EMPLOYMENT TRIBUNALS

Claimant: Mr G Levy

Respondent: The Commissioner of Police of the Metropolis

Heard at: Watford, by video **On:** 22, 23, 24, 25 & 26 May 2023

Before: Employment Judge Dobbie, sitting with members Mrs Knapton and Mrs Davies

Representation
Claimant: In person
Respondent: Mr R Oulton (Counsel)

RESERVED JUDGMENT

1. The Claimant's claims for breach of the duty to make reasonable adjustments are dismissed upon withdrawal;

2. The Claimant's claim for victimisation succeeds in respect of the detriment of being moved back to Team 1, Met Detention in November 2021. The victimisation claim based on the detriment of Insp Warren blocking the restoration of the Claimant's roster fails;

3. The claim for harassment related to disability succeeds in respect of two acts of unwanted conduct as set out below. The third act of unwanted conduct (moving the Claimant back to Team 1, Met Detention in November 2021) cannot simultaneously amount to a victimisation detriment and harassment. Therefore, it is not upheld as a harassment claim, having already been found to be an act of victimisation detriment above; and

4. The detriments claimed under s.15 Equality Act 2020 ("EqA") for discrimination for something arising in consequence of disability are the same acts as relied upon as unwanted conduct for the harassment claims. The Tribunal cannot uphold them as both claims under s.15 EqA and harassment. Accordingly, those claims are not upheld under s.15 EqA, having already succeeded as harassment claims.

REASONS

INTRODUCTION

5. This is a claim brought by a current serving Police Sergeant of the Respondent, for disability discrimination, harassment and victimisation.

6. The matter came before us having been case managed by EJ Moore. In an order sent to the parties on 27 October 2022, EJ Moore set out the issues to be decided, as set out at pages [52-54]. By the time the matter reached us, the Claimant had withdrawn one of the claims under s.15 EqA (namely item 4.2(c) in the list of issues [53]) which had been dismissed upon withdrawal.

7. Prior to the final hearing, the Claimant had also written to the Tribunal seeking to withdraw all reasonable adjustments claims, but his request had not been actioned and those claims had not been dismissed. I clarified with him whether he maintained that withdrawal and he confirmed that he did, hence I agreed to dismiss that claim upon withdrawal also.

8. In respect of the jurisdictional issues, it was agreed with the parties that there was no live time point to be determined, given the dates of the acts relied on by the Claimant. Further, it was agreed that there was no need to determine whether the Claimant was disabled at an earlier time than the date already conceded by the Respondent (due to the dates of the acts giving rise to the claims all falling after the date of the Respondent's concession). The Respondent had also conceded knowledge of disability from a date which pre-dated the acts relied upon and had conceded that the pleaded protected acts were in fact protected in law.

9. Accordingly, the remaining issues to be determined were narrower than those set out in the list of issues, being purely the substantive merits of the claims for: victimisation, harassment and disability-related discrimination.

10. Over the course of the hearing, we live heard evidence from the following witnesses:

    For the Claimant:
    (a) The Claimant; and
    (b) PS South.

    For the Respondent:
    (c) Inspector Whelan;
    (d) Inspector Warren
    (e) Chief Inspector Walker-Tassel
    (f) PS Aggarwal;
    (g) Inspector Moseley; and
    (h) PS Micalleff.

FINDINGS OF FACT

11. The Claimant commenced employment on 22 September 2003. At the material times pertaining to the claims, his substantive role was as a Police Sergeant, working as a Custody Officer in the Custody Suite at Collindale (working what is known as the mid-shift). Within the Respondent, there is the concept of a "BWT" role, which is the individual's substantive role and stands for Budgeted Workforce Target. We were informed that this is the phrase used to mean that someone's role is part of the budgeted team for their specific department. Hence, if they are said to be "within BWT", their role falls within the budget for the department they work for. If they are assigned elsewhere for a temporary period (perhaps for recuperative duties) they would be "outside BWT" of that team, meaning their labour fell as surplus to the BWT of that team. When placed on assignment in this way, their original role is kept open for them and remains part of the BWT of their original team, albeit that the BWT role would be retained for them, awaiting their return.

12. The Claimant has suffered with asthma for many years but it was well controlled and he was physically active and able to undertake the full remit of his duties as a Custody Officer (which is a front-line role) until late 2020.

13. The Claimant suffered from Covid-19 in February 2020 and took sickness absence in February and March 2020. On 26 October 2020, he was assessed by Occupational Health ("OH") and advised that he was a vulnerable person by reason of bronchial asthma that had been exacerbated. OH stated he should avoid frontline duties, meaning he was not fit to do his substantive BWT post in the Custody Suite [212].

14. In early December 2020, the Claimant started working for the Met Detention Centre Operations Department ("Ops") in Lambeth, as a form of recuperative duties due to his condition. All Sergeants working in Ops were working from home at this time, due to the pandemic lockdown, and therefore the Claimant was working from home too. The Claimant's role was not formally or permanently changed, this was a temporary measure to accommodate the adjustments he needed, as advised by OH. The Claimant's line management remained with his substantive BWT role, namely in the Custody Suite at Collindale (latterly, under Inspector Whelan). However, the day-to-day management of his work in Ops was carried out by an Inspector in the Ops team, Inspector Warren (who sits in the Planning and Continuity Team in Met Detention, overseeing the financial aspects of Met Detention, policy changes and vetting for police staff and contractors).

15. This meant that during the Claimant's recuperative assignment to Ops, his management was split between Inspectors Whelan and Warren: Insp Whelan was responsible for matters of welfare, performance, absence management, etc but daily duties and annual leave requests (anything pertaining to his role in Ops on a day-to-day basis) sat with Insp Warren. As a result, Insp Warren did not have access to any OH reports or consultations with the Claimant about OH matters, which only Insp Whelan was privy to.

16. The Claimant's working pattern for his BWT post in Met Detention was a 28-day rotating shift pattern of 5 days on, 5 off, 4 on, 4 off, then 5 on 5 off, working 12-hour days. We shall refer to this as the "5-4-5" pattern or the "28-day rotating" pattern. When the Claimant was placed in Ops on recuperative duties, he continued to work to that pattern of rotating days but did fewer hours per day. Sometimes, he worked 6 hours (half his contractual hours) per shift, and other times up to 8 hours. On the Respondent's HR management system (called "CARMS") he was recorded as still being on the 5-4-5 pattern of 12-hour shifts, but each shift was recorded on the system as comprising 6 or 4 recuperative hours within the 12 hours.

17. In respect of his work in the Ops team, the Claimant was not replacing anyone, nor occupying a vacant role. He was simply an extra resource on top of the normal team BWT. The staff in that team tended to work a Monday to Friday shift pattern, 8 hours a day, from 7am to 3pm and occasional weekend working. However, not all of them did. There were some staff working other patterns, including Sergeant Aggarwal who worked the same shift pattern as the Claimant, meaning he was sometimes off work for 4 or 5 consecutive days.

