(i) 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."

119. The first limb of the analysis at section 15(1)(a) is to determine whether the respondent treated the claimant unfavourably "because of something arising in consequence of the claimant's disability". This analysis requires the tribunal to focus on two separate stages: firstly, the "something" and, secondly, the fact that the "something" must be "something arising in consequence of B's disability," which constitutes a second causative (consequential) link. It does not matter in which order the tribunal takes the relevant steps (Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305 at paras 26-27) also City of York Council v Grosset [2018] IRLR 746 paragraph 36).

120. When considering an employer's defence pursuant to section 15(1)(b) the 'legitimate aim' must be identified. The aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. 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. (Bilka-Kaufhaus GmBH v Weber von Hartz [1986] IRLR 317.)

121. The question as to whether an aim is "legitimate" is a question of fact for the tribunal. The categories are not closed, although cost saving on its own cannot amount to a legitimate aim (Woodcock v Cumbria Primary Care Trust 2012 ICR 1126.)

122. Once the legitimate aim has been identified and established it is for the respondent to show that the means used to achieve it were proportionate. Treatment is proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. A three- stage test is applicable to determine whether criteria are proportionate to the aim to be achieved. 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? (R(Elias) v Secretary of State for Defence [2006] IRLR 934).

123. Determining proportionality involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the treatment as against the employer's reasons for acting in this way, taking account of all relevant factors (EHRC Code paragraph 4.30). The measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same

objective (see EHRC Code (para 4.31). It will be relevant for the tribunal to consider whether or not any lesser measure might have served the aim.

124. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business but it has to make its own judgment, based upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary (Hardy & Hansons Plc v Lax [2005] IRLR 726 and Hensman v Ministry of Defence UKEAT/0067/14/DM). It is not the same test as the 'band of reasonable responses' test in an unfair dismissal claim. However, in Birtenshaw v Oldfield [2019] IRLR 946 (para 38) the EAT highlighted that in considering the objective question of the employer's justification, the employment tribunal should give a substantial degree of respect to the judgment of the decision maker as to what is reasonably necessary to achieve the legitimate aim provided it has acted rationally and responsibly. However, it does not follow that the tribunal has to be satisfied that any suggested lesser measure would or might have been acceptable to the decision-maker or would otherwise have caused him to take a different course. That approach would be at odds with the objective question which the tribunal has to determine; and would give primacy to the evidence and position of the respondent's decision-maker.

125. It is necessary to weigh the need against the seriousness of the detriment to the disadvantaged person. It is not sufficient that the respondent could reasonably consider the means chosen as suitable for achieving the aim. To be proportionate a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so (Homer v Chief constable of West Yorkshire Police Authority [2012] IRLR 601.)

Direct discrimination

126. Section 13 Equality Act 2010 states:

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

127. Section 23 of the Equality Act 2010 provides:

> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case…
> (2) The circumstances relating to a case include a person's abilities if-
> a. On a comparison for the purposes of section 13, the protected characteristic is disability…

128. In some cases it may be appropriate to postpone consideration of whether there has been less favourable treatment than of a comparator and decide

the reason for the treatment first. Was it because of the protected characteristic? (*Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL; Stockton on Tees Borough Council v Aylott)*

129. The claimant must show that they received the less favourable treatment 'because of' the protected characteristic. In *Nagarajan v London Regional Transport 1999 ICR 877, HL* Lord Nicholls stated: *"a variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds… had a significant influence on the outcome, discrimination is made out'."*

130. The judgment in R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors 2010 IRLR 136, SC summarised the principles that apply in cases of direct discrimination and gave guidance on how to determine the reason for the claimant's treatment. Lord Phillips emphasised that in deciding what were the 'grounds' for discrimination, a court or tribunal is simply required to identify the factual criteria applied by the respondent as the basis for the alleged discrimination. Depending on the form of discrimination at issue, there are two different routes by which to arrive at an answer to this factual inquiry. In some cases, there is no dispute at all about the factual criterion applied by the respondent. It will be obvious why the complainant received the less favourable treatment. If the criterion, or reason, is based on a prohibited ground, direct discrimination will be made out. The decision in such a case is taken on a ground which is inherently discriminatory. The second type of case is one where the reason for the decision or act is not immediately apparent and the act complained of is not inherently discriminatory. The reason for the decision/act may be subjectively discriminatory. In such cases it is necessary to explore the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his or her mind.

131. The relevant comparator must not share the claimant's protected characteristic. There must be no material difference between the circumstances relating to each case. The circumstances of the claimant and the comparator need not be identical in every way. Rather, what matters is that the circumstances which are relevant to the claimant's treatment are the same or nearly the same for the claimant and the comparator (paragraph 3.23 EHRC Employment Code.) With the exception of the prohibited factor (the protected characteristic) all characteristics of the complainant which are relevant to the way his case was dealt with must be found also in the comparator. They do not have to be precisely the same but they must not be materially different. (Macdonald v Ministry of Defence, Pearce v Governing Body of Mayfield Secondary School [2003] ICR 937). Whether the situations

are comparable is a matter of fact and degree (Hewage v Grampian Health Board [2012] ICR 1054.)

Victimisation

132. Section 27 Equality Act 2010, so far as relevant, provides that:

> (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.

133. A protected act requires that an allegation is raised which, if proved, would amount to a contravention of the Equality Act 2010. No protected act arises merely by making reference to a criticism, grievance or complaint without suggesting that it was in some sense an allegation of discrimination or otherwise a contravention of the Equality Act 2010: Beneviste v Kingston University UKEAT/0393/05/DA [29].

134. The test for detriment has both subjective and objective elements. The situation must be looked at from the claimant's point of view but his perception must be 'reasonable' in the circumstances.

