



EMPLOYMENT TRIBUNALS

Claimant: Ms S Ibrahim

Respondent: The Chief Constable of Gwent Police

Heard at: Cardiff **On:** 6-10 March 2023

Before: Employment Judge R Brace
Members: Mrs L Owen
Mrs Y Neves

Representation
Claimant: Mr D Flood (Counsel)
Respondent: Mrs H Winstone (Counsel)

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that the claims of disability discrimination are not well-founded and are dismissed.

WRITTEN REASONS

Preliminary Issues

1. This has been a partly remote hearing which has been consented to by the parties. The Claimant participated remotely by video (CVP), as did Mrs Owens, one of the non legal members. All others participated in person.
2. The hearing commenced at 10am with some private case management to discuss timetabling and to discuss the draft agreed list of issues.

Early Conciliation and the Claims

3. The Claimant was employed by the Respondent as a Police Constable from 5 August 2013 until 8 October 2021. On 1 December 2021, the Claimant contacted ACAS and on 11 January 2022, an Early Conciliation Certificate (R195163/21/03) was issued [1].

4. On 2 February 2022, the Claimant's claim was accepted by the Tribunal [2]. In the Rider to the ET3 [18-29], the Claimant brought disability discrimination complaints of direct, discrimination arising from, indirect, failure to comply with duty to make a reasonable adjustment and victimisation.
5. The Claimant relied on Gilbert's Syndrome, anxiety and depression and Long-Covid (following contracting Covid-19 in December 2020,) to support her claim that she was a disabled person and referred to matters dating back to April 2020 when she returned to work following an earlier period of sick leave. Within the Rider, the Claimant set out a narrative of her interaction with the Respondent, in particular from the date she contracted Covid-19, and confirmed that she had remained off work from January 2021 until her resignation ended her employment on 8 October 2021.
6. Within the ET3 Response, the Respondent denied all of the claims, did not admit that the Claimant was a disabled person, asserted that it was not clear from the ET1 which conditions the Claimant was relying on to advance her disability claims and relied on lack of jurisdiction in relation to time as it appeared that the complaints related to a period in early 2020 [23].
7. On 29 July 2022, following a case management hearing before Judge Ryan, the complaints of direct discrimination and victimisation were dismissed on withdrawal by the Claimant [78].

Disability

8. Within the Claimant's Disability Impact Statement prepared on 4 August 2022, the Claimant confirmed that prior to her Long Covid diagnosis in March 2021, she suffered with fatigue, kidney pain, vertigo, insomnia, anxiety, depression, Raynaud's and that she would often feel nausea and that suffering with these symptoms would often make her feel exhausted [83]. She also confirmed that she had been diagnosed with Gilbert's Syndrome in March 2020, which resulted in pain and fatigue. She confirmed that after contracting Covid-19 in December 2020, she was diagnosed with Long Covid in March 2021 and with Mast Cell Activation Syndrome (extreme allergic reactions) in May 2021 and was prescribed antihistamines. She explained in that Impact Statement (§6-9 [84]) the symptoms of Long Covid, how she was also on medication for vertigo and sickness, that she was prescribed medication for shingles in July 2021 and that she missed some of her Long Covid online courses because of her symptoms. She described how she was diagnosed with fibromyalgia in July 2022 (post-dating the termination of her employment with the Respondent). At §17 Disability Impact Statement, the Claimant described the day to day activities that were impacted.
9. In response, the Respondent conceded that the Claimant's condition of Long Covid did amount to a disability on the relevant dates (§10 and 11 Respondent's Statement on

Disability [108],) but continued to dispute that the Claimant was disabled by reason of Gilbert's Syndrome and anxiety and depression.

10. By way of email dated 16 November 2022, the Claimant's representative confirmed that the Claimant no longer pursued claims of unlawful disability discrimination in respect of Gilbert's Syndrome and anxiety/depression, accepting that they did not amount to disabilities under s.6 Equality Act 2010 at the relevant times [113].

List of Issues

11. The parties had prepared a List of Issues which had been agreed between the parties as directed at an earlier preliminary hearing but, at the outset of the hearing, there was a discussion as to the date of disability.
12. The Claimant's representative confirmed that the Claimant was claiming that she was disabled by reason of Long Covid from 25 March 2021. The Respondent's representative confirmed that the Respondent conceded that the Claimant was disabled by reason of Long Covid from that date but continued to dispute knowledge.
13. The parties subsequently redrafted the list of issues which was subsequently agreed and adopted by the Tribunal as the issues to be determined as follows.

Disability – s.6 Equality Act 2010

1. The Respondent concedes that the Claimant was disabled within the meaning of Section 6 EqA 2010 between the 25th of March 2021 and the end of her employment with the Respondent by reason of Long Covid.

Jurisdiction – time limits

2. Have the Claimant's claims below been brought within three months of the acts complained of, taking into account the effect of the 'stop the clock' provisions in respect of early conciliation?
3. In respect of the Claimant's complaints which are based on the Respondent's failure to do something (e.g. make reasonable adjustments), when is the Respondent to be treated as having decided those things?
4. In respect of any complaints which are out of time, do they form part of a

continuing act, taken together with acts which are in time?

5. If the complaints were not submitted in time, would it be just and equitable to extend time?

Failure to make reasonable adjustments – s.21 Equality Act 2010

6. Was Respondent aware, or ought it have been aware of the Claimant's disability?
7. Did the Respondents impose the following PCPs?
 - 7.1. The requirement for the Claimant to work in the office with minimal home working, from the 4th of February 2021. *The Respondent's case is that this was not imposed until the 6th of May 2021.*
 - 7.2. The requirement for the Claimant to work at least 50% of her hours when starting a phased return from sickness absence, from the 4th of February 2021. *The Respondent's case is that this was not imposed until the 6th of May 2021.*
 - 7.3. The requirement for the Claimant to engage in a 6 week phased return from sickness absence from the 4th of February 2021. *The Respondent's case is that this was not imposed at all.*
8. In the event that each PCP was imposed, in respect of each: Did the PCP put the Claimant at a substantial disadvantage in comparison with persons who were not disabled (but off work on LTS not disabled with Covid)? In that:-
 - (a) Each PCP prevented the Claimant from engaging in a phased return to work.
 - (b) The Claimant was not on full pay whilst off work during the relevant period i.e. 25 March to end of employment.
 - (c) The Claimant's continued absence from work exhausted the 6 months half pay she was entitled to whilst absent with ill health leading to a point in late September 2021 when she would move onto zero pay.
- 8.1. Did the Respondents know, or ought the respondents to have known, that

the Claimant was likely to be affected by being placed at that substantial disadvantage?

8.2. Did the Respondents fail to take such steps as it was reasonable to take, in all the circumstances of the case, in order to prevent the PCP having that effect? The reasonable adjustments suggested by the Claimant are those set out by the FMA in May 2021 of:

- A phased return of greater than 6 weeks
- Hours less than 50% / of 25% and
- Working primarily from home

Discrimination arising from disability – S.15 Equality Act 2010

9. Was the Respondent aware, or ought it have been aware of the Claimant's disabilities?

10. Did the Claimant's long term sickness absence as a result of the symptoms of Long-Covid amount to 'something' arising in consequence of her disability/disabilities?

11. Did the Respondent subject the Claimant to unfavourable treatment by declining the Claimant's requests for a phased return to work of longer than 6 weeks, with less than 50% of her hours and involving primarily home working by requiring the Claimant to (a) work 50% of her hours during a phased return to work; (b) complete her phased return to work within 6 weeks; (c) work primarily from the office during any phased return to work and (d) failing to implement the occupational health advice from the Force Medical Advisor?

12. If the Respondent subjected the Claimant to the unfavourable treatment identified in paragraph 13, was this because of the something arising out of the disability/disabilities identified at paragraph 10.

13. If the Respondent did subject the Claimant to unfavourable treatment arising from disability, was the treatment a proportionate means of achieving a legitimate aim?

Indirect Discrimination – S.19 Equality Act 2010

14. Did the Respondent impose the following PCPs?:

14.1. The requirement for the Claimant to work in the office with minimal home working, from the 4th of February 2021. *The Respondent's case is that this was not imposed until the 6th of May 2021.*

14.2. The requirement for the Claimant to work at least 50% of her hours when starting a phased return from sickness absence, from the 4th of February 2021. *The Respondent's case is that this was not imposed until the 6th of May 2021.*

14.3. The requirement for the Claimant to engage in a 6 week phased return from sickness absence from the 4th of February 2021. *The Respondent's case is that this was not imposed.*

15. Did the Respondent apply the PCP's to employees other than the Claimant during the relevant period?

16. In relation to each:

16.1. Does, or would, the PCP put those who share the Claimant's disability at a particular disadvantage compared to others?