18. On 20 May 2021, the Claimant was assessed by OH. The report stated that he was fit for recuperative duties, 8 hours a day and that he would benefit from a stable shift pattern [284]. OH also advised management that in OH's view, the Claimant was likely to be covered by the definition of disability under EqA [285]. There was no mention of whether the Claimant needed his 4-5 rest days between his stints of 4 or 5 days on. There was similarly no mention that he could work a 40-hour (full-time) week every week. Whilst the report was written on the basis of the shift pattern he was working on at the time (the 5-4-5 rotating pattern) it did envisage a move to a static weekly pattern, but did not specify rest days or recommended / maximum hours for any such stable pattern. The report also stated "please refer to OH when he has a diagnosis / his symptoms are better for further assessment and recommendations" [285].

19. On 14 June 2021, the Claimant had an appointment with a Consultant to discuss his condition. On 16 June 2021, the Claimant sent an email to Insp Warren requesting a meeting to discuss his condition but noting there had been no diagnosis by that point. Insp Warren replied the same day suggesting they speak the following day (namely 17 June 2021) [287].

20. In a letter dated 17 June 2021, based on the assessment on 14 June 2021, the Claimant's Consultant diagnosed with him with COPD [749], i.e. Chronic Obstructive Pulmonary Disease, a chronic degenerative condition that causes breathing difficulties.

21. The Tribunal finds that on balance of probability, Insp Warren and the Claimant did discuss his health on 17 June 2021. We make this finding because they had agreed to do so in the emails on 16 June and because in the Claimant's live evidence, he stated he "I spoke to Inspectors Whelan and Warren about it at the meeting I had on 17 June, I informed her [Insp Warren] I had my diagnosis". Further, in paragraph 13 of Insp Warren's statement she stated: "I cannot recall the specifics of this conversation with Gill or whether I asked him to update me on his latest OH advice,

although we had several discussions whilst he was working in the Duties / Operations Team." Further, the Consultant's letter was dated that day [749] and in the emails of 24 June 2021, Insp Warren refers to an OH referral and "consultant's advice" [289].

22. Accordingly, we find that Insp Warren knew that the Claimant had been diagnosed with COPD by this point and whatever she may not have known about COPD, she did know it was a progressive long-term condition. It was due to this that she started the email of 24 June 2021 by stating "I am assuming you will be with us for a while longer now that you have received your OH referral and consultants advice [sic]" [289]. It was for this reason (the belief he would be in Ops for some time) she first requested that the Claimant move to the standard Monday – Friday, 7am-3pm roster that various other members (though not all) of the team worked. The reason given for wanting to move the Claimant to that shift pattern was that "it would greatly benefit Tracey [South] in the North area and free up Chloe to work on other areas when needed' [288-289].

23. The Claimant replied on 25 June 2021 by email stating:

> "I am happy with the idea of changing my shift pattern to greater suit Ops. I am coping reasonably well with what I am doing in terms of health, but also get extremely fatigued when I push things so I would like to speak about expectations around what I can do at work – I am extremely scared of reducing my ability to be active to avoid deterioration and if I follow an Ops schedule, this may be hard to maintain activity levels without a negative impact due to reducing how much I do due to more working days or increased demand on me just fatiguing me. If I can incorporate some of that in my working day then I think I will be able to maintain a good balance. I hope that all makes sense. I have seen that you are off till July so I guess we will speak then." [288].

24. On 23 July 2021, the Claimant was assessed by OH again, which advised that he was fit for recuperative duties, working 8 hours a day and working from home. The report did not comment on or discuss whether he could do 8 hours a day 5 days a week [293]. However, it did say he is not fit to move up to full-time hours at that time [295] which would tend to indicate he was not deemed fit to do a standard working week of 40 hours, Monday to Friday (7am-3pm) or any full-time roster at this time. Insp Warren was not sent a copy of this OH report because the Claimant's line management for welfare and absence remained with Insp Whelan as described.

25. The Claimant wrote to Insp Warren on same day (23 July 2021) to update her on the OH advice and stated:

> "I was asked what hours I was doing and how I would cope with Monday to Friday 40 hour week. I responded much as I did when you posed the question – I am happy to move to a Monday to Friday 8 hour shift pattern, I just need understanding around two main issues, that I seem to have a limit before I fatigue and I am very concerned about deteriorating. Both these mean that with full time working, having to maintain physical activity to reduce any deterioration and having a young family I feel I need understanding around providing me time to go for walks or I won't have the capacity to maintain that activity. I also pointed out that although I am working at home, if there was a need to travel to work that too is part of my activity capacity, if that makes sense. The discussion also covered

medical retirement, which was raised in the OH referral. With the concerns I raised she questioned if adjusted duties were suitable as they require you to be on a full time roster and my responses seemed to indicate that this might not be a reasonable expectation. She is therefore going to refer me to the CMO [Chief Medical Officer] and will be seeking my permission to have access to my medical records. In the meantime she advises that there is no change to my OH recommendations." [297-8]

26. Insp Warren did not reply to that email and there was no conversation at that time or prior to it, despite the fact that the Claimant had suggested on 25 June 2021 that they should discuss his situation after Insp Warren returned from leave in June. On 25 July 2021, the Claimant informed Insp Warren he was going on annual leave and signed off "speak to you in a couple of weeks" [299]. She did not reply to that email either.

27. On 12 August 2021, the Claimant had an OH review meeting with Insp Whelan and mentioned that he faced difficulty maintaining a balance between working hours and finding time to exercise, but that he did not want to make flexible working request to reduce his hours to part-time. There was no discussion about shift patterns [300-301]. The Claimant did however mention that he would need regular exercise and to take rest breaks due to fatigue. He did not specify whether this was a need for rest *during* a shift, or time between shifts (nor how long or frequent any such rest periods would need to be).

28. In early September 2021, the Claimant ceased taking a specific medicine on the advice of his GP and the withdrawal caused what the Claimant describes as a mental health crash / crisis. On 8 September 2021, he self-reported as sick on the work system. He had a short conversation with Insp Whelan by telephone, informing him he was suffering mental ill-health.

29. Inspectors Warren and Whelan spoke on 8 September 2021 and Insp Whelan accepted that he had (incorrectly) assumed that the Claimant was likely to be off for some time due to the fact that the Claimant had reported sick with mental health concerns. Insp Whelan also accepted that he expressed something along these lines to Insp Warren, but not specifying any particular timeframe he believed the Claimant would be signed off for.

30. By approximately 08:30 on 9 September 2021, Insp Warren asked Jane Whaley to implement a roster change for the Claimant to move him to 8 hours a day, five days a week (Monday to Friday, 7am to 3pm) every week from 27 September 2021. Jane Whaley confirmed this by asking the MO6 Roster Team to make the changes on the system. [333] There is no independent evidence of what was said by Insp Warren to Jane Whaley when this was requested. Insp Warren accepts she made the request by email (para 24 Insp Warren's statement) and this is evident from the email at page 333 which states "Re" in the subject line. However, we do not have the first email in the chain and have been told it cannot be found. The Claimant was not informed of the request to change his roster and neither was Insp Whelan. Insp Warren had not sought medical advice about the Claimant from OH or any other source before deciding to change the Claimant's roster.

31. Insp Warren accepted (and the evidence showed) that the Respondent's rules require a minimum if 28 days' notice of a change in roster. The Claimant was plainly not given that on this occasion. Even if he had been informed on 8 September 2021 (when the request was made) this would have been 19 days' notice. As it happened, he was not told at all. He discovered the change himself, quite inadvertently, as described below.