135. The employee must be subjected to the detriment 'because of' the protected act. The same principles apply in considering causation in a victimisation claim as apply in consideration of direct discrimination (see above). The protected act need not be the sole cause of the detriment as long as it has a significant influence in a Nagarajan sense. It need not even have to be the primary cause of the detriment so long as it is a significant factor. Detriment cannot be because of a protected act in circumstances where there is no evidence that the person who allegedly inflicted the detriment knew about the protected act. In the absence of clear circumstances from which such knowledge can be inferred, the claim for victimisation will fail Essex County Council v Jarrett EAT 0045/15.

Section 20/21: reasonable adjustments.

136. Section 20 (so far as relevant) states:

(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) The second requirement is a requirement, where a physical feature 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.
(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.

…

137. Section 21 states:

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
(3) …

138. The correct approach to a claim of unlawful discrimination by way of a failure to make reasonable adjustments remains as set out in Environment Agency v Rowan 2008 ICR 218 and is as follows:

(a) Identify the PCP applied by or on behalf of the employer,
(b) Identify comparators (if necessary),
(c) Identify the nature and extent of the substantial disadvantage suffered by the claimant.

139. The identification of the applicable PCP is the first step that the claimant is required to take. If the PCP relates to a procedure, it must apply to others than the claimant. Otherwise, there can be no comparative disadvantage.

140. A 'substantial disadvantage' is one which is 'more than minor or trivial.'

141. Only once the employment tribunal has gone through the steps in Rowan will it be in a position to assess whether any adjustment is reasonable in the circumstances of the case, applying the criteria in the EHRC Code of

Practice. The test of reasonableness is an objective one. The effectiveness of the proposed adjustments is of crucial importance. Reasonable adjustments are limited to those that prevent the PCP from placing a disabled person at a substantial disadvantage in comparison with persons who are not disabled. Thus, if the adjustment does not alleviate the disabled person's substantial disadvantage, it is not a reasonable adjustment. (Salford NHS Primary Care Trust v Smith [2011] EqLR 1119) However, the threshold that is required is that the adjustment has 'a prospect' of alleviating the substantial disadvantage. There is no higher requirement. The adjustment does not have to be a complete solution to the disadvantage. There does not have to be a certainty or even a 'good' or 'real' prospect of an adjustment removing a disadvantage in order for that adjustment to be regarded as a reasonable one. Rather it is sufficient that a tribunal concludes on the evidence that there would have been a prospect of the disadvantage being alleviated. (Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075.

142. Where the disability in question means that an employee is unable to work as productively as other colleagues, adjustments to enable her to be more efficient would indeed relate to the substantial disadvantage she would otherwise suffer (Rakova v London Northwest healthcare NHS trust [2020] IRLR 503. It cannot be assumed that a desire to achieve greater efficiency does not reflect the suffering of a substantial disadvantage. The fundamental question is what steps it was reasonable for the respondent to have to take in order to avoid the particular disadvantage not what ought 'reasonably have been offered.'

143. An employer has a defence to a claim for breach of the duty to make reasonable adjustments if it does not know and could not be reasonably be expected to know that the disabled person is disabled and is likely to be placed at a substantial disadvantage by the PCP etc. The questions is what objectively the employer could reasonably have known following reasonable enquiry.

Burden of Proof

144. Section 136 of the Equality Act 2010 provides that, once there are facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof "shifts" to the respondent to prove any non-discriminatory explanation. The two-stage shifting burden of proof applies to all forms of discrimination under the Equality Act.

145. The wording of section 136 of the act should remain the touchstone.

146. The relevant principles to be considered have been established in the key cases: Igen Ltd v Wong 2005 ICR 931; Laing v Manchester City Council and another ICR 1519; Madarassy v Nomura International Plc 2007 ICR 867; and Hewage v Grampian Health Board 2012 ICR 1054.

147. The correct approach requires a two-stage analysis. At the first stage the claimant must prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out on the balance of probabilities is the second stage engaged, whereby the burden

then "shifts" to the respondent to prove (on the balance of probabilities) that the treatment in question was "in no sense whatsoever" on the protected ground.

148. The approved guidance in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205 (as adjusted) can be summarised as:

a) It is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.
b) In deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. In many cases the discrimination will not be intentional.
c) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination, it merely has to decide what inferences could be drawn.
d) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts. These inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information. Inferences may also be drawn from any failure to comply with the relevant Code of Practice.
e) When there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent. It is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground.
f) Not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment. Since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden.

149. The shifting burden of proof rule only applies to the discriminatory element of any claim. The burden remains on the claimant to prove that the alleged discriminatory treatment actually happened and that the respondent was responsible. The statutory burden of proof provisions only play a role where there is room for doubt as to the facts necessary to establish discrimination.

In a case where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against on the alleged protected ground, they have no relevance (Hewage). If a tribunal cannot make a positive finding of fact as to whether or not discrimination has taken place it must apply the shifting burden of proof.

150. Where it is alleged that the treatment is inherently discriminatory, an employment tribunal is simply required to identify the factual criterion applied by the respondent and there is no need to inquire into the employer's mental processes. If the reason is clear or the tribunal is able to identify the criteria or reason on the evidence before it, there will be no question of inferring discrimination and thus no need to apply the burden of proof rule. Where the act complained of is not in itself discriminatory and the reason for the less favourable treatment is not immediately apparent, it is necessary to explore the employer's mental processes (conscious or unconscious) to discover the ground or reason behind the act. In this type of case, the tribunal may well need to have recourse to the shifting burden of proof rules to establish an employer's motivation

151. The claimant bears the initial burden of proving a prima facie case of discrimination on the balance of probabilities. The requirement on the claimant is to prove on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination. The employer's explanation (if any) for the alleged discriminatory treatment should be left out of the equation at the first stage. The tribunal must assume that there is no adequate explanation. The tribunal is required to make an assumption at the first stage which may in fact be contrary to reality. In certain circumstances evidence that is material to the question whether or not a prima facie case has been established may also be relevant to the question whether or not the employer has rebutted that prima facie case.