16.2. Did the PCPs put the Claimant at that particular disadvantage?

16.3. Can the respondents show that the PCP was a proportionate means of achieving a legitimate aim?

Bundle

14. The Tribunal was referred selectively to the hearing bundle of relevant documentary evidence ("Bundle"). References to the hearing Bundle (pages 1-619) appear in square brackets [] below.

The Evidence

15. The Tribunal heard evidence from the Claimant and for the Respondent, and using their respective rank/job title at the relevant time, from:
- a. Detective Inspector ("DI") Laura Bartley (now Temporary Chief Inspector);
 - b. Detective Sergeant ("DS") Emma Coopey (now Detective Inspector);
 - c. Detective Inspector Shelley Comley, and
 - d. Ms Sarah Davies, HR Business Partner (now HR Operations and Planning Lead).
16. All witnesses who attended to give live evidence relied upon witness statements, which were taken as read, and they were all subject to cross-examination, the Tribunal's questions and re-examination. The Claimant also relied on witness statements from two other witnesses who had not attended to give live evidence and it was confirmed that little to no weight would be placed on such written evidence in those circumstances.

Assessment of the evidence

17. Findings are made on the basis of balance of probabilities and it is not necessary to reject a witness's evidence, in whole or in part, by regarding the witnesses as unreliable or as not telling the truth. The Tribunal naturally looks for the witness evidence to be internally consistent and consistent with the documentary evidence. It assesses a range of matters including:
- a. whether the evidence is probable,
 - b. whether it is corroborated by other evidence from witnesses or contemporaneous records of documents,
 - c. how reliable is witness' recall; and
 - d. motive.

Facts

Employment History

18. The Claimant was employed by the Respondent from 5 August 2013 to 8 October 2021 in the role of Police Constable.
19. In the latter part of 2016/beginning of 2017, the Claimant was absent due to anxiety and stress [167] and returned to work on limited duties as a result of the Claimant's particular anxiety of being physically vulnerable when undertaking confrontational duties [169]. Her concerns regarding her personal safety, and in turn in dealing with physical confrontations, continued and in 2018 the Claimant was removed from front-line response and placed on permanent restricted duties as a result.

20. In late 2018, the Claimant moved to the Domestic Abuse Team, a team which was overseen by DI Laura Bartley, joining on restricted duties and not performing confrontational duties due to her anxiety and not being able to work past 8pm due to medication she was taking at that time.

Claimant's duties – Quartz

21. The Claimant continued in this role until 1 April 2019, when she was deployed to the Child Sexual Exploitation unit, the 'Quartz' operation, part of the Public Protection Unit ("PPU"), working with vulnerable children who had been victims of sexual exploitation, predominantly girls, a deployment that had been suggested by DI Bartley and which continued until the termination of the Claimant's employment.

22. The Quartz unit was based in Blackwood, close to the Claimant's home. Work was initially allocated on a geographical basis with the Claimant being responsible for children living in the Blaenau area. Other officers deployed to Quartz had responsibility for children in the remaining areas of Torfaen and Caerphilly. A specific officer was also responsible for children at risk of criminal exploitation, predominantly boys, across the three boroughs. Numbers of children allocated varied, with the officers for Caerphilly and Torfaen being responsible for around 10-15 children respectively and the Claimant, around 5-6 children.

23. When the Claimant was first deployed to Quartz, she reported to a temporary sergeant, DS Ian Haines, when again DI Laura Bartley was the DI with wider responsibility for PPU. From October 2019, DS Emma Coopey joined Quartz, replacing DS Ian Haines as the Claimant's line manager. DI Shelley Comley was posted to PPU in November 2020, replacing DI Bartley and covered Quartz until January 2021, maintaining sickness contact with the Claimant for continuity purposes however until the Claimant's resignation.

24. Within Quartz the Claimant's duties included being the single point of contact and visiting and managing those children in her Blaenau area, including holding planned regular visits to keep in touch with them, and attending in response to any crisis event which was more unpredictable. Her duties also involved writing up risk assessments and reports after the visits to the children and working with social services and attending multi-agency meetings.

25. She worked as part of a team of officers and from 2019 managers had permitted the Claimant a certain degree of flexibility in her working time at Blackwood to accommodate the Claimant's childcare responsibilities, the Claimant being a single mum and having lost her main child-carer, her own mother. Such flexibility included working condensed full time hours of 40 hours per week, when the Claimant would work longer hours on a Tuesday and a Thursday to enable her to have a Friday off, and being allowed to work and write up reports at home after collecting her children from school or after school activities.

26. Other members of the team also had flexibility, with one working flexibly and one part-time and not working on a Wednesday. Being an emergency services provider, the work had to be covered across all three geographical areas and there was a need to ensure that such work was covered if required in the absence of any particular officer. It was a supportive unit cognisant of the domestic needs of its staff and desires to work flexibly for the raft of individual reasons whilst acknowledging the need to deliver support to the vulnerable children within its remit.

2020 – Absence and return to work

27. On 14 January 2020, the Claimant was again absent from work due to stress reaction, experiencing challenges in her personal life in attending to her brother following injury and hospitalisation, and still experiencing her own mental health issues following the loss of her mother the year before.

28. At around the same time and separately, Finance and the Professional Standards Department (“PSD”) were reporting concerns to the Claimant’s line management that the Claimant had not submitted timesheets supporting the work she had undertaken for two years.

29. DS Emma Coopey was requested to prepare a report into the issue, an issue which was subsequently investigated by PSD and included a keystroke analysis of the Claimant’s laptop [192-196]. This resulted in DI Bartley placing the Claimant on an action plan to support her and monitor her work [374]. Whilst no allegation of misconduct had been advised to management by PSD, and PSD had suggested that there should be local resolution, this resulted in the managers questioning whether the Claimant could be trusted to work from home.

30. By the end of March 2020, the UK was facing the Covid-19 pandemic and with that the consequential stay-at-home lockdown announcement on 23 March 2020.

31. The Claimant remained off work until the end of April 2020 reporting with stress at home and fatigue [204] and DI Coopey was tasked with managing the Claimant during her sickness absence supporting and enabling her to return to work, which she did in following receipt of the report from the occupational health adviser (“OHA”) of 21 April 2020 [225], which indicated that the Claimant would also need consideration of a flexible work pattern due to childcare issues.

32. The Claimant returned to work on 27 April 2020 on a phased return working 4 hours per day in the office, building up to 6 hours after a week with 2 days in the office and 2 days at home. This followed previous phased returns to work for the Claimant, where she commenced working at 50% of her hours building up to full hours over a period of 6 weeks and which resulted in review meetings each a Friday to see how the phased return was working.

33. The Claimant asserts that on her return to work in April 2020, she was the only one in the office on a daily basis as all others were working for home at that point due to the pandemic and lockdown.
34. Both DI Bartley and DS Coopey gave evidence that due to the pandemic, and the need to balance considerations of safety of office-based work with the delivery of the support to vulnerable children, a rota as arranged such that staff roughly worked in the office 2 days per week and at home 3 days per week, where after a visit to a child or agency, they could document that visit from home. Whilst there were more constant absences and work from home arrangements for some staff, these arose as a result of a mixture of pregnancy-related reasons or specific physical vulnerabilities that required special arrangements.
35. The Claimant was included in the rota, where she could work from home as the rest of the team was able for 2 days of the week, but the Claimant was asked to come into the office each morning on a daily basis, partly because of trust concerns regarding the Claimant's working from home formed as a result of the PSD investigation, and partly to provide support and integrate her back into the team following her absence, when her personal development reviews were undertaken.
36. As a result of the issues of cover and a desire to review all flexible working requests, on 18 May 2020, DS Coopey sent an email to all staff asking that any flexible leave requests be made in writing as soon as possible, so that an agreement could be reached that benefitted the department [248]. On 25 May 2020 the Claimant submitted hers requesting Wednesdays [598] but by this point, this could not be accommodated due to colleague's arrangements and the Claimant did not propose an alternative day off. In November that year, the Claimant's application to work 38 hours was approved.

December 2020 – Positive Covid test

37. On 31 December 2020, the Claimant tested positive for Covid-19 [254] and presented Fit notes indicating that she was not fit for work until 1 February 2021 [255-256].

First Attendance Support Meeting ("ASM") - 4 February 2021

38. At around this time, the roles in Quartz were also changing, with dropping levels of reported child sexual exploitation and increasing cases of child criminal exploitation over the lockdown period and with it a shift to more boys' involvement in criminal activities, with some of the children having markers for violence.
39. The Claimant was informed of this and her ability to carry out visits with such children due to her permanent restricted duties and anxiety with dealing with confrontation was discussed with the Claimant on 4 February 2021 in a sickness review meeting. The meeting was held on Microsoft Teams by DI Comley and DS Coopey [258/259].