32. On 9 September 2021, just after noon, there was a brief exchange of WhatsApp messages between Insp Whelan and the Claimant, in which the Claimant informed Insp Whelan:

    "feeling better today. Spoken to the doctor and got some sleeping tablets prescribed. I'm going to need a couple of days rest but should be back soon. Thanks Gill". [C1]

33. On 11 September 2021, the Claimant was feeling sufficiently well and was able to log in to work. In doing so, he discovered that his roster had been changed when he was on the CARMS system processing an annual leave request for another officer, as part of his duties. The Claimant raised a written complaint to Chief Inspector Walker Tassell, (Insp Warren's superior officer in Ops) but copying in Inspectors Hurd, Warren and Whelan [316-8]. In that complaint, the Claimant stated:

    "I have been casually asked how I would feel about such a change in June and I responded with my concerns relating to this around my health, although accepting that this would benefit Ops which I would be happy to do… to come back to with a new shift pattern imposed on me, without notice, warning, further discussion or review of my concerns has shocked me. I am not opposed to the change as long as my concerns are understood and although I am supposed to be given 28 days' notice of a shift change I am not looking to argue this point… I understand that in view of my OH referral and the needs of the organisation that this is the most reasonable outcome." [316]. He also described feeling like a pawn on a board to be moved around as seen fit.[316]

34. Insp Warren replied (Cc'ing CI Walker-Tassel and Inspectors Hurd and Whelan) on 11 September 2021 apologising for not giving the Claimant advance notice of the change and stating it was because she believed he would be "off sick for some time" and that she "wanted to discuss the implications of this with you personally when you resumed". She stated that the change had been "discussed" three months prior and that she had simply forgotten to input it into the system until then, which is why it happened when it did.

35. In fact, Insp Warren accepted in her live evidence that the change in roster had never been "discussed" (as in a conversation in person or by other means) and the email exchange was all that had taken place and that is what she described as a discussion. In the email of 11 September 2021, she further stated that: "I know you are on recup hours and only work 8 hours per shift, but that was also discussed that it would be accommodated locally". She signed off stating "If you wish to discuss your childcare issues and your recup hours, I shall be back in work on Tuesday and willing to have that discussion. [323]

36. The Claimant replied the same day stating he fully accepted her apology and that she should not be reading her emails on her day off and that it had been a challenging time for her. He also stated he wanted to discuss the change and that it had never actually been discussed (there had only had a few emails about it). He stated he did not expect it to have been actioned until it had been so discussed. He concluded stating:

    "I am happy to forego the 28 days… I am concerned about my being able to cope in terms of my health with less time to recuperate, and more importantly, my desire not to deteriorate through appropriate activity, but I am sure we will cover that when we are both in and are able to speak." [325].

37. In her live evidence, Insp Warren stated that from the comment in his email about having "less time to recuperate" she knew he meant that he was concerned about the impact of the loss of rest days he enjoyed under the 5-4-5 pattern.

38. On 14 September 2021, Insp Warren sent the Claimant an email noting that he was on a rest day and she suggested speaking on the Friday [330]. The Claimant then requested to take the Friday as a suitable rest day to balance his hours before the shift change came into effect (otherwise his diary would have been in disarray) and it he suggested they both speak the following Tuesday [329]. Insp Warren replied stating she would call him on Tuesday "if she had a spare 10 minutes" [328].

39. On 15 September 2021, CI Walker-Tassel replied to the Claimant's email of 11 September 2021 by email, acknowledging she did not know the background but nonetheless stating that she deemed Insp Warren's request to change his hours to be "very considerate and fair". She further stated she was unclear why he deemed it inconsiderate as "it would appear to be as a result of your agreement!". She then stated:

    "The request to change your hours is fair, in that the role you are currently undertaking in Ops requires these hours. Having read your email regarding fatigue and health concerns, a Mon-Fri role of more consistent hours seems to be much more supportive for you, than doing night duties. The role you are doing is also to support you in getting back to full fitness. If this role or the support given by the role does not suit you, that I can review with you, what other roles in the command are available, to support you whilst you return to full fitness. If your condition, and the effect on your health is long-term, potentially leading to adjustments, then I would advise getting ahead of the HR process for your own sake, and look to other roles within the MPS which could provide a more suitable role and support for you." [336].

40. Pausing there, the Tribunal notes that CI Walker-Tassel (on her own admission in the email) had no insight into the Claimant's situation. She discusses a move away from nights, when he was not in fact working nights. She professes to know what would be a more suitable shift pattern for him, when she has no medical training nor knowledge of his condition and without consulting him about his condition or what he thinks would assist. Nor had she read any of the OH reports or similar. Her email is defensive (in support of Insp Warren). It dismisses the possibility that the shift change is anything but correct and fair. We considered that this indicated a closed mindset and dismissive approach to the Claimant for

not "toeing the line" and doing as he was told by a superior. She also encouraged him to seek a role elsewhere rather than encouraging him to explore adjustments within the Ops role.

41. We noted that Insp Warren did not reply to this email informing CI Walker-Tassel or the Claimant that she never in fact intended him to work the full-time hours and was open to and expecting to make adjustments, which would have enabled him to stay in the Ops role (which is what she told the Tribunal was in her mind).

42. The Claimant replied on 18 September 2021, Cc-ing Inspectors Hurd and Warren stating he agreed the request itself was reasonable and that he had been amenable to the change, but that was in June 2021 (prior to his diagnosis of COPD and prior to his health deteriorating immediately before the shift change.) He stated: "making changes to a person's shift pattern whilst they are off with mental health concerns without notification either prior to or after the change [] is unreasonable." He also explained that he had not unequivocally agreed to the shift change in June 2021, rather he had expressed he was amenable to it but held reservations about it due to his health. Further that he was awaiting an OH referral and that any decision should be deferred until he is consulted. He highlighted that Insp Warren had failed to consult with him to date and corrected CI Walker-Tassel's suggestion that his condition was one which could ever improve to "full fitness". He explained it was a long-term disability that is chronic and progressive. He cut and pasted an extract from the July 2021 OH report and stated that it was clear from that report that he was not fit to work full-time hours. He concluded by stating that having a number of consecutive rest days under his existing shift pattern was beneficial and that the new working pattern will not support him in this way. [334-335].

43. On 19 September 2021, the Claimant met with Insp Whelan for a Recuperative Duties review meeting [342-3]. The meeting notes record that the Claimant did not feel able to work 8-hour days full time and that the Monday to Friday 7am – 3pm shift pattern was contrary to the OH advice. Insp Whelan noted that an update from the Chief Medical Officer ("CMO") would be critical. Insp Whelan stated that he (Insp Whelan) would speak to another inspector (presumably referring to Insp Warren) to consider changing the shift pattern back to the Claimant's 28-day rotating pattern in the meantime. The Claimant also informed Insp Whelan that he was progressing a grievance about the way in which his hours had been changed.

44. Also on 19 September 2021, the Claimant raised a grievance to Superintendent Payne narrating what had happened and alleging disability discrimination [339] (This is relied on as the first protected act and the Respondent has conceded it is protected in law.)