152. 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 (see Madarassy).

153. If the claimant establishes a prima facie case of discrimination the second stage of the burden of proof is reached and the burden of proof shifts onto the respondent. The respondent must at this stage prove, on balance of probabilities that its treatment of the claimant was in no sense whatsoever based on the protected characteristic.

154. In some instances, it may be appropriate to dispense with the first stage altogether and proceed straight to the second stage (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.) The employment tribunal should examine whether or not the issue of less favourable treatment is inextricably linked with the reason why such treatment has been meted out to the claimant. If such a link is apparent, the tribunal might first consider whether or not it can make a positive finding as to the reason, in which case it will not need to apply the shifting burden of proof rule. If the tribunal is unable to make a positive finding and finds itself in the

situation of being unable to decide the issue of less favourable treatment without examining the reason, it must examine the reason (i.e. conduct the two stage inquiry) and it should be for the employer to prove that the reason is not discriminatory, failing which the claimant must succeed in the claim.

155. In the context of a section 15 claim in order to establish a prima facie case of discrimination the claimant must prove that he or she has the disability and has been treated unfavourably by the employer. It is also for the claimant to show that "something" arose as a consequence of his or her disability and that there are facts from which it could be inferred that this "something" was the reason for the unfavourable treatment. Where the prima facie case has been established, the employer will have three possible means of showing that it did not commit the act of discrimination. First, it can rely on section 15(2) and prove that it did not know that the claimant was disabled. Secondly, the employer can prove that the reason for the unfavourable treatment was not the "something" alleged by the claimant. Lastly, it can show that the treatment was a proportionate means of achieving legitimate aim.

156. Where it is alleged that an employer has failed to make reasonable adjustments, the burden of proof only shifts once the claimant has established not only that the duty to make reasonable adjustments had arisen but also that there are facts from which it could reasonably be inferred (absent an explanation) that the duty been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it can be properly inferred that there is a breach of that duty. Rather, there must be evidence of some apparently reasonable adjustment that could have been made. Therefore, the burden is reversed only once a potentially reasonable amendment adjustment has been identified Project Management Institute v Latif [2007] IRLR 579. (see in particular paragraphs 54-58 Elias J (P)

157. In a victimisation claim where there is clear evidence of the reason for the treatment (which forms the detriment) there is no need for recourse to the shifting burden of proof in section 136. However, where the shifting burden of proof does come into play it is for the claimant to establish that he/she has done a protected act and has suffered a detriment at the hands of the employer. Applying the approach in Madarassy would suggest that there needs to be some evidence from which the tribunal could infer a causal link between the protected act and the detriment. One of the essential elements of the prima facie case that the claimant must establish appears to be that the employer actually knew about the protected act (Scott v London Borough of Hillingdon [2001] EWCA Civ 2005).

Conclusions

158. The Tribunal has applied the law to its findings of fact and has reached the following conclusions in relation to the claims as set out in the list of issues [105].

Withdrawn complaints

159. The following complaints were withdrawn by the claimant during the course of the hearing and have been dismissed:

a. Complaint of section 15 discrimination at paragraph 4.2 relating to the allegation that on 30 June Superintendent Pirie informed the claimant that she was being moved from Guildford to Reigate.

b. Complaint of section 15 discrimination at paragraph 4.5 relating to the allegation that there was a decision to require the claimant to remain at home between 22 June and 17 August 2020.

c. Complaint of section 26 harassment at paragraph 15.1 regarding the removal of the claimant from the HHPU unit.

d. Complaint of section 26 harassment at paragraph 15.2 regarding the decision to restrict the claimant from carrying out overtime outside her current role.

Section 15 discrimination

Paragraph 4.1: On 13 May 2020 DS Moores reporting the claimant as sick for the whole day after she went home sick

160. In line with our findings of fact above the claimant has failed to prove the factual allegation which forms the basis of this complaint of discrimination. DS Moores reported the factually correct position. He reported that the claimant had gone home sick part way through the shift. If the claimant ended up being recorded erroneously as absent for the whole day rather than for just part of the shift this was not an act done by (or at the behest of) DS Moores. Furthermore, we are not satisfied that the claimant was subjected to *unfavourable* treatment when an accurate report of the sickness absence position was made.

161. Once DS Moores had accurately reported the sickness absence for part of a shift it was others within the organisation who recorded the claimant as absent for the whole shift instead of part of the shift. Whilst this *could* have had unfavourable *consequences* for the claimant it did not in fact do so. The claimant asserted that it *could* have led to her hitting the sickness absence procedure triggers prematurely or the loss of fringe benefits such as a fuel card. Neither of these things actually happened. On those bases we are not satisfied that the 'unfavourable treatment' element of the section 15 complaint is made out.

162. In any event, even if there were unfavourable treatment in the way the claimant asserts, the Tribunal would need to determine whether it was because of the 'something arising from disability' relied upon. The 'something

arising' relied upon are the claimant's PTSD related symptoms and episodes such as the episodes that occurred between 12 and 15 May 2020. The Tribunal is not satisfied that the necessary causal link is established. The recording of a whole day's absence by someone within the respondent organisation is, on balance, likely an administrative error or, alternatively, a feature of the respondent's 'clunky' absence recording system. Either the person actually making the record made a mistake or there was not the facility within the system to record sickness absence for *part* of a shift. Neither of these things have *any* link to the alleged 'something arising' from disability in this case. Indeed, the relevant email to "Duties" does not inform the Duties or sick team that the claimant's absence is for any particular reason. She is just described as 'unwell.' The person recording her absence would not have known of the 'something arising from disability' and so could not have acted because of it (as opposed to the notification that she had gone home.) The Tribunal is not satisfied of any link between the 'something arising' in consequence of disability and the incorrect absence record.