40. Whilst DS Coopey was the Claimant's line manager, and DI Comley would not normally involve herself in such meetings, DI Comley attended as she had recently taken over responsibility for the Quartz team from DI Bartley and wanted to discuss with the Claimant that she wanted an occupational health assessment to reassess the Claimant as a result of the increase in work within criminal exploitation involving more boys.
41. The notes of that meeting reflect that the Claimant still had breathing difficulties and coughing and that the Claimant was getting anxious regarding visits. She was informed that her role meant that she had to attend the office as she needed to carry out regular visits with the vulnerable children she was responsible for managing on Quartz [259].
42. There is a dispute between the parties as to what was said at that meeting regarding any phased return to work. The Claimant asserts that at that meeting she was told that she would only be entitled to a 3-week phased return and within that time she would need to be fully operational and that she could not work from home as her role was visiting vulnerable children.
43. This is denied by both DS Coopey and DI Comley within their written evidence, with DI Comley adamantly denying telling the Claimant at that meeting that she had to return to full duties within 3 weeks, explaining that she was familiar with the standard phased return process of 6 weeks and that there was no reason for her to say otherwise.
44. The notes of the meeting [258 and 259] make no reference to such a limited phased return. However, they likewise make no reference to DI Comley telling the Claimant that a phased return to work could take place over 6 weeks.
45. We found on balance, that whilst it was likely that the Claimant was of the view that any phased return at that point would be three weeks, not least as she referred to this in her later attendance meeting on 6 May 2021 and to her own GP on 16 April 2021 [141], there was insufficient evidence to find that she had been informed of this by DI Comley at that meeting. Either way, such a view was in fact corrected at that later May attendance meeting when still the Claimant was not in a position to return to work, on a phased return or otherwise in any event.
46. After the 4 February 2021 meeting, an occupational health report was requested to review the Claimant's suitability for the changes to the role within Quartz. The Claimant was informed of this by email on 8 February 2021[275].

First OHA post Covid-19 - 10 Feb 2021

47. On 10 February 2021, the Claimant attended the Gwent Police Force's OHA, the first appointment since her Covid-19 positive test and a report was prepared. It appears that

this was not to review her suitability to work with changes to the role, as desired by DI Comley, just a review more generally of the Claimant's anxiety issues [274].

48. Such OHA reports were provided to the individual employee first for approval and comment, and they would then be sent by the OHA to HR and the employee's line manager, with them receiving them between 7-10 days later.
49. The report from this OHA review was sent to HR (Sarah Davies) and the Claimant's line manager, DI Coopey [263] and within that February OHA Report, OHA indicated that:
 - a. the Claimant's respiratory symptoms were a barrier to a return to work or full duties;
 - b. the Claimant was likely to be covered by the Equality Act. No indication of the condition or justification of that was provided;
 - c. they recommended that she be reviewed in 8 weeks for an update on her respiratory health; and
 - d. Adjusted duties were recommended over a period of 6 months.
50. There is no indication that DI Comley had that sight of that report, not being the Claimant's line manager and the report not dealing with the change to risk presented by the increased criminal exploitation work. DI Comley gave evidence that she could not recall having seen that report and the report that she had requested had been specifically in relation to the Claimant's suitability to deal with the amended Quartz duties. We accepted that evidence and found that this report had not been seen by her.
51. DI Comley spoke to the Claimant on 22 February 2021, as the Claimant had contacted her and likely because DS Coopey was on leave at that time. The Claimant reported that she was walking and still struggling to breathe despite x-rays being clear and her observations being normal. She confirmed that her GP had signed her off for a further two weeks but was wanting to return to work thereafter [267]. The Claimant was told that she would be required to come into the office when returning to work and it was agreed that DI Comley would contact her on 4 March 2021 to discuss a return to work date.

March 2021

52. In a follow-up conversation on 9 March 2021, the Claimant indicated that she was still not well enough to return to work as she was still having issues with fatigue and her breathing and was waiting on a Fit note from her GP [273]. It was agreed that when she sent in her Fit Note that a further meeting would be arranged or a phased return to work would be arranged if she was able to return to work.
53. By this point DS Coopey had unfortunately been in a car accident and was herself off work. As a result, DI Comley took over responsibility formally for managing the Claimant's sickness in the absence of her DS Coopey as her line manager.

54. Further contact was made on 18 March 2021 between the Claimant and DI Comley, when the Claimant confirmed that she was still not well enough to return to work, she was still struggling to breath and she was feeling tired [277]. DI Comley queried with the Claimant if she had been referred to a long covid clinic and asked that she speak to her GP and to chase a date for a respiratory clinic. She was reminded that her Fit note had expired and that a second ASM meeting would need to be undertaken, which was arranged for 23 March 2021 [278].

55. DI Comley gave evidence that her understanding of Long Covid at that time came from information on the Force's Long Covid Hub site on the intranet and was limited to knowing that there was a concept of Long Covid, which was distinct from Covid itself where symptoms persisted for longer, although she could not recall whether any specific time had been referenced.

Second ASM March 2021 – 23 March 2021

56. A second ASM review meeting took place on 23 March 2021, conducted by DI Comley and this time, also attended by Sarah Davies, HR Business Partner.

57. The notes of the meeting reflected that the Claimant reported that she was still struggling with shortness of breath and fatigue and had been monitoring her oxygen levels. She was asked if there had been any follow-up regarding the possibility of Long Covid [280/281]. The Claimant had been unable to get an appointment. DI Comley asked the Claimant to push her GP to ensure that she wasn't forgotten.

58. The Claimant was advised that they needed to plan for a return to work and it was agreed that the Claimant would call after her appointment with her GP the following week, so that the Respondent could look at what was required in terms of support. It was agreed that the Claimant would call DI Comley later that week. At that meeting, the Claimant was also advised by Sarah Davies that she would be moving to half pay the week later on 30 March 2021 [281].

59. The Claimant gave evidence in her witness statement that she made suggestions of phased return to work and home working at this meeting, but that this was refused. DI Comley on cross-examination gave evidence that there was no discussion of reasonable adjustments at that meeting as the Claimant was telling her that she was not well enough to return to work at that stage.

60. We accepted DI Comley's evidence and found that the Claimant was not making suggestions of returning to work, whether on a phased return or from home. We also found that, taking into account how the Claimant's symptoms were at that time, that she was struggling with the shortness of breath and fatigue, as reflected in the note of the meeting and indeed in the Claimant's own GP record two days later on 25 March 2021, that she was not fit for work at that time. In making this finding, we also took into account the notes

of the meeting which reflected that the Claimant was asked if there was anything that was required from the Respondent and she said that there was no support required.

61. We also accepted DI Comley's evidence that there was no frustration with the Claimant as her absence was slipping, but rather that she was telling the Claimant to push her GP to ensure that she was not forgotten. Again, we accept that whilst the Claimant may have felt 'pushed', we accepted the evidence of DI Comley as to her intentions.
62. Indeed following that meeting the Claimant became more sick and had to go to bed for 2 days [298] and on 25 March 2021, when she did telephone her GP, he diagnosed post-covid syndrome and indicated that they could provide a Fit Note for adjusted hours or duties if occupational health or she herself believed this could work [142].
63. Despite the GP confirming this to the Claimant, we further found that at no time during the remainder of her employment did the Claimant seek such a Fit Note from her GPs and that that each Fit Note that was subsequently provided indicated that the Claimant was not fit for work at all. On no occasion did any GP provide a qualified Fit Note indicating that the Claimant was fit for work but with adjustments, for example.
64. On 30 March 2021, the Claimant went onto half pay and on the same date contacted the Respondent and spoke to DS Smith indicating that she did not feel well enough to face full time working in an office environment, that she had been referred to respiratory clinic. It was suggested to her that she may wish to use her annual leave if she was concerned about half pay.
65. The Claimant indicated that she did not want to return and then have to return to sick if she felt unwell [280].

Second OHA Post Covid-19 – 13 April 2021

66. On 13 April 2021, the Claimant again attended the OHA and report was subsequently provided. The medical issues referred to her Long Covid only and indicated that the Claimant's respiratory symptoms had improved but that it was very difficult to plan for a productive and sustainable return to work with adjustments [288].
67. They also reported that the Claimant herself had informed them that she had concentration and recall issues and that:
 - a. her half pay was also causing anxiety;
 - b. her relationship with colleagues was now strained and that the Claimant was unsure that this was salvageable; and
 - c. she was unsure if she could return to the department and was considering alternative post.