45. Between 19 and 27 September 2021, Inspectors Warren and Whelan must have spoken about the Claimant. We make this finding because in the email of 27 September 2021, the Claimant notes that Insp Whelan had told him he (Insp Whelan) and Insp Warren had in fact spoken and in Insp Warren's reply email, she indicates she is aware of the matters that Insp Whelan had told the Claimant he would raise with her and she does not refute that she had spoken to Insp Whelan [385]. Further, Insp Whelan

accepted in his live evidence that they probably had had a discussion during that time. When asked in live evidence whether it was reasonable to assume that Insp Whelan would have informed Insp Warren of the Claimant's grievance at this time, he replied "Quite possibly yes".

46. On 21 September 2021, in an email replying to the Claimant's email to her of 18 September 2021, CI Walker-Tassel informed the Claimant that it was for him to discuss / agree with his line manager and get a roster on the CARMS system. She plainly understood Insp Whelan was the Claimant's line manager because in the next paragraph she suggested that if the role in Ops is suitable, the Claimant could change line management to Insp Warren. She also encouraged him to consider other roles across the Respondent in case there were no permanent opportunities in Ops, once all adjusted duties officers had been accommodated. Inspectors Whelan and Warren were copied in and mentioned in the email, with a suggestion that they take action [344-348].

47. On 21 September 2021, the Claimant replied, Cc-ing Inspectors Warren and Whelan, stating that further input from OH was needed and that it had been agreed with Inspector Whelan that the Claimant would work to his existing roster until the OH referral outcome, when adjusted duties or ill health retirement could be considered. In the final paragraph, the Claimant requested that his roster be restored to the 28-day rotating pattern and explained the impact and strain that the changes and lack of consultation had on him [349-350].

48. On the same day, 21 September, the Claimant sent emails to Insp Whelan and Jane Whaley requesting a formal change on the CARMS system to his original roster pattern and to do so before the roster change was due to start (on 27 September) which would lead to problems on the CARMS system [362, 370].

49. At 21:06 on the same day, Insp Warren replied to the Claimant out of hours noting it was the Claimant's rest day, but inviting him to make contact if he wanted to, failing which they would speak on Tuesday [371]. She made no mention of re-implementing the change to his roster to the Monday to Friday 7am-3pm pattern.

50. Just four minutes later, Insp Warren emailed Jane Whaley instructing her to move the Claimant's roster back to the original rotating pattern until 25 October 2021, then the Monday to Friday 7am-3pm pattern from then on (i.e. commencing on 26 October 2021) on the basis that he was "insisting" on his 28 days' notice [372]. This was inconsistent with the orders given to her by CI Walker-Tassel and inconsistent with what she had led the Claimant to believe she would do in the email to him just four minutes prior. Further, it is factually incorrect in that the Claimant had not insisted on 28 days' notice and Insp Warren knew this. Indeed, in his email to Insp Warren above, the Claimant had expressly stated he was happy to forego the 28 days' notice. His objections to the new shift pattern were far more substantive than the notice requirement.

51. On 23 September 2021, on one of the Claimant's rest days, the Claimant attempted to call Insp Warren twice and there were a few messages back and forth seeking to arrange a time to speak. The Claimant then

suggested they schedule a time to speak on the Tuesday [379-380]. Insp Warren did not respond further on that suggestion and did not have a conversation or make further contact with the Claimant on this topic until he complained on 27 September 2021, as set out below.

52. On 24 September 2021, the Claimant was advised that to progress his grievance he had to complete form 6690. This was essentially mis-advising him to skip directly to the formal stage of the process, without attempting the informal stage, and completing the appeal form.

53. On 27 September 2021, the Claimant was concerned that the roster published that Friday showed him working the incorrect roster. He emailed Insp Whelan saying that it was playing on his mind because the roster was wrong and would lead to problems on CARMS. [378] The Claimant explained in the email that he had been trying to make contact with Insp Warren since June 2021 and there were repeated failures by Insp Warren to make time to speak to him.

54. At 08:28 on 27 September, the Claimant wrote to Insp Warren querying the roster and stating he cannot work more hours when he is on reduced hours [385]. Insp Warren replied at 08:52 that day informing the Claimant that he would work his 28-day rotating pattern until 25 October then move to the Monday to Friday, 7am-3pm pattern, which she said was adequate for the 28 days' notice [384]. She stated Insp Whelan was arranging another OH referral to see how many hours a day the Claimant could work and that "this should come through before it changes again" [385].

55. At 09:17, the Claimant wrote further to Insp Warren stating:

"Considering your reply I no longer feel that a constructive conversation can occur between the two of us and I shall be contacting my line manager to discuss this. I am unsure of why you would instruct me to be put back on this roster before my line manager has received advice from OH that I can work full time or what hours would suit my disability, especially as the current advice is that I cannot do full hours. What assurance did you have that the OH advice will occur in that timescale? … let me make it clear that I believe that not involving me in a discussion, and for clarity the below is a diktat as far as I can see, amounts to disability discrimination. It has already happened once with the previous roster change and I don't know why you would be repeating the experience." [384]

56. Insp Warren replied at 09:23 insisting that the change "will happen" on the date she had imposed it. She stated:

"Good morning Gill. I'm sorry you feel like this. I was not intending putting you on full hours straight away, which is why the discussion took place about referring you back to OH to advise on the recup hours. We had the discussion about moving to Monday to Friday and you agreed, therefore you have been given your 28 days' notice and it will happen on 26th October. I am more than happy to go along with the advice that OH give us and if you don't have a referral before 26th October, we can put in a local arrangement. I believe that I have been supportive of your situation, but we do need you to go on to a Monday to Friday shift pattern, which was agreed. I'm not sure where discrimination comes into this if we are supportive of what OH advises us?" [383].

57. The Claimant replied further at 09:57 explaining why he was aggrieved that she had once again changed the roster without discussion, OH advice or why she had done it when CI Walker-Tassel had said it was for his line manager (Insp Whelan) to do. He once again alleged disability discrimination, stating he believed she had been dishonest in presenting his emails of June 2021 as an agreement to the roster and that: "For you to seek changes without that [OH] advice amounts to disability discrimination as you are treating me as if I was someone without a disability, therefore it is discriminatory." [382].

58. Also on 27 September 2021, the Claimant submitted the incorrect form 6690 in pursuit of raising a grievance against Insp Warren and CI Walker-Tassel [388, 438-442].

59. The Claimant worked three shifts / days after the email exchange with Insp Warren (on 27 September) including attending and participating in morning briefings and doing his work as normal. At no point did Insp Warren seek to speak to him to resolve the tension or issues that had arisen. The matter had been ongoing since June 2021 and she had not found the time to consult with him about his condition even by late September. In her live evidence, she accepted that she could easily have asked him to stay on the Teams session after the morning briefing to have a conversation, but never did so.

60. On 28 September 2021, Insp Warren sent an email to Insp Whelan copying in CI Walker Tassel stating:

> "Gill seems to think that this was discriminating against him because of his disability, in fact I had informed him that I was happy to make a local arrangement… I understand that his recup plan is for him to work 8 hours a day, so I am at a loss as to why he thinks this isn't following his recup plan, especially when I am receptive for him to receive further OH advice." [460]

61. This indicates she was aggrieved / affected by the allegation of discrimination and felt it was unfair and incorrect. Insp Whelan replied commenting that the Claimant wanted advice from OH or the CMO before any roster change and that Insp Warren should try to smooth things over by having a chat with the Claimant. He also cut and pasted extracts from the most recent OH report which stated: "Initial recup hours per week – 8 hours day" and "he is not on / or able to do his full hours" [461].