163. The legal test for section 15 discrimination is therefore not met and this complaint fails and is dismissed.

Paragraph 4.3: The decision to give the claimant an action plan and subject her to the performance management process.

164. DCS Hughes' initial decision that the claimant should be put on an Action Plan was not in fact communicated to her. It remained incomplete and was not acted upon. It was essentially inchoate. In those circumstances we are not satisfied that the decision in the mind of one officer but not communicated to the person who would actually be put on the Action Plan can reasonably be characterised as unfavourable treatment of the claimant.

165. The incident on 15 May was caused by the claimant's interaction with her colleagues and their reports to her about their "Action Plans." She drew the conclusion that she too must be getting an Action Plan if her colleagues were getting one. This was not based on any action by or on behalf of the respondent. In those circumstances it cannot be said that the respondent treated the claimant unfavourably as alleged. The actions complained of are not the actions of the respondent, its servants, agents or employees, acting in the course of employment. The actions complained of are, in reality, the comments of the claimant's work colleagues and friends over which the respondent had no control and about which the respondent knew nothing.

166. Once again, on 30 June the respondent did not tell the claimant that she would be put on an Action Plan. She was told that there were performance issues. DI Scott did not talk about a support plan. In the conversation the following day DI Scott made it plain that whatever the performance issues were, it would not be a support plan either. All the respondent had done by this point was to indicate that there were some performance issues to be

addressed, the claimant had not, at this stage, been subjected to the performance management process.

167. By the time matters progressed to the issuing of a draft support plan (with the proposed meeting to discuss it), the claimant was being subjected to the performance management process, albeit the *informal* stage. Indeed, the performance management process never actually came to fruition insofar as the draft support plan was never finalized or implemented. It was dropped in favour of reflective practice and support once the claimant was moved out of HHPU.

168. It follows from the above that the claimant *was* subjected to the performance management process in its widest and loosest sense. She was not taken through formal proceedings, there was no Action Plan issued or communicated to her, but the informal stage was initiated, though not pursued. None of this would have been welcome to the claimant and therefore we are content to find that the claimant was treated 'unfavourably' in this regard.

169. The next question is whether the unfavourable treatment was because of the 'something arising in consequence of disability." We have looked at the matters triggering the draft support plan. Only the first area of concern was potentially connected to the 'something arising' i.e. the concerns about effective handling of confidential folders and material. The claimant's evidence was that she had left confidential information unsecured following the incident on 12 May which had exacerbated her mental health condition so that she went home ill. This issue was at least one of the reasons why performance management was considered and a draft support plan sent. There is therefore a limited link between the 'something arising' and the unfavourable treatment. To that extent we are satisfied that the link between the unfavourable treatment and the 'something arising in consequence of disability' is established.

170. The final element of section 15 is to consider whether the unfavourable treatment was a proportionate means of achieving a legitimate aim. We have concluded that the respondent has established a defence to this complaint. Its legitimate aims included ensuring the health, safety and wellbeing of the claimant, the respondent's duty of care towards the claimant and the protection of the public. The legitimate aims included the need to manage or improve the claimant's performance and that of its staff in general and to manage concerns regarding the team dynamics and the breakdown in relationships with supervisors. Part of the duty of care to the claimant is addressing any shortcomings in her performance in an appropriate way and part of the protection of the public is ensuring that the officers who work in HHPU are carrying out their duties to an appropriate standard and with due regard for confidentiality etc. Raising performance issues with the claimant in the manner we have set out is one way of furthering these legitimate aims. The respondent has got to be able to raise performance issues in managing the workforce. The way the respondent went about it in this case, although

criticised by the claimant, was actually the most sensitive, least intrusive and least offensive option open to the respondent. It did not go into formal proceedings with the claimant. It attempted to use a support plan. It took into account occupational health advice as to how best to address the issues with the claimant. It amended the usual procedure to give the claimant forewarning of the proposed contents of the support plan in writing so that she could prepare for the meeting (the opposite way round to the normal process which starts at the meeting and ends with the written and agreed plan). When this, too, became problematic and it became clear that the claimant would be redeployed rendering portions of the plan obsolete, the support plan was dropped. A 'no consequences' meeting was arranged to allow the claimant to put forward her point of view in a non-threatening environment and the concerns were dealt with by reflective practice.

171. In the Tribunal's view the respondent reacted flexibly to the claimant as matters developed and took a sensitive approach. If the Tribunal were to conclude that the respondent's approach was not proportionate in the circumstances, we would effectively be saying that the respondent could not raise performance issues with the claimant at all because of her disability and its manifestations. It cannot be correct for a Tribunal to tie a respondent's hands in this way. Put another way, we cannot really think of a less intrusive way to raise performance concerns with the claimant. We cannot identify a more proportionate option short of saying that the respondent could not discuss performance concerns with the claimant at all. The respondent would be precluded from properly managing the claimant and her work and thereby precluded from pursuing its legitimate aims.

172. In light of the above we consider that the respondent has established its defence to this complaint. This complaint of section 15 discrimination therefore fails and is dismissed.