68. The OHA did not consider the Claimant to be covered by the Equality Act at that stage but did recommend long term adjusted duties over 6 months on her return to work. They considered that the Claimant would struggle with full-time hours and the report also reflects that the Claimant had suggested working from home but that she had felt that there was resistance to this option.
69. They recommended a 'graded phase to work approach' and noted that they had discussed with the Claimant the financial implications if this would go over the 'standard '6 weeks'' and that a discussion take place about options on the basis of her current health and '*her workplace issues which are not entirely of a medical nature*'. What the Claimant's concerns with 'workplace issues' was not in evidence before us and no cross-examination arose on this particular point. We therefore make no positive findings on what this related to.
70. The Claimant also confirmed that her GP had also offered to support her on adjusted duties as this was potentially a longer term recovery.
71. On 16 April 2021, the Claimant attended her GP reporting with stress at work and informing her GP that she was raising a grievance at work, saying that she felt victimised for something that was not her fault, that there were issues with her work colleagues, explaining that she was upset as she felt she could do something in work. It was not clear in the evidence before us what the issues with work colleagues related to, but it appeared to persist and underpinned her desire not to return to PPU.
72. The GP issued a new Fit Note that the Claimant was not fit for work at all, which expired on 3 May 2021 [142].
73. Following receipt of that report, again DI Comley attempted to contact the Claimant without success [291] and on 19 April 2021, the Claimant presented a further Fit Note to 3 May 2021 [141][292].
74. Despite the Claimant informing the OHA that her GP would support her on adjusted duties, and despite this being reflected in the GP's own notes, there was nothing in the Fit Note that indicated that the Claimant was fit to return to work with any such adjusted duties. Rather, the Fit Note indicated that the Claimant was not fit to return to work and we found that this was the case; that the Claimant was not fit to work at that point on any basis.
75. At some time in April, likely 21 April 2021, the Claimant was also seen by Respiratory Consultant when the Claimant was reporting as still struggling with a dry cough, fatigue and breathlessness. No follow-up was given for rehabilitation as funding was only given for those who had several illness requiring intensive care or CPAP or oxygen which the Claimant had not received [294].
76. On 30 April 2021, the Claimant obtained a further Fit Note to 16 May 2021 after the Claimant had emailed her GP about her lungs, lung pain/shortness of breath, fatigue, sinus

issues, muscle pain and headaches and asked if any thing else could be done to assist her.

77. DI Comley attempted to contact the Claimant over the following week again without success, the Claimant sending a text only on 27 April indicating that her phone was not working, issues with her mobile phone signal being the indicated cause [296].

Third ASM – 6 May 2021

78. On the morning of 6 May 2021, the Claimant called her GP complaining of fatigue and shortness of breath and was prescribed some anti-depressant for her low mood she said was caused by stress at work, the Claimant telling her GP that she felt that work had isolated her [140].

79. Later that day the Claimant attended a meeting with DI Comley and Sarah Davies. At that meeting, the Claimant was represented by her Police Federation Representative and again notes of the meeting were contained in the Bundle [298-303].

80. At that meeting the Claimant explained how she had good and bad days, and that she had more energy in the morning but struggled in the afternoon, referred to as a 'roller-coaster' on a number of occasions during the Claimant's live evidence in this hearing, and confirming that she had been in contact with her GP and was on that low dosage of anti-depressant. She complained of lack of contact with the wider team and that she felt that the situation with them was not something that she could go back to – they had defriended her on Facebook, and that this was a personal issue unrelated to work.

81. She also informed them that after the last ASM she had felt pressured and had been told that she had to be back in work to full capacity within three weeks, that she had taken ill after the previous ASM and had to go to bed for two days. At that meeting DI Comley denied having said that the Claimant had to return within 3 weeks.

82. As already indicated, even if the Claimant was under the apprehension that she had to return on a phased period of three weeks, we found that view was corrected at that meeting.

83. The Claimant indicated that it was unfair to expect her back in the office and was told at that meeting that there was a requirement to be in the office. DI Comley spoke to her about needing to be back in the office, and that there were concerns regarding lack of support for her if she worked from home after the Claimant had said she had not been supported. She was told that there was some flexibility on being able to work from home but she needed to be able to go back to the office so that support could be given.

84. The Claimant was also told at this meeting that she needed to aim for 50% of working hours on the first week of her return and that after 6 weeks she would need to be able to work her full hours.
85. DI Comley confirmed on cross-examination, which was not challenged, that the Claimant's Federation representative asked the Claimant in that meeting if she was fit to return to work in that meeting and she confirmed that she was not. That evidence was not further challenged and we accepted that evidence. We found that at that meeting the Claimant said that she was not fit to return to work. We did not consider that this was qualified by or because of the Respondent's position that:
- a. she was not able to work from home,
 - b. work 50% of her hours; or
 - c. she had to be able to build up to full time in 6 weeks.
86. Rather, we found that the Claimant was stating that she was not fit to return to work at all.
87. As the Claimant had indicated that she was unfit to return to work in any capacity, the issue of whether the Claimant was disabled and/or needed reasonable adjustments was not expressly addressed by DI Comley or Sarah Davies, but we did find that more likely than not that this meeting, and indeed all meetings with the Claimant during this period, lasted no more than an hour, as Sarah Davies gave live evidence on cross-examination which was not challenged and which we accepted, that all such meetings lasted no longer than an hour as the Claimant as she could not cope with interaction for any longer period.
88. Indeed the Claimant attended her GP the following day with chest pain and was referred to the local hospital for bloods and an ECG [139]. She informed DI Comley on 14 May 2021 reporting her recent hospitalisation and symptoms she was experiencing and confirmed she would get a fit note, which it appears that she did later that day, complaining that she was really struggling with fatigue and shortness of breath. Again no indication was given that the Claimant was fit to return with adjustments.

Third OHA Meeting 19 May 2021

89. On 19 May 2021, the OHA undertook a telephone review meeting and the report subsequently sent indicated that the Claimant was still reporting experiencing symptoms consistent with Long Covid including shortness of breath, fatigue, brain fog and a cough [308]. It did indicate that the Claimant had told the OHA that there had been discussions with her as to whether she would be able to return to work on a phased basis and whether she would be able to work from home.
90. As Long Covid was a new condition, a gradual return to work outside of the usual 4-6 week phased return was recommended, accepting that this was for the operational management to determine if this could be accommodated. It was considered unlikely that the Claimant

could manage 50% of her working hours due to the ongoing difficulties she was experiencing, with predominantly brain fog and fatigue. They stated *'In order to successfully get her back to work, it is likely that we would need to start somewhat lower, perhaps at 25%'* and it was suggested that 25% was a start point.

91. The OHA also indicated for the first time that they did not consider that the Claimant would be able to work outside of the home environment due to the *'additional effort involved in committing and the associated interactions with colleagues that she would experience in the work environment'*.
92. They also reported that the Claimant found background noise difficult to tolerate which added to her fatigue and brain fog and recommended, if possible,
 - a. a prolonged phased return;
 - b. beginning with 25% of usual hours;
 - c. undertaking administrative duties only from home with only minimal phone usage; and
 - d. that she was likely to need to break up her working hours into smaller sessions to manage her fatigue.
93. Adjusted duties for 3-6 months was recommended but the OHA did not consider that the Claimant was likely to be covered by the Equality Act.
94. The Claimant appeared to have attended her GP the following day and was issued with a further fit note confirming that the Claimant was not fit for work until 7 June 2021, with no indication that the Claimant was fit to return with adjustments [312].
95. On 24 May 2021, the Claimant attended a private consultation with a Consultant Physician as a result of her symptoms of fatigue, nausea, brain fog, light-headedness on standing, palpitations, ringing in her ears, nasal stuffiness, chest pain, breathlessness, air hunger, abdominal cramping and bloating, nausea, alternating diarrhoea and constipation and frequent urination, symptoms she had experienced for several years but which had *'come to a head post Covid'*. The Claimant was querying whether she had PoTs and the consultant considered it likely that the underlying problem was some degree of Mast Cell Activation aggravated by her Covid infection. A raft of strategies and medication was recommended including antihistamine
96. She also called DI Copley that day and confirmed that she was starting medication to try and help with her breathing and headaches and that she was paying privately to see a consultant. The Claimant confirmed that she did not need anything further from DI Comley at that time.
97. We found that at this time, the Claimant was still not fit for work in any capacity and was confirming as much to DI Comley.

Grievance

98. On 27 May 2021, the Claimant submitted a grievance [331/332] relating to matters dating back to DS Coopey's management of her return to work in April 2020, the year before and in particular her ability to work from home at that point and the impact her role had on her childcare. She stated she would like to change teams.
99. We make no findings of fact in relation to that grievance beyond those matters and that the Claimant did not complain within that grievance that there had been a failure to make reasonable adjustments to enable her to return to work at that point in 2021 or more generally about the management of her at this time.
100. On 29 May 2021, the Claimant provided a further fit note from her GP which indicated that she was not fit for work at all for the period from 17 May – 7 June 2021 [312] and over the following week updated DI Comley regarding her medication and symptoms [318/313].