62. Despite being informed of this, on 29 September 2021, Insp Warren wrote to Insp Whelan stating:

> "Gill has stated that he doesn't want a discussion with me as he feels our lines of communication has now broken down. If Gill's OH report said that he can't work more than 8 hours per day, and I'm placing him on an 8 hours day, what's the issue?...If things don't look up, we may have to pass Gill back to the North area to find work for him, as if he believes me to be dishonest in dealing with him, and he does not want to communicate, then I'm not left with much choice!" [464].

63. From this email, it would appear that Insp Warren did not understand why the roster was in conflict with OH recommendations. She repeatedly questions why an 8-hour day was a problem without appreciating that it

was a sequence of 8-hour days that was problematic. From this comment and similar such comments, we find that Insp Warren did not intend to reduce / adjust the Claimant's hours or days when she made the requests to move him to the Monday-Friday 7am-3pm pattern. She considered that the pattern she wanted him to work (8-hour days, 5 days a week every week) to be in accordance with the OH advice. Her occasional comments about local arrangements being possible would appear to therefore be off-hand suggestions which she had given no thought to (and were perhaps to placate the Claimant or others when she believed him to be lazy and seeking to avoid full-time hours, as was revealed by her subsequent email below). Had she intended to make adjustments to his hours or days in the new shift pattern, she would need to have liaised with the Claimant and received medical advice to know how and in what way to adjust his roster. Further, she would most likely have done these things before adjusting the roster. Her actions had no reasonable or plausible explanation and her behaviours were inconsistent with her protestations that she would agree to adjust his hours, because she never took the simple and obvious step of asking the Claimant why the proposed roster would cause him difficulties.

64. Insp Whelan replied to Insp Warren's email on 30 September stating it was the series of consecutive days that was the issue and the fact that the Claimant cannot work full-time hours. [474]

65. On 1 October 2021, at 04:54, Insp Warren sent an email to CI Walker-Tassel stating:

> "This is keeping me awake at night!!! … I have had 18 years of a wonderful career with the Met, helping people and ensuring that good is done. I now face allegations of abuse of position and victimisation from a Sergeant that would not know hard work if it jumped up and slapped him in the face!!... I do believe we have come to the end of our 'professional' relationship and will be happy to send him back to his area to do some 'meaningful' work there. Do you think this would be the best idea, or should I just grin and bear it with him in Duties?" [473]

66. At 06:26, Insp Hurd sent an email to CI Walker Tassel referring to the Claimant's allegations against Insp Warren (specifically referencing the discrimination allegation) and stating:

> "It is only time until he too makes such assertions about me as I am not just going to roll over and give him what he wants i.e. to work minimum hours for full time pay, allowing him to continue with his existing childcare responsibilities and to dictate when and where he works."

67. Insp Hurd then suggested that the Claimant be moved out of Ops for both her and Insp Warren's "sanity" and she concluded by describing the Claimant's complaints as spurious (despite them not yet having been investigated). [478] We noted that both Insp Warren's and Insp Hurd's emails comment on their perception that the Claimant was lazy in some way.

68. There is no written reply to these emails from CI Walker-Tassel. We consider it would be most peculiar for CI Walker-Tassel not to have spoken to Insp Warren further before deciding to move the Claimant

(which she communicated to Insp Whelan on 4 October). However, there are no written records of a reply and CI Walker-Tassel's statement is silent on whether there was a discussion. In Insp Warren's statement, she stated she cannot recall any such discussion.

69. On 4 October 2021, CI Walker-Tassel informed Insp Whelan by email that the Claimant was being moved out of Ops. She stated:

> "It has come to the point where Gill is no longer able to be supported, or undertake the work in Ops. You will need to find some alternative work to support him whilst he goes through the OH process. Everything possible has been done to support and manage him, however his restrictions and issues with what he is being asked is not conducive to his supporting the work in Ops." [489].

70. We find it plainly inaccurate to state that "everything possible has been done to support him" when the few matters the Claimant had requested (to wait for updated OH advice *before* making a change to his roster and to be consulted) had not been done.

71. On 5 October 2021, the Claimant was signed off sick with stress until 25 October 2021. He was informed of the move out of Ops by Insp Whelan by telephone on 7 October 2021.

72. On 11 October 2021, the Claimant asked Jane Whaley to restore his roster on CARMS to the 5-4-5 pattern he worked in Met Detention. This was two weeks before the roster was due to change. [494]

73. On 12 October 2021, Insp Wappat instructed Jane Whaley to change the Claimant's roster on CARMS with the LRPM (Local Resource Planning Meeting) date as the start date for the change. [1057]

74. On 15 October 2021, the grievance administrator wrote to the Claimant saying he (the Claimant) had to go through the informal stage of the process first and he was passed back to Superintendent Payne [497].

75. On 19 October 2021, the OH report stated that the Claimant was fit for office-based duties only, increasing his daily hours up to full hours by February 2022. [499]

76. Insp Micallef was appointed as the Informal Resolution Champion ("IRC") in respect of the informal stage of the grievance and he contacted the Claimant on 1 November 2021 to arrange a meeting [521]. On 2 November 2021, the Claimant replied stating he would be seeking resolution through a different route. [521]

77. On 2 November 2021, the Claimant returned from leave and worked in the Custody Suite on the 28-day rotating shifts pattern he had always been on. However, it was not until 29 November that his roster was changed on CARMS, having gone through a formal process. In the meantime, manual changes needed to be made, which meant there were discrepancies which concerned and inconvenienced the Claimant. The roster change continued to cause problems for the Claimant until February 2022.

78. Whilst the Respondent tried to retrospectively change the roster back from the date of 26 October 2021 (the date it changed) this was seemingly not possible or at least not easily achieved. [560-563]

79. On 13 December 2021, the Claimant states that he spoke to Insp Moseley who informed him Insp Warren was blocking the changes to his (the Claimant's) roster by holding herself out as the Claimant's line manager. In the Claimant's questions to Insp Moseley, it became clear that the Claimant recalled Insp Moseley had told him that Vickki Perry had told him (Insp Moseley) this. It is not something that Insp Moseley had witnessed first-hand. Following the discussion between Insp Moseley and the Claimant, the Claimant sent an email to Insp Moseley stating "she was never my line manager. It is just simply wrong that she presents that she was…" [589]. Insp Moseley did not respond to this email. In his evidence, Insp Moseley stated that he was not aware of anyone blocking the change to the Claimant's roster and he does not recall telling the Claimant this. Insp Moseley also stated that he had spoken to Vikki Perry, and she may have been confused as to who the Claimant's line manager was. Inspector Moseley himself stated he knew it was Insp Whelan, but that perhaps Vikki Perry believed it was Insp Warren, or perhaps that she had referred to the Claimant's "supervisor" which could have been Inspector Warren or Whelan.

80. On or around 18 January 2022, the Respondent closed the grievance process on the basis it had understood that the Claimant had withdrawn the grievance by his email of 2 November 2021.

81. In February 2022, the Claimant's roster issue was finally resolved.

RELEVANT LAW

Victimisation

82. Under s.27 EqA, victimisation occurs where a claimant has done protected act(s) and they are subjected to a detriment because of the protected act(s). The Respondent has conceded that the pleaded protected acts in the present case are protected in law. It is therefore unnecessary to examine the law on this issue.

83. When deciding if an act is a "detriment", the Tribunal should ask itself "is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" (**Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337). This has both subjective and objective elements. The tribunal must consider the subjective impact on the claimant, but their perception must also be objectively reasonable in the circumstances. An unjustified sense of grievance is not a detriment.

84. The next element of the cause of action is to demonstrate causation between the protected act and the detriment. Under EqA 2010, victimisation occurs where a claimant is subjected to a detriment "because" they have done (or might do) a protected act. This is

synonymous with the test under the old legislation which required the detriment to be "by reason that" the victim had done (or might do) a protected act.

85. As with direct discrimination, victimisation need not be consciously motivated, it can be subconscious (**Nagarajan v London Regional Transport and others** [1999] IRLR 572). Further, the protected act need not be the main or only reason for the treatment. However, the protected act must be more than simply causative of the treatment in the "but for" sense. As Lord Nicholls indicated in **Nagarajan**, if protected acts have a "significant influence" on the employer's decision-making, discrimination will be made out.

86. **Nagarajan** was considered by the Court of Appeal in **Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases** 2005 ICR 931, CA, where Lord Justice Peter Gibson clarified that for an influence to be "significant" it does not have to be of great importance. A significant influence is, rather, "an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial."

87. The "significant influence" test was applied by the EAT in the context of victimisation in **Villalba v Merrill Lynch and Co Inc and ors** 2007 ICR 469, EAT. On appeal, the EAT confirmed that the tribunal had applied the correct test, stating:

> "we recognise that the concept of "significant" can have different shades of meaning, but we do not think that it could be said here that the tribunal thought that any relevant influence had to be important… If in relation to any particular decision a discriminatory influence is not a material influence or factor, then in our view it is trivial."

Discrimination because of something arising in consequence of disability (s.15 EqA)

88. Under s.15 EqA, a claimant will succeed if:
    (a) They were disabled in law at the material times;
    (b) The Respondent had actual or constructive knowledge of disability;
    (c) The Respondent treated them unfavourably; and
    (d) The reason for the unfavourable treatment was because of something arising in consequence of disability.

89. The Respondent need not know that the "something arising" was because of the disability.

90. There is scope for a Respondent to justify any unfavourable treatment.

91. For the reasons set out below, having considered the claims that are pleaded under both ss.15 and 26 EqA (which both rely on the same acts) and mindful of the fact that detriments claims under s.15 EqA cannot simultaneously amount to both forms of prohibited conduct, we do not set out the law on s.15 EqA in any great detail.

Harassment (s.26 EqA)

92. To succeed in a claim for harassment, a claimant must show that:
    (a) They were subjected to unwanted conduct;
    (b) The conduct is related to a protected characteristic (in this case disability); and
    (c) The purpose or effect of the unwanted conduct was to violate the claimant's dignity or create an intimidating, hostile, degrading humiliating or otherwise offensive environment for the employee.

93. The concept of "unwanted conduct" is similar to the concept of detriment. In **Reed and anor v Stedman** [1999] IRLR 299 the EAT held that the word "unwanted" is essentially the same as "unwelcome" or "uninvited".

94. In **Thomas Sanderson Blinds Ltd v English** EAT 0316/10, the EAT pointed out that whether conduct is "unwanted" should largely be assessed subjectively, i.e. from the employee's point of view.

95. To demonstrate that the unwanted conduct is "related to" a protected characteristic, the causative connection is a lower threshold than the "because of" / "on the grounds of" formulation used in present and past discrimination provisions. "Related to" allows for a looser connection with the protected characteristic to be sufficient. Of course, conduct that would previously have been held to be "on grounds of" a protected characteristic will normally satisfy the "related to" requirement. However, other conduct that might not previously have been caught by the "on grounds of" formulation or might not amount to being "because of" the protected characteristic could now be covered by being "related" to it.

96. In **Hartley v Foreign and Commonwealth Office Services** 2016 ICR D17, EAT, the EAT stated that a tribunal considering the question posed by s.26(1)(a) EqA must evaluate the evidence in the round, recognising that witnesses "will not readily volunteer" that a remark was related to a protected characteristic. The alleged harasser's knowledge or perception of the victim's protected characteristic is relevant but should not be viewed as in any way conclusive. Likewise, the alleged harasser's perception of whether his or her conduct relates to the protected characteristic "cannot be conclusive of that question".

97. The EHRC Employment Code adopts a broad interpretation of the phrase "related to", providing the following example:

    "a female worker has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by continually criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker but because of the suspected affair, which is related to her sex. This could amount to harassment related to sex" (para 7.10).

98. In **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor** 2020 IRLR 495, EAT, the EAT held that the question of whether conduct is "related to" a protected characteristic is a matter for the appreciation of the tribunal, making a finding of fact drawing on all the

evidence before it. The fact that the complainant considers that the conduct related to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser.

Relationship between harassment claims and detriment claims

99. Section 212(1) EqA states that the concept of "detriment" does not include conduct that amounts to harassment. This means that acts that amount to detriments and those amounting to harassment are seemingly mutually exclusive. Some forms of prohibited conduct use the term "detriment" within their definition. This includes victimisation claims. In respect of various other types of prohibited conduct under EqA, including s.15 EqA claims (discrimination because of something arising in consequence of disability) the concept of detriment is not incorporated into the definition, but it is incorporated into the cause of action due to the interaction with s.39 EqA. Section 39 EqA is the gateway provision through which most types of conduct in respect of employees are rendered unlawful. The prohibited conduct itself is defined in alternative provisions (ss.13-27).

100. Section 39 EqA lists the various types of wrong that fall within scope. In respect of employees, s.39(2) EqA lists: terms of employment; affording access to opportunities for promotion, transfer or training or of receiving any other benefit, facility or service; dismissal; and "any other detriment". Accordingly, where the type of claim pursued by a claimant is held to amount to a breach of s.39(2)(d) EqA, or is victimisation, thus amounting to a detriment in law, it would appear that the same act cannot be harassment also – the concepts are mutually exclusive.

CONCLUSION ON CLAIMS

101. We address the claims in the order they appear in the list of issues at pages [52-54]

Victimisation

102. The Respondent has accepted that the acts pleaded as protected acts are in fact protected within the meaning of s.27 EqA. These are: the email of 19 September 2021 to Supt Payne; the email to Insp Warren of 27 September 2021; and the grievance email of 27 September 2021 [52].

103. Accordingly, the only matters to be decided in respect of the victimisation claims are:
    (a) Did the acts relied on as detriments occur?;
    (b) If so, were either or both of them a "detriment" in the legal sense?; and
    (c) Was the reason for doing that act because of a protected act?

104. The acts relied on as detriments are: (1) being moved back to Team 1 on or about 2 November 2021; and (2) Inspector Warren repeatedly blocking the specialist roster team from aligning the Claimant's roster [52].

105. It was not in dispute that the Claimant had been moved back to Team 1 on 2 November 2021. It was however disputed that Insp Warren blocked a change to the roster.

106. We find on balance of probabilities that Insp Warren did not block the restoration of the Claimant's roster. Whilst the evidence is clear that it took an unusually lengthy period to restore the Claimant's roster, there was no independent evidence that Insp Warren had participated in this process to stall it in any way. The Claimant's case on this rested on what he had been told by Insp Moseley. It was therefore hearsay. Hearsay is admissible and can form the basis of the evidence to substantiate a claim. However, Insp Moseley himself could not recall having made the comment relied on. Further, with hearsay, there is sometimes greater room for misunderstanding or error than with direct testimony.

107. On balance, we were satisfied that whatever Insp Moseley had said to the Claimant, there was a misunderstanding or miscommunication. As found above, Insp Moseley himself reported something he had been told by Vikki Perry about Insp Warren holding herself out as the Claimant's line manager, but there was no evidence that Vikki Perry had told Insp Moseley that Insp Warren was blocking his roster. Moreover, there was no independent evidence to suggest Insp Warren had done so.

108. Further, the email at page [675] showed that on 4 February 2022, Insp Warren asked PS Aggarwal what was happening with the Claimant's CARMS records and that she needed it to be correct so as to ensure he had the correct annual leave hours recorded. This is somewhat inconsistent with the suggestion that Insp Warren blocked the reconciliation of the Claimant's CARMS record prior to this time.

109. As for the length of time it took to resolve the roster issue, we accepted PS Aggarwal's evidence as to the process and how he had worked with Jane Whaley, Vikki Perry and others to resolve the issue and how it had taken as long as it had. If Insp Warren had taken steps to block the roster being resolved, it would be unusual for PS Aggarwal not to have known about this.

110. For these reasons, we do not uphold the victimisation claim predicated on this detriment (blocking the roster) because we consider the detriment to be a continuing consequence of the earlier roster changes and the Respondent's inability to rectify the matter on its systems, not because Insp Warren was doing anything by way of any subsequent act or omission to prevent the restoration of the roster.

111. Turning then to the act which did take place, the move out of Ops and back to Team 1, we considered the evidence given by the Claimant about why he deemed it to be detrimental. He explained to us that he was, in effect, having to make up work to keep himself occupied and this gave him a sense of being "a spare wheel" and not doing meaningful, valuable work. In Ops, he was doing a valuable and necessary role, and assisting a team that was overburdened. He had settled nicely into the role and was gainfully employed, deriving job satisfaction from the value he was adding to the team. In his old team, he was unable to do his BWT front-line detention role. He felt that he had to make up administrative type tasks

that did not exist prior, and were not strictly necessary, in order to make himself of some use. However, in some cases, his new systems led to problems when the team came to rely on them and he was on a scheduled rest day, unable to assist. Further, the move was decided without any consultation with the Claimant.

112. We accepted the Claimant's evidence on this. Therefore, we do find that the move back to Team 1 in Met Detention was detrimental subjectively (the Claimant did not want to move) and it was objectively detrimental in that a reasonable person in those circumstances would consider it to be detrimental. It was not an unjustified sense of grievance.

113. As to why Insp Warren and CI Walker-Tassel decided to move the Claimant back to Met Detention, we find that it was because of the Claimant's protected act or acts. Most significantly, the email to Insp Warren on 27 September 2021 (in which the Claimant alleged disability discrimination). We make this finding because:

(a) Insp Warren replied defensively and with an authoritarian imposition of the roster change when she replied to the Claimant's email of 27 September 2021, as transcribed above. In her reply email, she refutes the allegation of discrimination, which indicated she was affected and offended by it and believed it to be untrue. She also insisted (in respect of the roster change) that "it will happen on 26th October" [emphasis added] which was an indication of her displaying her power over the Claimant, rather than taking a more conciliatory approach and consulting with him and OH before the change;

(b) Despite attending / running morning briefings, which the Claimant attended for three days following his email of 27 September 2021, Insp Warren did not seek to have a one-to-one discussion with him to discuss the matter or resolve his concerns, which she herself stated she easily could have done, further indicating her irritation or annoyance;

(c) In her email to Insp Whelan of 28 September 2021 [460], Insp Warren's tone and the content (set out above) shows she was aggrieved / affected by the allegation of discrimination and felt it was unfair and incorrect;

(d) In Insp Warren's email to Insp Whelan on 29 September 2021 [464], her irritation and disbelief is apparent. She stated:

> "If Gill's OH report said he can't work any more than 8 hours per day, and I'm placing him on an 8 hour day, where is the issue? I've said that I'm open to what the OH advisors recommend, so again not sure where the problem lies… Anyway, if things don't look up, we may have to pass Gill back to the North area to find work for him, as if he believes me to be dishonest in dealing with him, and he doesn't want to communicate, then I'm not left with much choice!"

(e) Moreover, in the email to CI Walker-Tassel on 1 October 2021, Insp Warren stated:

> "This is keeping me awake at night!!! … I have had 18 years of a wonderful career with the Met, helping people and ensuring that good is done. I now face allegations of abuse of position and victimisation from a Sergeant that would not know hard work if it jumped up and slapped him in the face!!... I do believe we have come to the end of our 'professional' relationship and will be happy to send him back to his area to do some 'meaningful' work there. Do you think this would be the best idea, or should I just grin and bear it with him in Duties?" [473] [emphasis added].

We find that the reference to victimisation was a reference to the allegations of discrimination;

(f) In the email of 4 October 2021, in which CI Walker-Tassel informed Insp Whelan that she was moving the Claimant back to Met Detention, she stated that: "his restrictions and issues with what he is being asked is not conducive to his supporting the work in Ops." [489] [emphasis added]. The reference to the "issues with what he is being asked" is clearly his complaint that they were imposing a roster change in a way that was discriminatory;

(g) Para 42 CI Walker-Tassel's statement stated:

> "I took this decision [to move the Claimant back to Team 1] based on the fact that Gill was having difficulties with the functions of the job (due to his health), and that his relationship with Insp Warren had deteriorated. I also felt that Gill's rotating shift pattern did not fit the resourcing needs of the team, that the work was taking a toll on his health, and that the issues he had raised were also impacting on Insp Warren's welfare." [emphasis added]

There was in fact no evidence whatsoever to suggest that the Claimant was having difficulty with the functions of the job in Ops due to his health or otherwise, nor that the work was taking its toll on his health. Similarly, whilst it might have been more convenient for the Respondent if the Claimant had worked a Monday to Friday shift pattern, he was open to this, simply after OH advice and with adjustments. Moreover, others in the Ops team did not work this pattern and they were not moved out of the team. The Claimant had been a valuable member of the team and the fact that he took four or five consecutive rest days cannot have been the reason he was moved because others in the team worked to that pattern. Further, he was an additional headcount above the BWT. So it cannot have been the case that when he was off on a rest day there was no one there to cover his work. The truth is that the work should have been and was being done by the original BWT team before his cross-assignment and on the days he was working, he was able to assist them as an additional resource. On the days he was on a rest day, they would have to carry the normal workload for the BWT.

114. The fact that CI Walker-Tassel gave all manner of reasons that were unsubstantiated and, we find, untrue, begs the question "why does she need to make up or embellish a reason? Why can't she just give the real reason?". The real reason must therefore have been "the issues he raised" which, is also stated by her in this email. Those "issues" are the complaints of discrimination.

115. Insp Warren stated that the reason for the desire to move the Claimant was due to the irretrievable breakdown in communications and working relationship. However, this too did not appear to be true. The Claimant had in fact continued to work and participate in morning briefings and was not being disruptive. He had also replied to emails even after the email stating he felt he could no longer have a constructive dialogue. Therefore we find that whilst the relationship was strained by this point, it had not irretrievably broken down and Insp Warren should and could have taken steps to restore it. We find that when she references it being irretrievably broken, she really means that from her perspective she could no longer work with him because of the allegations he had made against her, namely, his protected acts.

116. For all these reasons, we find that Insp Warren and CI Walker-Tassel, between them, decided that the Claimant should be moved out of Ops and back to Met Detention and that the reason for this was his complaint that the shift pattern being forced upon him was discriminatory.

117. It is rare indeed for there to be written evidence indicating that an act was done for the proscribed reason. However, this is just such a case where there is such stark evidence. All the inferences drawn from other sources of evidence pale into comparison against the backdrop of the emails and evidence at (e), (f) and (g) above. Nonetheless, they are consistent.

118. We consider it is most unfortunate that the Ops team did not engage with the Claimant to better understand his concerns (which Insp Whelan clearly understood and tried to explain to Insp Warren) and that they did not appear to understand their legal obligation to consider and make reasonable adjustments.

Section 15 claims

119. As stated above, the detriment recorded at paragraph 4.2(c) of the list of issues was withdrawn and dismissed on 10 May 2023. Therefore, there were two remaining detriments pursued under this claim [53]. Those same detriments were pleaded as incidents of unwanted conduct related to disability under the harassment claims. Given our findings below (namely upholding these acts as harassment) these acts could not simultaneously amount to detriments under ss.15 and 39 EqA.

Harassment claims

120. The harassment claims are predicated on three acts of “unwanted conduct”. The last of which (namely being moved back to Team 1 in Met Detention) has already been held to amount to victimisation within the meaning of ss.27 and 39 EqA and therefore cannot also amount to harassment, due to the effect of s.212 EqA set out above.

121. The remaining two acts are: (1) attempting to push through the roster change without 28 days’ notice; and (2) threatening to change his roster without consultation and/or discussion and/or sight of his OH

records [53]. We find that these two matters are so closely related that they should be dealt with together.

122. It is not denied that Insp Warren attempted to (and did) change the Claimant's roster on the CARMS system on two occasions, both of which were without the 28 days' minimum notice. There is no separate evidence to suggest that Insp Warren "threatened" to do this. But she did do it and did so without consultation or discussion with the Claimant (only a few emails) and without sight of the OH reports. The Respondent did not deny these facts. We therefore find that the conduct complained of did happen.

123. We consider that such conduct is "unwanted". The Claimant was entitled to the minimum 28 days' notice. Moreover, he was entitled to have the extant OH recommendations heeded. The OH reports stated that whilst he could work 8 hours a day, that recommendation was made in the context of his 5-4-5 rotating shift pattern, under which he normally had regular batches of 4 or 5 consecutive days' rest. The decision to move the Claimant to a Monday-Friday shift pattern was unwanted because: (1) he lost his consecutive rest days; (2) he had no guarantees that his hours would be adjusted and if so by how much; (3) he was given no assurances that he would get any activity breaks that he had stated were needed and if so what they would be (how long and how frequently); (4) the Respondent had not obtained OH clearance or advice on the specific change before making it; (5) the uncertainty of the new working arrangement and the way in which Insp Warren pushed it though without addressing these matters caused him anxiety and stress; and (6) the changes to CARMS took months to rectify causing issues with the Claimant's recorded hours and holiday and causing him further anxiety and stress over a prolonged period.

124. Was the unwanted conduct related to his disability? We find that the original driving force behind changing the Claimant's hours was that the Ops team would benefit more from the changed working pattern. However, whilst that may have been the conscious motivating reason at the outset, we find that the second time the roster change was made it was related to disability. This is because on the second occasion that Insp Warren changed his roster, it was done as a show of authority, to put the Claimant in his place, because he had raised disability-related concerns about the first change to his roster. The reason we make this finding is that the decision by Insp Warren to change the Claimant's roster for a second time was very peculiar and called for explanation given that:

(a) Insp Warren had been copied into the email from her superior (CI Walker Tassel) who urged that it was a matter for the Claimant to discuss a recoup plan with his manager (Insp Whelan) and get it onto CARMS. [344] In spite of this, Insp Warren deemed to appropriate (and her place) to push the change through a second time;

(b) CI Walker-Tassel also stated in the same email: "Chris, Lorraine can you <u>discuss</u>, and get a <u>support recoup plan in which suits Gill</u> going forward for review in 12-18 weeks a further OH referral is due" [344] [emphasis added]. In spite of this mandate, Insp Warren pushed the change through without any discussion with the Claimant or Insp Whelan and with no plan having been agreed;

(c) In her email to the Claimant of 21 September 2021, Insp Warren indicated they would speak about the matter, then just 4 minutes later, she sent the instruction to Jane Whaley to change the roster again. Surely when she sent the email to the Claimant, just 4 minutes prior, she must already have had in mind her plan to send the email to Jane Whaley just 4 minutes later, but she did not inform him of this. Even if she did not have this in mind at the time she sent the email to him (and we find that she did) she could have informed him immediately after or copied him in, but she did not.

125. Despite calling for explanation, Insp Warren had no plausible explanation as to why she had requested the second roster change at the time that she did and in the manner that she did (ignoring superior orders and without informing or discussing it with the Claimant). When asked this by the bench she stated: “I was under the impression he wanted the 28 days’ notice so that is why I changed it back. I tried to arrange a discussion with him and we were going to on 27 September and everything was in place to happen. I had already sent an email to Jane back to 12 hours and then gave him notice.”

126. We did not find Insp Warren’s explanations credible, not least because the Claimant had specifically told her in an email that the 28 days’ notice was not the key issue, as set out above.

127. Considering also Insp Warren’s email of 27 September 2021 where she told the Claimant that the roster change “will happen” despite his concerns, and the irritation she demonstrated when he challenged her decision to change the roster, we consider this act to be a show of authority / power in response to him having made disability-related protestations to the changes. She was affronted that he did not simply accept her mandate and that he was raising disability-related concerns instead of acquiescing to the change. Therefore, bearing in mind the broad scope of the “related to” formulation under the definition of harassment, we find that the unwanted conduct was related to disability.

128. Having heard the Claimant’s evidence, we find that the second roster change did create an intimidating and hostile environment for him. He felt disregarded by the fact that the normal rules of notice were not being given to him (for the second time) and that his health needs and OH recommendations were seemingly disregarded and his concerns ignored.

129. Further, we consider that it was perfectly reasonable in all the circumstances for the unwanted conduct to have had this effect on the Claimant in respect of the second roster change. This is particularly so due to the unusual circumstances in which the second roster change was pushed through (against orders, against the rules in respect of notice, without updated OH advice and without consultation). We find it was deliberately designed to make him feel her authority over him and was thus intimidating.

Disposal

130. We heard some evidence and submission on the financial aspects of remedy. However, the Claimant seeks recommendations also. Once in receipt of the Claimant's proposed recommendations, and the Respondent's responses to them, a determination on all aspects of remedy shall be made.

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Employment Judge Dobbie

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Date 26 June 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

27 June 2023

GDJ
FOR EMPLOYMENT TRIBUNALS