Paragraph 4.4: The referral to occupational health on 2 July 2020 by DS Squire

173. We do not accept that this referral to Occupational Health constituted unfavourable treatment within the meaning of section 15. The questions posed were neutral. They did not lead occupational health towards particular advice or to a particular conclusion. The respondent did not know how they would be answered. DS Squire had no vested interest in any particular outcome. Indeed it is to the claimant's benefit to ensure that the respondent's decisions are adequately supported by occupational health guidance. The respondent would potentially be open to criticism if it did not ask for clarification from Occupational Health.

174. In any event, even if this had been properly characterised as unfavourable treatment we would have been satisfied that it was a proportionate means of achieving the respondent's legitimate aims, particularly of discharging its duty of care to the claimant and protecting her health, safety and wellbeing. The respondent needed to have proper and accurate specialist advice about the

potential risks that might be posed to the claimant's health, safety and welfare, in particular the possibility of triggering another serious PTSD episode, by being placed back into the HHPU working environment. The respondent was engaged in risk assessing the claimant's work in light of her PTSD. It was therefore prudent to get as much guidance as possible as to the risks posed to the claimant's health by different types of work and any measures which could be taken to reduce or remove risk. In ensuring the claimant's wellbeing the respondent would also be furthering its duty to protect the public via fully and adequately performing officers.

175. In light of the above this complaint of section 15 discrimination fails and is dismissed.

Paragraph 4.6: the decision to remove the claimant from HHPU on 17 July 2020

176. We accept that this could be characterised as unfavourable treatment, particularly from the claimant's point of view. The claimant loved her job in the unit and did not want to leave it. We are also satisfied that the decision was closely related to the claimant's PTSD and the risks of an exacerbation or episode of PTSD symptoms. However, we also consider that the respondent took this decision in furtherance of its stated legitimate aims. It was attempting to discharge its duty of care to the claimant, to ensure her health and safety and, indirectly, to discharge its duty to the public. The respondent had a duty to protect the claimant's health, the interests of her colleagues and of the wider public. The respondent had already considered less drastic alternative measures such as adjusting the claimant's duties without redeploying her. However, the evidence available to the respondent at the time indicated that none of the alternatives would be both practicable and effective in protecting the claimant's health and wellbeing. The occupational health evidence indicated that even triaging the claimant's work would leave her unnecessarily at risk of exposure to significant triggers for her PTSD (e.g. from overhearing discussions of other officers' cases.) Given the severity of the episode on 15 May the respondent could not assume that any exacerbation of the PTSD would be mild. It had to take into account the risk of a severe or life-threatening exacerbation which would put the claimant and others at risk. A move from HHPU on the basis of the available occupational health evidence was the only reasonable and proportionate option left open to the respondent to meet the risks.

177. On that basis we are satisfied that the respondent's defence is established. This complaint of section 15 discrimination therefore fails and is dismissed.

Paragraph 4.7 The meeting on 10 August where she was informed by DS Squire that she was being moved out of HHPU

178. In the course of the Tribunal hearing the claimant conceded that this complaint did not add anything to the complaint she was already making about the decision to move her itself. There was nothing particular about the

way the decision was communicated which 'added insult to injury' or was discriminatory in itself. The decision was the problem rather than the communication of it. In those circumstances this complaint of section 15 discrimination is dismissed for the same reasons as the complaint in paragraph 4.6.

Paragraph 4.8: The decision to restrict the claimant from carrying out overtime outside of her current role.

179. We accept that this constituted unfavourable treatment. Whilst it did not prevent her from doing overtime per se, it did put limitations on the opportunities to do overtime. The restriction operated to prevent the claimant from doing the SCARF overtime for PSPA. The decision was made because of the 'something arising in consequence of disability.' In the same way as the claimant was moved out of HHPU because of the risks posed to her health by the job, the overtime for PSPA was stopped because it was thought to pose a risk to her health. It was thought that it might prompt a PTSD episode and there were no measures which could reasonably be put in place to adequately safeguard against such an eventuality.

180. We considered whether the respondent had a defence to the complaint. The evidence was that the respondent could not triage the PSPA overtime so as to ensure that the claimant was not exposed to harmful material. The claimant would have to take the risk of opening the SCARF report and reading its contents. She would be doing this without normal line management support and supervision. We have considered whether there was a material difference in the risks posed by reading the SCARF documents as compared to overhearing conversations about cases in HHPU. We have concluded that in reality there wasn't. If the evidence stated that there was a 70% trigger risk arising from overhearing discussions about cases of violence and if the HHPU case load would have had to be triaged to remove cases of violence from the claimant's caseload, then it is logical and consistent that the respondent needed to remove the risk of the claimant reading about such cases in a SCARF context (as opposed to the HHPU unit.) There is no material difference in the risks posed by the two activities. Furthermore, the measures taken by the respondent with regard to overtime were in fact less intrusive. The move from HHPU necessitated a change to the claimant's main job role, against her wishes. That would have a much more significant impact on the claimant than the removal of the opportunity to do certain types of overtime (and yet that more significant impact was justified in the circumstances). Removal of the overtime had a much lesser impact on the claimant. It was the removal of an 'extra' rather than changing the core of her role. Furthermore, there was nothing to prevent the claimant from exploring other overtime opportunities. She was not precluded from working overtime per se.

181. In those circumstances we consider that the respondent's actions were a proportionate means of achieving a legitimate aim, namely the need to

protect the claimant's health, safety and wellbeing and to discharge the duty of care towards the claimant and the protection of the public. Consequently, this complaint of section 15 discrimination fails and is dismissed.

Direct discrimination :section 13

Paragraph 2.1: the decision to remove the claimant from HHPU

182. The decision to remove the claimant from HHPU was not taken because she was disabled or because she had PTSD. Rather, the decision was taken because of the risks associated with her continuing in that post and the lack of adequate protective measures. It is important that the Tribunal does not conflate the notions of 'disability' and 'something arising from disability.' A section 13 claim requires us to look at the disability itself rather than the factors and features which flow from it. Hence we have considered those other features in determining the related section 15 claim.