Meeting 2 June 2021

101. On 2 June 2021, the Claimant and DI Comley met at the Claimant's home shortly after the Claimant and informed her of her private appointment confirming that the consultant believed that she had Mast Cell Activation Syndrome. She confirmed that she would make contact with DI Comley again after speaking with her Police Federation representative to discuss future plans [318]. Again, there was no indication at that point that the Claimant was fit to work in any capacity. Indeed she attended her GP on 8 June 2021 and requested a further Fit Note for just another week with her GP noting that she was questioning '*planning to try returning to work*'. She was asked to speak to the GP if a further Fit Note was required [137].
102. This indicated again to the Tribunal that the Claimant had not at this point indicated to the Respondent that she was fit for work. Rather this supported the finding that she was not, and had indicated that she was, fit for work to the Respondent at this time. We did not accept that the Claimant had obtained the Fit notes as she had been told to get them by DI Comley. Rather we found that at best DI Comley reminded her that she did not have a Fit Note covering her absence and/or her Fit Note was about to expire and that if she was not returning to work, she would need a further Fit Note. Nothing in that indicated that the GP was prevented from issuing a Fit Note indicating a return to work with adjustments.
103. The notes of the discussion seemed at best to reflect that this was the start of the Claimant beginning to think that she was well enough to do some work and was starting to contemplate a possible return to work. It did not evidence to us that the Claimant was, or was saying at this stage, that she was fit for work in any capacity.

104. On 15 June 2021, the Claimant again contacted her GP [137] reporting with low mood and stress at work also referencing fatigue and Long Covid being difficult. A further call took place between the Claimant and DI Comley later that morning when the Claimant reported as having been very poorly the week before with a chest infection [323]. DI Comley told the Claimant that:
- a. she needed to provide a new fit note, her previous one having expired,
 - b. that DI Comley had not been able to speak to the Claimant's representative; and
 - c. she had spoken to HR and 50% of hours was required.
105. The Claimant indicated that she would want to speak to her Police Federation representative before she discussed further.
106. Again we found that the Claimant was not indicating that she was fit to return at this point and indeed on 17 June 2021 the Claimant attended her GP again with a chest infection that had been ongoing the previous week and on 18 June 2021 the GP reported that the Claimant had requested a further Fit note for a further two weeks.
107. On 18 June 2021 the Claimant submitted a fresh Fit Note indicating that the Claimant was not fit for work and that this would be the case to 29 June 2021 [324]. On 2 July 2021 the Claimant called in still reporting that she had a chest infection and that it was badly affecting how she was breathing and confirmed that a further Fit Note would not be issued by her GP until the existing one, which was in place to 29 June 2021 [135], had run out [329].

8 July 2021 meeting with Police Federation

108. On 8 July 2021, the Claimant, accompanied by her Police Federation representative Jitka Tomkova-Griffiths, met with DI Comley and Sara Davies. HR Business Partner [350]. The Claimant reported that she was still suffering from a fresh chest infection and was still 'not right'. She explained her symptoms.
109. The Claimant was informed that when she returned to work:
- a. The hours would be 50% and not 25%; and
 - b. She would be full-time in 6 weeks of her return to work; and
 - c. that the role would be office-based with some working from home.
110. The Claimant indicated that she did not want to return to her role but the Claimant's ongoing grievance was not discussed.
111. She confirmed that she would accept any role but that she did not want anything from them at that time and that a meeting was arranged for 28 August 2021. It was arranged

that the Claimant would get her laptop reconnected and she was informed that her pay would be reduced to nil pay on 29 September 2021 [350/351].

112. On 9 July 2021 the Claimant queried why she needed any further occupational health review as the recommendations made in May 2021 had been refused [355].
113. Whilst we found that the Claimant was considering returning to work at this point, and was unhappy with the refusal to allow her to return to work on anything less than 50% hours over 6 weeks phased return and working from home, she was still not indicating that she was ready and able to return in any capacity.
114. On 12 July 2021, the Claimant attended her GP for a review of her chest infection and a fit note was issued on 16 July to 2 August 2021, presumably after DI Comley again contacted the Claimant as her previous fit note had expired [361]. Again, there is no indication that the Claimant was seeking to discuss a fit to return with amended duties on her Fit Note and the Fit Note indicated that she was unfit for work.

OHA - 16 July 2021

115. On 16 July 2021 the Claimant was again reviewed by occupational health by way of telephone consultation and on the same day the Claimant was in hospital with her daughter.
116. The OHA Report that was subsequently received reflected that the medical issues that had been considered were limited to her Long Covid only, and reported of slow progress in terms of day to day activities and attempts by the Claimant to try to build up stamina [362].
117. In terms of workplace issues, the OHA reported that whilst the Claimant wanted to return to work, she acknowledged that she was 'some way off a result to engaging with full duties'.
118. The OHA indicated that current guidance on Long Covid and that:
- a. rehabilitation focussed on a much more protracted phased return to work and that this was likely to be in the order of 8-12 weeks rather than 4-6 weeks;
 - b. Any work activity would need to have low physical demands
 - c. Avoiding commuting and supporting working from home on a flexible basis would be beneficial;
 - d. The Claimant was not fit for full duties and that this was likely to be the case for several months;
 - e. Management might need to consider alternative duties on a temporary basis to help support her return.

119. It was acknowledged that acceptability of these recommendations was ultimately a management/HR decision. The OHA indicated that adjusted duties should be in place for 3-6 months and that she was not likely to be covered by the Equality Act 2010.
120. On the same day that she attended the PHA, the 16 July 2021, the Claimant also obtained a further Fit Note confirming that she was not fit for work for the period 13 July – 2 August 2021 and this was sent in to DI Comley [134][361].
121. On 19 July 2021, the Claimant obtained a further Fit Note to 7 August 2021 on the basis of her Long Covid [134] and on that day Sarah Davies also responded to the Claimant's email of 9 July 2021, explaining that the OHA was not in a position to advise that the Claimant was to return to work on 25% as the Respondent's position was that 50% hours was the minimum [370]. She stated that the reason for the 50% was that '*medically if you cannot start on 50% hours you are not in a position health wise to achieve the requirements of the role and to achieve contract hours within 6 weeks*'. She advised the Claimant to attend the OHA appointment so that the Respondent could look at when the Claimant would be in a position to return on 50% hours.
122. On 23 July 2023, DI Comley contacted the Claimant who confirmed that she had been having a difficult few weeks with her children being unwell. As DI Comley was about to go on leave the Claimant was informed that she should contact Sarah Davies (HR) in her absence [372].
123. The Claimant again attended her GP on 28 July 2020 with 2-3 days, complaining of vertigo and accompanying sickness and later on 4 August 2021 with shingles. The Claimant was still not fit for work, or reporting that she was fit, whether as a result of her Long Covid and/or her chest infections and/or shingles, at this stage. On 10 August 2021 presented a further Fit Note to 9 September 2021.
124. Indeed we found that for the entirety of the period, commencing from January 2021 to around the middle/late August 2021, the Claimant was not at any time fit for work, or indicating to the Respondent that she was fit for work.

Telephone call 20 August 2021

125. On 21 August 2021, DI Comley contacted the Claimant on her return from leave. At that time the Claimant had shingles but confirmed that she was feeling better [386]. In her evidence, DI Comley indicated that whilst the Claimant's current Fit Note was about to expire on 9 September 2021, the Claimant told her that whilst she was still feeling tired she may be able to do some things in work depending on what was offered to her. DI Comley's evidence was that this was the first time, since the Claimant had gone off sick that she mentioned that she may be well enough to do any work.¹

¹ DI Comley WS\$25

126. It was agreed that DI Comley would contact the Claimant after the following OHA assessment and that she would call her when she returned from leave in early September but that if the Claimant needed anything, she should text or call.
127. We accepted that evidence and found that this was the first time that the Claimant was and/or had indicated that she was, fit to do some work in any capacity.
128. Whilst the Claimant's representative urged the Tribunal to rely on the reports of the OHA, rather than the GP Fit notes, arguing that they had primacy over the GP Fit notes, in order to reach a finding that the Claimant was in fact fit to return to work earlier than this date (but with the recommended adjustments,) we did not make this finding. Rather, we found that the GP Fit notes supported the finding that until this point the Claimant was not fit to return to work.

Alternative Employment - Newport City Council

129. Whilst we can make no findings on the exact date, we also concluded that around this time the Claimant was looking for alternative job opportunities outside of the Respondent. Despite being pressed on cross-examination, the Claimant had no recall at all on when she had applied for a role at Newport City Council as Domestic Violence Adviser. We found her answers evasive and the Tribunal was surprised that despite having good recall on other evidence relating to matters around and prior to this period.
130. Taking into account the Claimant had been interviewed for and offered employment with the Council by 10 September 2021, we concluded that it was more likely than not that the Claimant would have applied for that role at some time in early – mid August 2021.
131. This was a role which she subsequently interviewed for, offered and accepted by the Claimant and which she commenced on 20 September 2021 [458].

Alternative roles

132. It appears that a meeting was arranged for 23 August 2021 with the Claimant and her Federation representative but that this was postponed as the representative could not be contacted. The Claimant asked for an update and was informed by Sarah Davies that there was a temporary role with West LPA to conduct Achieving Best Evidence interviews ("ABE") [398]. The role was Monday – Friday and that there would be an element of homeworking based in Blackwood and that it would be a temporary role for 3 month period. There was no reference to the period of time of the phased return but it was more likely than not that the Claimant would have considered this to be over 6 weeks although we did find that the Claimant would have considered that to be flexible with a potential to slowly build up the hours over that period as had previously been the position in prior phased returns.

133. On 3 September 2021, the Claimant confirmed that she did not consider the role to be suitable, explaining her some of her then symptoms of fatigue, breathlessness, headaches, brain fog and sensory overload and expressed concern that the role carried too much responsibility and in essence that she would not be able to provide this support. She rejected that role as a possible alternative. She repeated this on cross-examination and indicated that she wasn't ready to video interview people

134. On 6 September 2021, on her return from leave the Claimant called DI Comley and the notes [403] indicate that the Claimant wanted to '*Speak to Sarah [Davies] about coming back to a role*' and a discussion took place regarding an agreement on hours and using annual leave to build up her time and strength. DI Comley indicated that she could talk to the new sergeant in PPU (DI Comley having left) about getting work allocated from a mixture of sources until something permanent could be found and that he would be her point of contact. The Claimant confirmed that did not feel she could go back to the PPU environment and wanted a fresh start.

135. DI Comley agreed that she would speak to Sarah Davies and call the Claimant the following day.

Meeting on 8 September 2021

136. On 8 September 2021, the Claimant met with DI Comley and Sarah Davies and an option was discussed of the Claimant returning to work in PPU using her 265 hours of accrued annual leave to reduce the hours she worked and to enable the Claimant to build to full time over a longer period, the Claimant having suggested working 4 hours on two days of the week, then taking three days annual leave, enabling a 6 weeks normally given for a phased return to work, to be further extended.

137. It was confirmed that her new sergeant could manage her workload from different places and could be the point of contact for her. The Claimant indicated that she did not consider she could do that and wanted a complete fresh start [403]. That was confirmed in an email [409] and later that day she responded by email informing them that she had been advised to raise a second grievance with regards to disability discrimination to '*cover the refusal of reasonable adjustments*' recommended by the OHA. She indicated that she had been forced to ask by her Federation representative for ill-health retirement.

138. This was followed by a phone call on 10 September 2021 from the Claimant in which she indicated that she had attended a job interview that morning and had been offered a position and that she was handing in her notice [411].

139. The Claimant's employment ended on 17 September 2021 and she indicated that she would be seeking to use annual leave during her notice.

140. On 13 September 2021, she submitted her second grievance [415] and a further fit note to 16 September 2021 [418].
141. The Claimant's last OHA Report was dated 14 September 2021 [433] which indicated that she still had prominent shortness of breath and fatigue and associated dizziness.
142. The Claimant commenced her new role on 20 September 2021 with Newport City Council on a 38 hour per week basis with the contract of employment for the new role indicating (clause 3) that her place of work would be Civic Centre in Newport. The Claimant gave evidence however, which we accepted, that her base is working from home liaising with social services and the police. She confirmed she does visit those within her responsibility, specialising in the older person who is the subject of domestic violence, or when the 'target hardens',. No explanation was provided of what that meant but we concluded that the Claimant worked full time hours from 20 September 2021, predominantly from home but that she did undertake outside visits as part of her role.
143. The Claimant continues to have bad days when, as an adjustment, her current employer allows her to work from bed when she has a bad day.

Respondent's Submissions

144. With regard to knowledge, it was submitted that whilst the Respondent was aware of the impairment of Long Covid, but that the Respondent had no knowledge, and indeed no one had knowledge, of how long symptoms of Long Covid were going to last as still a new disease and the position was complicated as the Claimant had a multitude of impairments including anxiety.
145. In terms of the reasonable adjustments claim, it was argued that the PCPs were not applied until 8 September 2021, as the Claimant was not fit and ready to return to work prior to that date and therefore no PCP disadvantaged her.
146. In relation to home-working, this was not a reasonable adjustment as the Claimant had poor phone signal and that it was not practicable for the Claimant to work from home when she had not attended the visits. In relation to 50% hours, this was not applied to the Claimant until September when the Claimant confirmed she could work a block of 4 hours a day. It was submitted that the adjustments were not reasonable or feasible and that in any event the Claimant had not said that the disadvantage was other than she was fearful of returning to work.
147. In relation to the longer phased return to work, it was submitted this was not applied until at least September, after the Claimant had indicated in August that she could return to work. We were reminded of **Lancaster v TBWA Manchester** UKEAT 0460/10 that the focus was on the practical result and it was submitted that even if the duty was triggered, there was not a chance that they would have worked in any event prior to that date.

148. It was submitted that in relation to the s.15 EqA, claim the 'something arising' was not the long term sickness, but the Claimant's inability to work 50% of her hours or at all and that the Respondent's rejection of the OHA recommendation, of a return on 25% of hours, was not unfavourable treatment as this was a 'fanciful suggestion'; that the Claimant could return to work over a period of longer than 6 weeks and that requiring the Claimant to attend work was not unfavourable treatment as she required support.
149. In terms of proportionate means, we were reminded that the Claimant knew the phased return was 'moveable' and that the Respondent says the requirement to work 50% corresponded with a 'real need' i.e. that someone had to work a minimum of 4 hours to be considered well enough to return to work.
150. In terms of the indirect discrimination claims, that the Respondent had not imposed the PCPs was repeated, and that the Respondent did not request the Claimant to return to work office as she was not presenting as fit for work even for an hour a day at home until 24 August, when the offer was turned down in any event.
151. The 50% hours and 6 week phased return was presented as a 'moveable feast' and whilst it was accepted that the Claimant was reminded of that from 6 May 2021, it was not imposed on or applied to the Claimant until 8 September 2021.
152. In terms of comparator group it was submitted that this would be formed of those with Long Covid symptoms who had been off work as the Claimant for a similar length of time and that group disadvantage had not been made out by the Claimant.
153. In terms of time, the Respondent's position is that if the PCPs applied or would have applied, that would have been 8 September 2021 and the claims were in time.

Claimant's Submissions

154. With regard to knowledge, we were reminded that the Tribunal was to form its own view (**Gallop v Newport City Council** [2014] IRLR 21) acknowledging that Long Covid was new but it was submitted that the Respondent was on notice as result of the May and July OHA reports, and at that stage that Long Covid could very well last 12 months.
155. With the regard to the application of the PCPs, it was submitted that these were applied to the Claimant from 2 February 2021 in respect of homeworking and a phased return of 6 weeks, and from 6 May 201 in respect of a 6 week phased return. In the alternative it was submitted that as there was an unwritten policy that phased returns were for 6 weeks and a minimum of 50% of hours, this was 'omnipresent' and as a result all of the PCPs applied throughout.

156. It was the Claimant's case that she could have returned to work before the offer on 6 September 2021, that she was constantly expressing a desire to return to work and that and the PCPs presented a barrier to her returning.
157. It was conceded by the Claimant's representative that the Claimant would require all three adjustments in conjunction with each other of 25% hours, a phased return of longer than 6 weeks and working from home as a reasonable adjustment and not one or more in isolation from the others.
158. In relation to the s.15 EqA claim and the 'something arising', it was agreed by the Claimant's representative that this was the inability to work full or 50% hours and not the sickness leave as set out in the List of Issues.
159. The Tribunal was referred to **Carranza v General Dynamics** [2015] IRLR 43 and **Clark v TDG Ltd (t/a Novacold Ltd)** I.R.L.R. 318; that the imposition of the PCPs was the barrier preventing the Claimant from returning to work and that the unfavourable treatment (in respect of both the s.15 and s.19 EqA claims) was the imposition of these PCPs that the Claimant could not get around until 8 September 2021 when the offer was made. It was conceded that if the aim was public and employee safety, these were legitimate aims, but that the Respondent could not establish proportionate means.
160. In relation to the s.19 EqA indirect discrimination claim, reliance was placed on **Rutherford v Secretary of State** [2006] 4 All E.R. 577 and **Pendleton v Derbyshire** [2016] IRLR 580. It was submitted that the comparator group was of those with symptoms of Long Covid of breathlessness and fatigue and brain fog who did not have Long Covid and were not disabled and that the extra disadvantage was that the issue was with a phased return over 6 weeks and 50%, submitting that there did not have to be a situation where the comparator group had no disadvantage as a result of the PCPs being applied.
161. In relation to whether the Claimant had evidence of group disadvantage, it was the Claimant's evidence that she still had bad days and cannot get out of bed and that her problems have lasted longer than 12 months. There was no medical evidence on general longevity of Long Covid as a condition.
162. In relation to jurisdiction it was argued that these were continuing acts (**Commissioner of Police of the Metropolis v Hendricks** 2003 ICR 530, CA) save in relation to the reasonable adjustments which were conceded were omissions but the Tribunal was asked to have sympathy with the Claimant as all PCPs placed the Claimant at a real disadvantage.