183. We are satisfied, based on the evidence, that the reason for the claimant's move out of HHPU was not the disability itself. Indeed, the claimant had been working in HHPU (and the predecessor department, ViSOR) for some considerable period of time. The claimant had been disabled by PTSD throughout this period. We are satisfied that the disability did not cause the move. Rather, we have set out at some length above the reasons why the decision was taken. In short the respondent needed to put in place adequate safeguards to ensure that the claimant was not doing work which would unnecessarily pose a risk to her health or exacerbate her symptoms. In particular, the respondent wished to avoid any repetition of the life-threatening events of 15 May.

184. Furthermore we do not accept that the claimant's chosen comparators were sufficiently similar or suitable comparators within the meaning of section 23 in any event (PCs Sherlock, Davidson and O'Hara.) There were no similar restrictions on the type or scope of work which the named comparators could carry out in HHPU. They were not put at risk by being exposed to the HHPU environment. These are material differences between their cases and the claimant's. Likewise, a hypothetical comparator with similar limits on the tasks which could safely be undertaken would also have been moved out of HHPU.

185. In light of the above, we are not satisfied that the claimant was treated less favourably than a suitable comparator was (or would have been). Nor was any such treatment because of the claimant's disability.

Paragraph 2.2: the decision to restrict her ability to perform overtime

186. Once again, it was not the fact that the claimant was disabled which caused the respondent to impose restrictions. Rather, it was the associated risks and

episodes of severe symptoms which arose from the disability. Put another way, this is a section 15 claim rather than a section 13 claim (and has been dealt with as such, above.) An appropriate hypothetical comparator, without the disability but with similar restrictions on the work she could safely undertake, would also have been prevented from doing this overtime. It was not the PTSD that was the issue. Rather it was the risks associated with the claimant's particular symptoms and episodes of PTSD.

187. The Tribunal is not satisfied that the claimant was treated less favourably than a suitable comparator was (or would have been). Nor was any such treatment because of the claimant's disability.

188. In light of the above, both claims of direct discrimination fail and are dismissed.

Victimisation section 27

189. The claimant relies on her first ET1 Tribunal claim as a protected act. This indeed qualifies as a protected act for the purposes of section 27. The claimant says the related detriment was the restriction of her overtime. We accept that this was a detriment. The real question in this complaint is one of causation. Was she subjected to the detriment because of the protected act?

190. Based on the totality of the evidence the Tribunal is not satisfied that the person who made the decision to restrict overtime (Mr Evans) actually knew about the protected act at the time he made the relevant decision. The ET1 was only received by the respondent on 12 December 2020. It was not specifically addressed to Mr Evans and there is nothing to indicate that it was drawn to his attention upon receipt. Mr Evans gave evidence about the organisation of the HR department at the respondent. Separate teams deal with tribunal claims/litigation as compared to 'business support' HR. Mr Evans was not working in the litigation team. It is not true to say that if one part of HR knew about the claim then Mr Evans 'must have' known about it. None of the cross examination in the case established that any sort of 'Chinese wall' had been breached or that Mr Evans had been told about the claim. If we were to say otherwise we would be speculating rather than basing our decision on the evidence which was presented to us. Whilst some of Mr Evans' evidence about this aspect of the case was elicited in supplementary questions and cross examination, rather than being included in his witness statement, we are not persuaded that this undermined the reliability or cogency of the evidence that he gave, when properly put in the context of the surrounding circumstances.

191. We also note that the timeframe is quite tight. The ET1 was received on 12 December 2020 and the overtime issue was identified on 6 January 2021. This does not leave much time for 'word to spread' to Mr Evans about the claimant's tribunal claim.

192. The Tribunal also notes that the source of the information about the overtime was not Mr Evans. We can see from the email correspondence that this was brought to his attention by DS Squire as a result of a message that she received from the claimant. Evidently, Mr Evans has not gone looking for this issue. Instead, it has been referred to him to consider. Once he was made aware of it he had to deal with it. This is not a case where an individual has been made aware of a protected act and has actively looked for an opportunity or pretext to victimise the claimant or subject them to a detriment as a result. There is a coincidence in the timeline but no evidence to suggest that Mr Evans has looked for or welcomed an opportunity to victimise the claimant. Indeed, the claimant seems to have speculated that her Tribunal claim was the reason for Mr Evans' decision without any evidential basis for this. Nowhere in any of the claimant's communications at the time did the claimant assert that there was any link between the Tribunal claim and the decision to stop her overtime.

193. Even if the burden of proof shifts to the respondent (which we doubt) we are satisfied by Mr Evans' explanation that the reason for his decision was nothing whatsoever to do with the Tribunal claim. We are satisfied that his contemporaneous emails (e.g. [494]) reflect his genuine thought process at the time. He is able to articulate the nature and source of his concerns and relate it back to the pre-existing occupational health evidence in the case. All the correspondence indicates that he was genuinely considering welfare issues [489-494]. The email at [494] is written only the day after he discovered the overtime issue and is, we think, good evidence as to his actual thought processes at the time. Nor is there any evidence to suggest a wider conspiracy whereby another staff member has deliberately referred the matter to Mr Evans so that he can 'make use of it.'

194. We also note that even after he had made the overtime decision Mr Evans went back to check his understanding of the position with Occupational Health. Whilst his defence might have been stronger if he had gone to Occupational Health before making the decision, the fact is that it would be a risky strategy to ask Occupational Health after the event if there was some malign motive or motivation at work. He could not know, at that stage, whether the occupational health advice would back up his decision or not. We also note that Mr Evans went back to DI Strugnell to ensure that he understood what the SCARF work entailed before he took the decision. If he was acting opportunistically to victimise the claimant because of the Tribunal claim it is perhaps unlikely that he would have made these enquiries to check that the work actually posed a risk. Rather, he would have found it easier to subject the claimant to a victimisation detriment without making these checks to satisfy himself that the restrictions were reasonably necessary.

195. The Tribunal understands why the claimant felt that the decision to restrict overtime was unnecessary. However, even if the decision was overly cautious this is a long way from Mr Evans acting in a malicious or dishonest way to protect the respondent's interests in the litigation, as the claimant

essentially alleges. We are satisfied that this was a bona fide decision taken out of a desire to safeguard the claimant's wellbeing and after considering the nature of the work concerned and the pre-existing occupational health evidence. We are not satisfied that Mr Evans was being dishonest when he gave his evidence to the Tribunal as to the reasons for his decision. The claimant was not subjected to the detriment because of the protected act.

196. For those reasons the victimisation complaint fails and is dismissed.

Reasonable adjustments

The first PCP: the line manager's practice of calling officers into meeting rooms at short notice

197. We find this this was a PCP and it was applied to the claimant. It was DS Moores' practice to call officers into meeting rooms at short notice. However, the Tribunal is not satisfied that the application of the PCP caused the substantial disadvantage relied upon by the claimant in the list of issues. The meeting with DS Moores did not trigger the 15 May episode. At most it was part of a wider picture of the claimant struggling more with her mental health over a period of time. We note that the claimant did not actually start her sick leave after this meeting. She carried on in work. It was after the subsequent email exchange the next day that the claimant went off on sick leave and it was the day after that that she suffered the 15 May PTSD episode. This all undermines any causal link between the PCP and the exacerbation of the PTSD.

198. In those circumstances the reasonable adjustments claim would fail at that stage.

199. If the link between the PCP and the substantial disadvantage had been established we would have had to consider the issue of knowledge. We heard evidence that DS Moores knew that the claimant suffered from PTSD. He also knew that impromptu meetings had an adverse effect on her and should be avoided. However, he did not know that the reason why impromptu meetings should be avoided was because they could trigger a PTSD exacerbation/episode.

200. The Tribunal has considered the state of knowledge within the wider organisation. It is difficult for the Tribunal and for DS Moores to know what the 'organizational knowledge' was at that stage in relation to the consequences of impromptu meetings with the claimant. If previous managers had discussed the issue with the claimant or had been informed that the respondent should not have meetings with the claimant without

warning her about the content and giving her advance notice, that has never been captured anywhere in the documentary record. The Tribunal does not actually know the detail of *why* it was that previous managers managed the claimant in the way that they did and whether the management style was designed to avoid PTSD flare ups triggered by impromptu meetings. There may well have been other reasons for them acting as they did.

201. In the absence of that evidence we cannot say that the respondent (and in particular DS Moores) knew or ought reasonably to have known that applying the PCP would put the claimant at the substantial disadvantage in question. There is nothing to show any wider organizational awareness or knowledge that impromptu meetings without warning and without warning of the subject matter could, or would, trigger a PTSD episode. The claimant has not been able to show that this was communicated to the respondent.

202. The Tribunal does find it remarkable that a department which has been managing a claimant with complex PTSD over a number of years has so failed to keep an accurate, up-to-date and readily accessible written record of what adjustments were in place and why (whether referred to as a 'disability passport' or otherwise). Whether this is part of the alleged dysfunctional management of the department or a wider structural failing we do not know. The Tribunal does not think that the later line managers (including DS Moores) should have been put in the position where they did not have the full background to the claimant's case and the risks associated with her PTSD before they were asked to line manage her.

203. We have gone on to consider whether, if the duty to make reasonable adjustments had been triggered in this case, we would have concluded that it had been breached. We have concluded that, in the context of the department and the organisation in question, it is not reasonable to require a line manager to give advance notice to officers of every face-to-face discussion with extra time for the officer to prepare. Whilst it may be possible to facilitate in some circumstances and may be necessary to protect the claimant at some times, there are a number of relevant factors to consider and weigh up before the Tribunal would be able to say that this was a blanket requirement as part of the duty to make reasonable adjustments.

204. The Tribunal is mindful of the fact that managers need to have some flexibility in managing their staff. Methods need to be practicable for the organisation and the job in question. It will not be possible to always give advance notice, depending on what else is going on in the department and the subject matter of the meeting. Some meetings may more obviously have the potential to trigger an adverse reaction so that they may need advance warning. Other meetings will be more routine in nature and may pose less of a risk to the claimant's health. The manager has to be able to weigh this up on a case-by-case basis to see if he should have an ad hoc meeting or pre warn the

claimant. It is often thought to be good practice to deal with management issues as and when they arise rather than allowing them to fester or grow stale. In some cases giving a pre-warning may actually make the meeting appear more formal, significant or important than it actually is. It may give the claimant extra time to worry and become anxious. Also, some matters (if left too long) become stale or are overtaken by events or may be overlooked entirely if more pressing matters arise in the interim. All of these factors demonstrate the need for a manager to be able to consider the issue on a case-by-case basis.

205. In considering the need to make reasonable adjustments we have also considered the extent to which the proposed adjustments would remove the disadvantage or improve matters for the claimant. We can look at what happened when the draft written support plan was sent to the claimant. Rather than benefitting from the advance warning it actually made matters worse for the claimant (perhaps unexpectedly). It is an example of how extra time and a written document may make matters appear more formal, more set in stone and less open for discussion, thereby generating anxiety.

206. We also heard evidence from the claimant about a meeting in the canteen which the claimant was called to without warning. In her witness evidence in relation to this even the claimant accepted that there are occasions where a manager needs to deal with matters immediately. In the case of the canteen meeting she did not criticise the respondent for holding an immediate meeting even though it triggered her PTSD and she felt the need to go to another part of the building afterwards to calm down.

207. We also note that DS Moores did in fact give the claimant 10 minutes warning of the meeting. He intended to let the situation 'cool down' a bit before he held the meeting. In the particular circumstances of the interaction he quite reasonably thought that it would be obvious to the claimant what the discussion was going to be about. It was objectively reasonable for him to think that. It is only the claimant's particular condition that introduces any level of risk into the situation.

208. The Tribunal is of the view that managers do need to be able to manage their staff from day to day without too many formal fetters. DS Moores could have told the claimant the subject matter of the meeting beforehand but we do not know whether it would actually have helped or made things worse in the circumstances. As it was, she had a break before the meeting and was forewarned that he wanted to speak to her in a side office. In the wide management spectrum of meetings which may occur between staff and managers (which may run from minor, day to day informal 'chats' or discussions all the way up to formal investigation meetings, disciplinary meetings etc) this encounter was clearly at the informal and minor end of the spectrum when looked at in its proper context.

209. On balance we think it is probably a step too far to *require* forewarning of the subject matter of a discussion as part of a legal obligation to make

reasonable adjustments bearing in mind that the obligation is to make reasonable adjustments rather than every adjustment which may be requested in a given set of circumstances irrespective of the practicalities and proportionality.

210. In light of the above, this complaint of a breach of the duty to make reasonable adjustments fails and is dismissed.

The second PCP: the practice of giving an officer an action plan where performance falls below the required standard without advance notice of the performance issues

211. Based on the evidence we have heard we are not satisfied that there was a practice within the respondent organisation of issuing an Action Plan without warning and/or without advance notice of the performance issues. There certainly was no such practice in place across the organisation.

212. The respondent's policy documents indicated that the performance procedure could be entered at any stage depending on the facts of the particular case. The more standard process would be to discuss performance concerns informally then either progress to issue a support plan or an action plan if earlier steps did not bear fruit. Within that standard process the discussion to agree the contents of the support plan or action plan comes before the implementation of the said plans. Almost by definition it would be impossible to issue such a plan without giving advance notice of the performance issues.

213. Furthermore, the evidence in this case shows that, of the claimant's three colleagues in HHPU, one was issued with an action plan and two were issued with support plans. This shows a flexible approach by the respondent depending on the circumstances of the particular case.

214. In any event this alleged PCP was not applied to the claimant. DCS Hughes' earlier decision to go straight to an Action Plan was not actually communicated to the claimant. It was not implemented. She was not issued with an Action Plan without prior notification of the performance issues. (She was not issued with an Action Plan at all.) The claimant got wind of the possibility of an Action Plan from others who were not her managers. The respondent cannot be said to be applying the PCP to the claimant by means of third party colleagues who are discussing and communicating with the claimant behind the scenes.

215. Indeed as set out in the findings of fact, the issue of the Action Plan originated with the claimant herself during the conversations on 30 June. She asked Pirie about it and he just confirmed that there were performance concerns. He did not say there would be an Action Plan. The claimant raised it with DI Scott who said that there were performance concerns but it was not an Action

Plan. The next day Scott again confirmed that it was not an Action Plan, it was performance concerns and the details would be explored at a later date.

216. At no stage was an action plan given to the claimant. Taking the case at its highest the respondent gave the claimant a draft support plan in writing. It only did this because the claimant wanted to see it in writing prior to any meeting. It was never issued in its final form and never actually applied to the claimant.

217. The substantial disadvantage relied upon by the claimant (the 15 May episode) was not caused by the application of the PCP in question. It was caused by the discussions and actions of her three colleagues.

218. In light of the absence of the PCP and the relevant substantial disadvantage, no duty to make reasonable adjustments is triggered in this case. Even so, had there been a duty to make reasonable adjustments we would have struggled to find that the respondent was in breach of it. This was a difficult situation for all involved. The line managers worked hard to keep the lines of communication with the claimant open and to adapt to the changing circumstances and evidence. They sought occupational health guidance on how to approach the issue. They adapted the normal support plan process to issue it in draft, in writing in order to accommodate the claimant. Unfortunately, that draft written support plan unforeseeably worsened the claimant's anxiety levels and DOCRA score. Once the respondent became aware of that they used the 'no consequences' meeting as a tool to break the impasse. All the while the respondent continued to look for alternative job opportunities for the claimant. In the end this search was successful and the claimant was successfully medically redeployed. She tells us that she is happy in her new job. In particular DS Squire undertook a two-way process with the claimant of identifying potential new roles and asking the claimant what she thought about whether they were suitable. Through that process she arrived at the deployment which the claimant was happy with. Furthermore on 10 August DS Squire had a welfare meeting with the claimant and there was ongoing input from the claimant's Welfare Officer and Federation Representatives. The respondent did not leave the claimant to 'stew' about the performance concerns. Rather, the respondent used the other available resources to support the claimant through the process and back to work.

219. We give credit to the claimant for continuing to engage in what would have been uncomfortable conversations. Both sides of the relationship stayed engaged. The respondent was not looking to 'get rid' of the claimant. She was valued and the respondent sought to retain her. Indeed we note that the claimant had initially intended to retire in 2019 but has stayed in post to date.

220. In light of the above we conclude that this element of the reasonable adjustments claim fails and is dismissed.

221. In light of our findings on the merits of the claims we have not found it necessary to address any jurisdiction points which arise in relation to complaints being presented outside the relevant limitation period.

Employment Judge Eeley

Date signed: 18 February 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

27 February 2023

FOR EMPLOYMENT TRIBUNALS