Legal Principles

Knowledge

163. In relation to knowledge of disability and knowledge of disadvantage, the correct questions are, in relation to the relevant time:
- a. Did the employer know both that the employee was disabled and that his disability was liable to disadvantage him substantially?
 - b. Ought the employer to have known both that the employee was disabled and that his disability was liable to disadvantage him substantially?
164. The required knowledge is of the facts of the disability, not that they meet the legal definition. Whether an employer knows that the employee was liable to be at a substantial disadvantage may vary from one alleged PCP to another.

S.20/21 EqA 2010 - Duty to make reasonable adjustments

165. Section 20 EqA states that: ...
- (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.*
166. Section 21 EqA states that:
- (1) A failure to comply with the first ... 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.*
167. The Equality and Human Rights Commission's Code of Practice on Employment contains guidance on the Equality Act, on what is a reasonable step for an employer to take will depend on the circumstances of each individual case (para 6.29). The examples previously given in section 18B(2) DDA remain relevant in practice, as those examples are now listed in para 6.33 of the Code of Practice.
168. In **Environment Agency v Rowan** [2008] ICR 218, the EAT set out how an employment tribunal should consider a reasonable adjustments claim (p24 AB, para 27). The tribunal must identify:
- a. the provision, criterion or practice applied by or on behalf of an employer or the physical feature of premises occupied by the employer;
 - b. the identity of non-disabled comparators (where appropriate); and
 - c. the nature and extent of the substantial disadvantage suffered by the claimant.
169. Laws LJ in **Newham Sixth Form College v Saunders** [2014] EWCA Civ 734 noted that *"the nature and extent of the [claimant's] disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot ... make an objective assessment of the reasonableness of proposed*

adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP'

170. In **Cumbria Probation Board v Collingwood** [2008] All ER (D) 04 (Sep), EAT, HHJ McMullen said that *"it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage"*. The EAT in that case then went on to uphold a finding of a failure to make a reasonable adjustment which effectively gave the claimant 'a chance' of getting better through a return to work.
171. S.212 (1) EqA 2010 defines 'substantial disadvantage' as one which is more than minor or trivial and whether such a disadvantage exists in a particular case is a question of fact and it is to be assessed on an objective basis (EHRC CoP, 6.15). It is necessary for a Tribunal to identify the nature and extent of any alleged disadvantage suffered and to determine whether that disadvantage is because of disability.
172. In order to do so, the Tribunal should consider whether the employee was substantially disadvantaged in comparison with a non-disabled comparator. If a non-disabled person would be affected by the PCP in the same way as a disabled person then there is no comparative substantial disadvantage (**Newcastle Upon Tyne Hospitals NHS Trust v Bagley** (2012) UKEAT/0417/11/RN, para 72).
173. In relation to the reasonableness of a proposed adjustment, this is a fact-sensitive question. It is an objective test: **Smith v Churchill Stairlifts plc** [2006] ICR 542.
174. Whether a particular step would be effective in avoiding the substantial disadvantage is relevant to the question whether it would be reasonable to have to take it. If its effectiveness is uncertain, that is one of the factors to be weighed in assessing reasonableness. Other matters to take into account include:
- a. practicability;
 - b. financial and other costs, and disruption to the employer, considered in the context of the financial and other resources available to the employer;
 - c. the nature of the employer's activities and the size of the undertaking.
175. It is an objective question whether a proposed step is one that it would be reasonable for the employer to have to take.

S.15 EqA 2010 - Discrimination arising from disability

176. Discrimination arising from disability is defined in s15 EA 2010:
- (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.

177. Section 15(2) applies only if the employer did not know (and could not reasonably have been expected to know) about the disability itself: ignorance of the consequences of the disability is not sufficient to disapply s15(1).
178. Under s15 EA 2010 it is the treatment which must be justified, rather than any policy which might lie behind the treatment. The test is reasonable necessity and the Tribunal must make its own objective assessment, weighing the real needs of the undertaking against the discriminatory effect of the unfavourable treatment.
179. If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified (EHRC Code, para 5.21).]
180. As for the correct approach when determining section 15 claims we refer to **Pnaiser v NHS England and others** UKEAT/0137/15/LA at paragraph 31.
181. The relevant steps to follow are summarised as follows:
- a. the tribunal must identify whether there was unfavourable treatment and by whom – no question of comparison arises;
 - b. the tribunal must determine the cause of the treatment, which involves examination of conscious or unconscious thought processes. There may be more than one reason but the “something” must have a significant or more than trivial influence so as to amount to an effective reason for the unfavourable treatment;
 - c. motive is irrelevant when considering the reason for treatment;
 - d. the tribunal must determine whether the reason is “something arising in consequence of disability”; the causal link between the something that causes unfavourable treatment and disability may include more than one link – a question of fact to be assessed robustly;
 - e. the more links in the chain between disability and the reason for treatment, the harder it is likely to be able to establish the requisite connection as a matter of fact;
 - f. this stage of the causation test involves objective questions and does not depend on thought processes of the alleged discriminator;
 - g. knowledge is required of the disability only, section 15 (2) does not extend to requirement of knowledge that the “something” leading to unfavourable treatment is a consequence of disability;
182. It does not matter precisely which order these questions are addressed. Depending on the facts the tribunal might ask why the respondent treated the claimant in an unfavourable way in order to answer the question whether it was because of “something arising 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.

183. When considering justification, the role of the Tribunal is to reach its own judgment, based on a critical evaluation, balancing the discriminatory effect of the act with the business/organisational needs of the Respondent.

S.19 EqA 2010 – Indirect Discrimination

184. S.19 of the Equality Act 2010 is in the following terms:-

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a 15 relevant protected characteristic of B's.

(2) For the purposes of sub-section (1), a provision, criterion or practice is discriminatory in relation to a relevant characteristic of B's if –

(a) A applies, or would apply, if the person to whom B does not share the characteristic,

(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with person with whom B does not share it,

(c) It puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(s20(3) EqA 2010)

Time

185. Section 123 EqA 2010 sets the time limit for bringing any complaint in contravention of Part 5 of the EqA 2010 and provides that proceedings may not be brought after the end of

- a. The period of three months starting with the date of the act to which the complaint relates, or
- b. Such other period as the employment tribunal thinks just and equitable.

186. For the purposes of s.123 EqA 2010, conduct extending over a period is to be treated as done at the end of the period and a failure to do something is to be treated as occurring when the person in question decided on it (s.123 EqA 2010).

187. Further s.124(4) EqA 2010 provides that in the absence of evidence to the contrary, a person is to be taken to decide on failure to do something:

- a. When a person does an act inconsistent with doing it, or

- b. If a person does no inconsistent act, on the expiry of the period in which a person might reasonably have been expected to do it.

Conclusions

Disability – s.6 Equality Act 2010 and knowledge

188. The Respondent conceded and we concluded that the Claimant was disabled within the meaning of Section 6 EqA 2010 between 25 March 2021 and the end of her employment with the Respondent by reason of Long Covid.
189. In relation to knowledge for the purposes of the s.20/21 and s.15 EqA 2010 claims, we had some sympathy with the Respondent's position, that in 2021 they did not know how Long Covid would last for; that possibly no one knew what the likely or possible duration of Long Covid would or could be. We accepted that whilst that would likely have been the position in March 2021 on the initial diagnosis of Long Covid, we further concluded however that in respect of this particular Claimant this position must have shifted as 2021 progressed.
190. Throughout the period that the Claimant was off work with Covid and Long Covid, the Respondent knew the impact on the Claimant of her symptoms, where she spoke of the debilitating impact on her day to day activities and we concluded that the Respondent was aware, or ought to have been aware of the impact of the Long Covid on the Claimant's day to day activities during her employment.
191. The Claimant had been presenting Fit notes, which indicated that she was not fit for work by reason of Long Covid from March 2021. Both DI Comley and Sarah Davies (HR) had the occupational health report of 16 July 2021, some 7-10 days after that report - effectively by the end of July 2021, which indicated adjustments were required for the Claimant for a further 3-6 months from that time. This would take the period that the Claimant was likely to require adjustments to a year from the date she first contracted Covid and first had the symptoms that she relies on to support her claim that she is disabled by reason of Long Covid.
192. We concluded that knowledge of the disability placed a burden on the Respondent to make reasonable enquiries based on this information. Whilst we had found that neither DI Comley nor Sarah Davies had specifically questioned with the Claimant whether she had required reasonable adjustments, they had nonetheless had put some thought to adjustments to accommodate the Claimant as they had adjusted the length of the sickness meetings for the Claimant, such that they were limited to one hour to enable her to manage them.

193. We concluded as a result that from the date of receipt of the 16 July 2021 report, the Respondent could no longer say that they 'could not reasonably be expected to know' (para 20 Sch 8 EqA 2010, para 6.19 EHRC Code) that the Claimant was disabled as, from that point, and certainly by the beginning of August, the Respondent was on notice that the substantial adverse effects of the condition were likely to last for at least 12 months in the sense that it could well happen (para C3).

Failure to make reasonable adjustments – s.21 Equality Act 2010

194. In relation to the PCPs relied on, the Respondent conceded that these were PCPs that had been applied to the Claimant but asserted that the PCPs were not applied to the Claimant until after she was ready to return to work. We agreed.

195. We concluded that whilst the Claimant had been informed of the obligation to undertake work from the office, with minimal home work, as early as May 2021 and that the 6 weeks phased return, commencing at 50% of hours, had throughout the Claimant's employment been a practice of the Respondent, we did not accept however that these PCPs had been applied from 2 February 2021.

196. We concluded that all three PCPs had been applied to the Claimant but not until, from the earliest, 20 August 2021 when the Claimant indicated that she was ready and able to return in some capacity and in practice from 8 September 2021 when the offer of the alternative role in PPU was provided to the Claimant.

197. In relation to substantial disadvantage, whilst we accepted that the Claimant was not on full pay whilst off work from 25 March 2021, and had exhausted 6 months' half pay, we did not conclude that the Claimant had demonstrated that the PCPs themselves prevented the Claimant from engaging in a phased return to work. Rather, the Claimant's health prevented her from working in any capacity and as such, the PCPs did not disadvantage the Claimant.

198. Whilst we accept that taken together the PCPs could, in principle, operate as a barrier to a return to work for an employee seeking to return, in this case and for this Claimant, they did not so operate.

199. We did not accept the Claimant's case that she could have returned to work before the offer on 8 September 2021, or that she was continually expressing a desire to return to work. Rather we had found the Claimant was not fit to return to work in any capacity until, at the earliest, 20 August 2021, when she confirmed as much to DI Comley, and we did not conclude that the PCPs themselves had operated as the barrier itself to the Claimant returning as had been submitted by the Claimant's representative.

200. The offer of the ABE post, made on 23 August 2021 almost immediately after the Claimant was in a position to return, was not acceptable to the Claimant irrespective of the

PCPs as she was not prepared to and did not feel able to video interview. As such the specific PCPs did not operate to disadvantage the Claimant in relation to that role.

201. In reality, the earliest that it could be said that the PCPs disadvantaged or were capable of disadvantaging the Claimant, was when the offer was made for the Claimant to return to PPU on 8 September 2021, something again the Claimant did not consider she could do as she wanted a fresh start and in fact resigned some two days later after accepting a post at Newport City Council. We found that the Claimant did not want to return to PPU, with adjustments or otherwise, and the PCPs did not disadvantage the Claimant in that regard.
202. In any event, whilst we accept that 'substantial disadvantage' under s.212 (1) EqA 2010 is simply something more than is 'minor or trivial', were not satisfied that the Claimant had demonstrated that the PCPs placed her more generally at a substantial disadvantage. Whilst the OHA reports had recommended adjustments to those PCPs, the Claimant in fact had accepted a role which, whilst allowing the Claimant to predominantly work from home, entailed a working week of 38 hours and did not commence on a phased basis of 25% or otherwise.
203. The Tribunal concluded that in accepting and commencing this role at Newport City Council, despite the recommendations from the OHA back in July and the Claimant's own evidence that she could not return to work on more than 25% of hours or indeed more than 50% of hours, the Tribunal could not identify the actual functional effects of the disability on the Claimant at this point in time. As a result, we concluded the Claimant had not demonstrated that the 50% of hours and/or longer phased return requirement placed her at a substantial disadvantage and had not demonstrated that she suffered a substantial disadvantage by reason of her disability as a result of the application of those PCPs.
204. It was not argued that the failure to comply with the duty to make a reasonable adjustment arose in respect of each PCP independently and the Claimant's representative conceded that each PCP in isolation did not disadvantage the Claimant, only when operating in conjunction with each other. However we would say that the PCP of minimal homeworking was not, in our view a reasonable adjustment taking into account the history of the need to support the Claimant and in the context of the operation of the Respondent.
205. As such, the Tribunal concluded that the PCPs did not place the Claimant at a substantial disadvantage and the claim of failure to comply with the duty to make a reasonable adjustment fails and is dismissed.

Discrimination arising from disability – S.15 Equality Act 2010

206. It was agreed during submissions by the parties that the 'something arising' was not the Claimant's long term sickness absence but the Claimant's inability to work 50% of her hours or at all.

207. We accepted that up to mid to late August 2021, the Claimant had been unable to work 50% of her hours or at all and that this amounted to something arising in consequence of her disability.
208. However, we were not certain that this was still 'something arising in consequence of her disability' of Long Covid from 20 August 2021 i.e. from the time that the Claimant started to indicate that she was fit to attend work.
209. Although the Claimant's evidence has remained that she could not commence work at more than 25% of her hours, we had found that she had at that time also started to apply for full-time jobs external to the Respondent organisation and by 10 September 2021 accepted a full time post at Newport City Council, a post which she commenced some 4 weeks later working 38 hours per week albeit from home.
210. This undermined what the Claimant was saying to the Respondent and her case in this Tribunal, that her inability to work 50% or at all was 'something arising' as at 20 August 2021, such that we concluded that being unable to work 50% of her hours or at all was no longer 'something arising' in consequence of her disability of Long Covid at that point in time.
211. On the basis of our findings of fact, we concluded that the Claimant had not demonstrated that the requirement to work 50% of hours, or indeed on a phased return to work over 6 weeks, operated as a barrier for her returning to work or that these were 'hard lines' that the Claimant could not get around until 8 September 2021 as had been submitted by the Claimant.
212. Rather, it was not until this point in time that the request for a phased return for longer than 6 weeks, commencing at 25% of hours and primarily homeworking could have operated as a barrier as, until 20 August 2021 the Claimant was not in a position to return to work at all due to her ill-health. Further, the Claimant did not demonstrate that they did not operate as a barrier to the Claimant returning to work as the Tribunal found that the Claimant did in fact return to work, working in excess of those hours at Newport City Council from 20 September 2021, some 4 weeks later.
213. We therefore concluded that if the Respondent did subject the Claimant to unfavourable treatment, by declining requests for a phased return of longer than 6 weeks and/or to work less than 50% of her hours, this was not because of something arising out of the Claimant's disability. Rather it arose because the Claimant did not wish to return to work for the Respondent on this basis.
214. In terms of the unfavourable treatment, of declining the Claimant's requests to work primarily from home, whilst the Tribunal wrestled with how this was because of the 'something arising' of the requirement to work 50% of hours, we concluded that this

treatment was not unfavourable treatment in the context of the need to provide support to the Claimant on her return to work.

215. In this case, the Tribunal concluded that the Claimant had not demonstrated a causal link between any unfavourable treatment and the 'something arising' and the claim brought under s.15 EqA 2010 is therefore not well-founded and is dismissed.

Indirect Discrimination – S.19 Equality Act 2010

216. We would repeat that whilst the Claimant was aware of the return to work requirements, we did not conclude that these operated as a barrier to the Claimant returning and did not apply to the Claimant until she was in a position to return to work in late August 2021 and in any event by 8 September 2021 when the alternative PPU offer was made.

217. Whilst we did accept that the PCPs applied or would have applied to others, we did not conclude that it had been demonstrated by the Claimant that the PCPs put those who shared the Claimant's disability of Long Covid at a particular disadvantage compared to others. In reaching this conclusion we considered the pool for comparison was those who had symptoms of Long Covid of breathlessness, fatigue and brain-fog, who do not have Long Covid and/or are not disabled by reason of such symptoms.

218. We concluded that it was not inevitable that those with Long Covid would be disproportionately affected by the application of the PCPs and the Claimant had not provided any evidence, whether statistical or expert or otherwise, or demonstrated to us the group disadvantage that she was required to demonstrate under s.19(2)(b) EqA 2010.

219. We therefore concluded that the claim of indirect discrimination did not succeed and should also be dismissed.

Jurisdiction – time limits

220. We concluded that the Claimant's claims had been brought within three months of the acts complained of, taking into account the effect of the 'stop the clock' provisions in respect of early conciliation had been brought within time as:

- a. the application of the PCPs did not arise until 8 September 2021,
- b. early conciliation was entered into on 1 December 2021 and ended on 11 January 2022; and
- c. On 2 February 2022, the Claimant's claim was accepted by the Tribunal.

Employment Judge R Brace
Dated: 3 April 2023

JUDGMENT SENT TO THE PARTIES ON 6 April 2023

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche