EMPLOYMENT TRIBUNALS

Claimant: James McCall

Respondent: The Chief Constable of Avon and Somerset Constabulary

Heard at: **Bristol ET** **On:** **17, 18, 19, 20 and 21 July 2023**

Before:
Employment Judge: Mr G. King
Members: Mrs L. Fellows
Dr C. Hole

Representation
Claimant: Mr M. Singh
Respondent: Mr M. Ley-Morgan

RESERVED JUDGMENT

1. The Claimant's claim of discrimination arising out disability (s.15 of the Equality Act 2010) is not well founded and is dismissed.

2. The Claimant's claim in respect of failure to make reasonable adjustments (sections 20 & 21 of the Equality Act 2010) is not well founded and is dismissed.

REASONS

Procedure

1. The Tribunal heard live evidence from the Claimant. The Tribunal also heard live evidence from DS Thomson on behalf of the Respondent. The Tribunal was assisted by a bundle of 432 pages, and an additional bundle of 15 pages. The Tribunal was also referred to a copy of the Police Appeals Tribunal ("PAT") final decision and written reasons in respect of the Claimant. Where pages of the bundle are referred to in this judgment, the page number is given in [square brackets].

Background

2. The Claimant was a serving police officer between 15 September 1997 and 11 November 2019.

3. On or around 19 December 2018, the Respondent received a complaint from a member of the public made an anonymous complaint about the Claimant's behaviour at a Christmas party which took place on the evening of 13 December 2018.

4. The complaint made the following allegations against the Claimant:
    a. During the evening, he bullied a young male police officer 'Josh' and a young female officer 'Dani', both of whom appeared shocked and extremely bothered by it;
    b. He shouted sexual remarks across the room at 'Dani', pinched her buttocks and slapped her on the arm, causing a red mark;
    c. He called 'Josh' a "gay cunt" and continually called him gay;
    d. He called people "bellends" and constantly used the word "cunt";
    e. He pinched the buttocks of a waitress;
    f. His behaviour during the evening was "vile" and "disgraceful".

5. The Respondent was separately informed of an allegation that the Claimant had misconducted himself towards two police community support officers in that:
    a. On 12 or 13 September 2018, whilst off duty, he saw two police community support officers in Starbucks;
    b. He shouted at the said officers, "Here's the fuckers",
    c. He raised two fingers to the said officers;
    d. He continued to swear and shout "fuckers".

6. The investigations into these two incidents were initially handled by separate teams in separate locations, but were combined after the investigation into the December 2019 incident was initiated.

7. A Regulation 15 notice was prepared on 20 December 2018 and served on the Claimant on 21 December 2018 by the investigating officer ("IO"), DS Craig Thomson. Following service of the Regulation 15 notice, pursuant to Regulation 16 (1) (a) of the Police (Conduct) Regulations 2012, the Claimant had ten working days to provide a written or oral statement relating to any matter under investigation. DS Thomson clarified this to explain that 'the Claimant *may* provide a written or oral statement, not *must*'.

8. It is the evidence of DS Thomson at paragraph 16 of his witness statement, that he was informed at this point by Mr Loker that the Claimant was suffering with his mental health. There is, however, no record in the log to support this.

9. Regulation 17 of the Regulations allows the IO to arrange a time and date to conduct an interview as part of a misconduct investigation. Under the

Regulations, if the officer is not available on the date set, the officer must propose an alternative date within five working days.

10. The Claimant was suspended following the Regulation 15 notice and remained on suspension until his dismissal on 11 November 2019.

11. The IO's log at [447] contains references to the Claimant's mental health, as concerns were being raised by a colleague called Will Stevens on 7 January 2019.

12. On 28 June 2019, the IO had a conversation with the Claimant's Police Federation representative, Mark Loker. Mr Loker discussed the Claimant's mental health with DS Thomson, which is recorded in DS Thomson's witness statement at paragraph 16, and in the investigation log at [450] as

    "ML has mentioned that JM is not in a good place and cannot at the moment face an interview".

    DS Thomson's further goes on to say, at paragraph 16 and in the investigation log at [450], that he told Mark Loker that the Respondent would need access to the Claimant's medical records, which were to include both occupational health and GP records, if the contention was that the Claimant was too unwell to respond.

13. A further Regulation 15 notice in respect of two other allegations was served on the Claimant on 8 July 2019, with Mr Loker agreeing to accept service of the Regulation 15 notice on the Claimant's behalf. The log records that pre-interview disclosure was sent to Mr Loker.

14. On 16 July 2019, nurse Elaine Mills of occupational health wrote in an email:

    "In my opinion, from today's encounter, any meeting (interview or otherwise) would negatively impact on Jamie especially if challenging or questioning." [130]

15. In a different email on the same day, Nurse Mills wrote:

    "I advise at this time he would not be fit to attend any formal, or informal meetings, within the organisation. I believe any meeting would potentially increase his anxiety to the point where he may not be able to answer questions in a thorough or helpful manner and therefore may be disadvantaged." [394].

16. The evidence of DS Thomson is that:

    "On or around 23rd July I emailed Mark to advise that the Claimant should provide a written response to the allegations by 16th August 2019. I do not hold copies of this email but my approach is set out in my report [159]."

    Unfortunately, the page numbering here refers to an earlier bundle. The correct page reference is [131]. The note on [131] says:

"I.O. requested that a written response was provided by the close of business on the 16th August 2019. A response had not been received as of the 19th August 2019."

17. The Claimant's case is that he denies that any deadline was given. The Tribunal is of the view that it does not assist the Claimant's case greatly if a deadline was given or not. As a finding of fact, however, the Tribunal takes note of the entry in the IO's log at [452], which is a copy of an email sent from the Claimant's Police Federation representative. The email says:

    "Hiya Craig,

    Sorry, meant to reply to you yesterday.

    Jamie is going to make a response, I am trying to arrange a time where I can meet him with the disclosure package and arrange for him to compile a response. This is compounded by his illness and he often starts crying when I try to talk to him and arrange a meeting. I am trying my best with him and I really appreciate your patience.

    I will speak to him again today and try to establish a meeting time and place"

18. The Tribunal finds that it is more likely than not that this email is in reply to DS Thomson's email of around 23 July, in which he says he set a deadline of 16 August. The wording appears to the Tribunal to be a likely response to such a request. DS Thomson was clear about this date in his evidence, as he said he remembered it due to that being the day he would return from annual leave. The Tribunal has no reason to doubt DS Thomson's evidence on this point. The Tribunal is satisfied that a deadline for a reply of 16 August 2019 was given to the Claimant via his Police Federation representative.

19. Around August or September 2019, the Claimant's Police Federation representative was changed from Mark Loker to Tony Henley. This was because Mr Loker was on holiday on the date of the Claimant's disciplinary hearing and so would not be in a position to represent him. The Legally Qualified Chair ("LQC") of the panel was to be Mr Peter Cadman.

20. The Claimant's disciplinary hearing was set for 11 and 12 November 2019. The Claimant was informed of this by a letter dated 3 October 2019. This letter was served on the Claimant and contained an evidence bundle of documents including Regulation 21 Notice, a schedule of unused material, and a draft Record of Police Service [136].

21. The Claimant, however, must have been aware of this hearing by 19 September 2019, as there is a GP note, reference at [94], which says:

    "In crisis. Crying++ [redacted section]. Thoughts jumbled. Suspended from police, not sleeping, hearing coming up in November."

22. In his evidence, the Claimant denied that he had been given any disclosure by the Respondent on 3 October and says he did not receive anything until two working days prior to his disciplinary hearing.

23. The Tribunal has considered the Claimant's evidence, but also notes Claimant's chronology, dated 5 November, which was prepared as part of his application to adjourn the disciplinary hearing. The Claimant's chronology states:

    "The disclosure bundle was provided on 03rd October 2019
    PC McCall"

24. As a finding of fact, the Tribunal is satisfied that the Claimant, via his Police Federation representative, had the pack of disclosure on 3 October 2019. The Tribunal is unable to make any determination as to whether Mr Loker or Mr Henley discussed the disclosure with the Claimant. The Tribunal did not hear evidence on this point, and this is not an allegation of discrimination made by the Claimant against the Respondent.

25. On 15 October 2019, Mr Henley sent a letter [140] to Mr Cadman and the Respondent, asking for the disciplinary hearing to be adjourned. The grounds for the adjournment were:

    a. The Officers [sic] mental health is fragile; he is receiving treatment for this and fully engaging with the Somerset Partnership, Occupational Health and the NHS. The joint consensus is that the Officer would not be, at present, in a fit state or of sound mind to fully cooperate with the process.
    b. The Officer is not mentally capable of understanding and as such, has not read the disclosure or material contained within the evidence file.
    c. Because of his condition, he has not been able to receive any legal advice.
    d. Any continuance at such a critical stage of his treatment is understood to be detrimental to his current health and any potential recovery.

26. The letter also stated:

    "To the Officer's credit and due to the Officer recognising his need for recovery, he has submitted his intention to retire from the service as of the 15th November 2019."

27. On 18 October 2019, Nurse Mills wrote, in an email to Mr Henley:

    "In my opinion I still do not feel he would be able to attend a formal hearing at this time. It is difficult to say whether he would be able to undertake an interview as his mood is fluctuating daily, so one day he may be fine with his emotions more intact, whilst another not." [141]

28. The application to adjourn was opposed by Mr Hamid, senior lawyer for the Respondent, in an email to Mr Cadman (which was also copied to the Claimant's representative) of 21 October [143].

29. Mr Cadman replied on 21 October, stating that any application to adjourn should be supported by "cogent medical evidence" [144]. On 22 October, Mr Cadman said in an email [145] that:

    "1. If there is an application, it should be clear what is being asked for. 2. Such application should be supported be [sic] cogent medical evidence relevant to the application".

30. On 25 October, Mr Henley sent an email to Mr Hamid [147] explaining that he had:

    "…received consent from Jamie to provide to the Chair and email from Occupational health and a medical report from the crisis team. Jamie has, however only given consent for me to disclose this to the Chair."

31. The Respondent declined to consider this without sight of the report, as the Respondent felt that it would prejudice the Respondent's position to be able to respond without sight of the report [147].

32. A renewed request for an adjournment was made by Mr Henley in an email to Mr Cadman on 1 November [149], and the Claimant's supporting medical evidence was also supplied to Mr Cadman on the same date [150].

33. On 2 November, Mr Cadman emailed the Claimant and the Respondent [156] to say he was not prepared to adjourned the hearing based on information presented to the panel but not to the Respondent. Mr Cadman also stated:

    "It also appears the officer saw a psychiatrist possibly on October 11th. I would expect a report from him/her as to the application to adjourn and/or make reasonable adjustments."

34. The medical evidence that the Claimant's representative had sent to the panel was disclosed to the Respondent on 4 November [157]. A formal application to adjourn the disciplinary hearing, dated 5 November, was submitted that day [158 – 161] and this was accompanied by a medical report of Dr Campbell, dated 4 November 2019 [408]. The application was opposed by the Respondent [165 – 168].

35. Mr Cadman replied to the Claimant's representative and the Respondent on 6 November. Mr Cadman refused the application to adjourn the hearing. Mr Cadman did, however, say in his email that he would not preclude the application from being re-opened on the day of the hearing.

36. The Claimant's disciplinary hearing commenced on 11 November 2019. The Claimant did not attend the hearing. He was represented at the hearing by a solicitor, Mr David Randle. Mr Randle made a renewed application for an

adjournment on behalf of the Claimant [185 – 189]. This was opposed by the Respondent [176 – 184].

37. The renewed application to adjourn was considered by the panel on 11 November [298 – 306]. The relevant pages are [302 – 303]. The panel refused the application to adjourn and the hearing proceeded. Mr Randle was without instruction, save as to the making of the application to adjourn, and so withdrew from proceedings when the hearing proceeded.

38. The panel found the allegations against the Claimant proved. The sanction that the panel imposed was dismissal without notice, and so the Claimant was dismissed on 11 November 2019.

39. The Claimant appealed to the Police Appeals Tribunal ("PAT"). The PAT heard the case and made its decision on 17 July 2020. Written reasons were published on 4 August 2020. The PAT did not uphold the Claimant's appeal.

40. The Claimant commenced Early Conciliation with ACAS on 16 January 2020 and the ACAS Certificate was issued on 31 January 2020. The Claimant's claim in the Employment Tribunal was issued on 28 February 2020.

List of Issues

41. A list of issues was produced by EJ Bax on 3 October 2022, and is reproduced below. The numbering is kept the same as in the original CMO.

Time limits

1.1 The claim form was presented on 28 February 2020. The Claimant commenced the Early Conciliation process with ACAS on 16 January 2020 (Day A). The Early Conciliation Certificate was issued on 31 January 2020 (Day B). Accordingly, any act or omission which took place before 17 October 2019 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. **Disability**

2.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

2.1.1 Whether the Claimant had a physical or mental impairment.

mental illness, consisting of PTSD type symptoms, low mood and anxiety

2.1.2 Did it have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities?

2.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

2.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

2.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

2.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

2.1.5.2 if not, were they likely to recur?

2.1.6 A further issue is relevant as to whether the Claimant had a tendency to physical or sexual abuse of other persons, which is a condition not to be treated as an impairment under reg 4 of the Equality Act 2010 (disability) Regulations 2020.

3. **Discrimination arising from disability (Equality Act 2010 section 15)**

3.1 Did the Respondent treat the Claimant unfavourably by:

3.1.1 In December 2018 initiating disciplinary action against the Claimant; (The Respondent's case is that it is required to investigate matters by the Conduct Regulations).

3.1.2 On 6 November 2019, refused to adjourn the disciplinary hearing;

3.1.3 On 11 November 2019, refused to adjourn the disciplinary hearing;

3.1.4 Dismissing the Claimant

3.2 Did the following things arise in consequence of the Claimant's disability? The Claimant's case is that he was unable to engage with the misconduct procedure due to his mental health. The Claimant says he behaved in that way due to something arising from his disability, in other words disinhibited behaviour. (This will be further clarified by way of further information.

3.3 Was the unfavourable treatment because of any of those things?

3.4 Was the treatment a proportionate means of achieving a legitimate aim?

3.4.1 The Respondent says that its aims were:

3.4.1.1 Maintaining public confidence in and the reputation of the Police service;

3.4.1.2 Upholding high standards in policing and deterring misconduct;

3.4.1.3 Protecting police officers, staff and the public;

3.4.1.4 Eliminating discrimination and/or harassment on grounds of sex and sexual orientation.

3.4.2 That it was reasonable because:

3.4.2.1 To be set out by way of further information.

3.4.3 That it was proportionate because:

3.4.3.1 To be set out by way of further information.

3.5 The Tribunal will decide in particular:

3.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

3.5.2 Could something less discriminatory have been done instead;

3.5.3 How should the needs of the Claimant and the Respondent be balanced?

3.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

4. **Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)**

4.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

4.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

4.2.1 A requirement that police officers must not engage in conduct which is abusive, offensive and incompatible with the principles of policing, failing which they will be subject to disciplinary action for misconduct or gross misconduct; (the Respondent says this is a statutory obligation and not a PCP)

4.2.2 The requirement for police officers accused of misconduct to engage with the misconduct investigation/procedure, by responding to correspondence/requests for information. It is

alleged that there was a failure to make adjustments at the early stages of the investigation and on 6 and 11 November 2019. (the Respondent says that this is a statutory obligation and not a PCP)

4.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that:

4.3.1 RE PCP 1 the Claimant was unable to control his moods, think or act rationally, was more prone to act as he did in late 2018 and more liable to be subject to disciplinary proceedings;

4.3.2 RE PCP 2, the Claimant's disability made it more difficult for him to comply and was unable to defend the allegations.

4.4 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

4.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:

4.5.1 Not treat the Claimant's actions as misconduct

4.5.2 Adopted a lesser sanction

4.5.3 Not dismissed the Claimant;

4.5.4 Allowing or assisting the Claimant to respond to the allegations in writing

4.5.5 Engaging proactively with the Claimant's Police Federation representative.

4.5.6 Suspending the investigation to enable the Claimant to undergo medical treatment/rehabilitation to the point where he was well enough to engage or participate.

4.5.7 Postpone the disciplinary hearing

4.6 Was it reasonable for the Respondent to have to take those steps and when?

4.7 Did the Respondent fail to take those steps?

5. **Remedy**

Discrimination

5.1 What financial losses has the discrimination caused the Claimant?

5.2 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

5.3 If not, for what period of loss should the Claimant be compensated for?

5.4 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

5.5 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

5.6 Should interest be awarded? How much?

Disability

42. The issue of the Claimant's disability was decided by EJ Leith on 18 February 2023. His Judgment concluded that the Claimant was disabled within the meaning of section 6 of the Equality Act 2010 at all relevant times (between 12 September 2018 and 11 November 2019) [86 – 100].

The Law

Time Limits

43. Section 123 of the Equality Act 2010 provides that no complaint may be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment Tribunal thinks just and equitable. For the purposes of this section conduct extending over a period is to be treated as done at the end of that period and failure to do something is to be treated as occurring when the person in question decided on it.

44. An act will be regarded as extending over a period if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant. The concepts of 'policy, rule, practice, scheme or regime' should not be applied too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period, *Hendricks v Metropolitan Police Comr*. [2003] IRLR 96, CA at paras 51-52.

45. Where there are numerous allegations of discriminatory acts or omissions, the complainant must prove that

    a. the incidents are linked to each other, and
    b. that they are evidence of a 'continuing discriminatory state of affairs'.

    The focus should be on the substance of the complaints to determine whether there was an ongoing situation or continuing state of affairs as distinct from a succession of unconnected or isolated specific acts.

46. If the claim is presented outside the primary limitation period (that is, after the relevant three months), the Tribunal may still have jurisdiction if, in all the circumstances, it is just and equitable to extend time. This is essentially an exercise in assessing the balance of prejudice between the parties, using the following principles:

    a. The Claimant bears the burden of persuading the Tribunal that it is just and equitable to extend time. There is no presumption that time will be

extended but nor is there any magic to that phrase and it should not be applied too vigorously as an additional threshold or barrier.

b. The Tribunal takes into account anything which it judges to be relevant and may form a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for a Respondent to be put to defending a late, weak claim and less prejudicial for a Claimant to be deprived of such a claim;
c. This is the exercise of a wide, general discretion and may include the date from which a Claimant first became aware of the right to present a complaint. The existence of other, timeously presented claims will be relevant because it will mean, on the one hand, that the Claimant is not entirely unable to assert his rights and, on the other, that the very facts upon which he seeks to rely may already fall to be determined. Consideration here is likely to include whether it is possible to have a fair trial of the issues. This will involve an assessment of two types of prejudice as referred to in the authorities. The first is the general prejudice that inherently follows from being required to respond to a claim which is presented out of time (the prejudice of meeting the claim). The second is the effect upon the evidence of the delay (sometimes referred to as forensic prejudice).
d. There is no requirement to go through all the matters listed in section 33(3) Limitation Act 1980, provided no significant factor has been left out of account, *British Coal Corporation v Keeble* (length and reason for delay, effect on cogency of evidence, cooperation, steps taken once knew of the possibility of action).

47. The best approach for a Tribunal considering the exercise of its discretion to extend time is to assess all the factors in the particular case. These will include the public interest in the enforcement of time limits and the undesirability in principle of investigating stale issues, *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23.

<u>Discrimination arising from disability</u>

48. The elements of a discrimination arising from disability claim (s.15, EqA 2010) are: (1) the Claimant was subjected to unfavourable treatment; (2) there must be something that arises in consequence of the Claimant's disability; (3) the unfavourable treatment must be because of the something that arises in consequence of the disability; (4) the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

49. Disability need only be a significant influence or effective cause of unfavourable treatment (Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893, EAT).

50. Tribunals had regard to the Equality and Human Rights Commission's Statutory Code of Practice on Employment ("the Code") in relation to this head of claim.

Disability – Reasonable Adjustments

51. Sections 20 and 21 provide the law on reasonable adjustments. Section 23 is concerned with comparators.

S.20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2)...
(3) The first requirement isa 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.

S.21 Failure to comply with duty

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

S.23 Comparison by reference to circumstances

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

52. A failure to make reasonable adjustment involves considering:
    a. the provision, criteria or practice applied by or on behalf of an employer;
    b. the identity of non-disabled comparators (where appropriate); and
    c. the nature and extent of the substantial disadvantage suffered by the Claimant.
    (See *Environment Agency v Rowan* [2008] IRLR 20, [2008] ICR 218)

53. In *Newham Sixth Form College v Sanders* [2014] EWCA Civ 734 is was confirmed that "the nature and extent of the 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".

54. A 'provision, criterion or practice' is a concept which is not to be approached in too restrictive a manner; as HHJ Eady QC stated in *Carrera v United First Partners Research* UKEAT/0266/15 (7 April 2016, unreported), "the protective nature of the legislation meant a liberal, rather than an overly technical

approach should be adopted'. In this case the ET were found to have correctly identified the PCP as 'a requirement for a consistent attendance at work"

55. The Tribunal will need to consider a pool of comparators; has there been a substantial disadvantage to the disabled person in comparison to a non-disabled comparator? *Archibald v Fife Council* [2004] UKHL 32, [2004] IRLR 651, [2004] ICR 954: the proper comparators were the other employees of the council who were not disabled, were able to carry out the essential functions of their jobs and were, therefore, not liable to be dismissed.

56. While it is not a breach of the duty to make reasonable adjustments to fail to undertake a consultation or assessment with the employee (*Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664), it is best practice so to do. The provision of managerial support or an enhanced level of supervision may, in accordance with the Code of Practice, amount to reasonable adjustments (*Watkins v HSBC Bank Plc* [2018] IRLR 1015)

57. The adjustment contended for need not remove entirely the disadvantage; the DDA says that the adjustment should 'prevent' the PCP having the effect of placing the disabled person at a substantial disadvantage *Leeds Teaching Hospital NHS Trust v Foster* UKEAT/0552/10, [2011] EqLR 1075: when considering whether an adjustment is reasonable it is sufficient for a Tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage—there does not have to be a 'good' or 'real' prospect of that occurring. *Cumbria Probation Board v Collingwood* [2008] All ER (D) 04 (Sep) – "it is not a requirement in a reasonable adjustment case that the Claimant prove that the suggestion made will remove the substantial disadvantage"

58. The test of 'reasonableness', imports an objective standard and it is not necessarily met by an employer showing that he personally believed that the making of the adjustment would be too disruptive or costly. *Lincolnshire Police v Weaver* [2008] All ER (D) 291 (Mar): it is proper to examine the question not only from the perspective of a Claimant, but that a Tribunal must also take into account "wider implications" including "operational objectives" of the employer.

59. Regarding employer's knowledge, *Gallop v Newport City Council* [2013] EWCA Civ 1583, [2014] IRLR 211 confirms that a reasonable employer must consider whether an employee is disabled, and form their own judgment. The question of whether an employer could reasonably be expected to know of a person's disability is a question of fact for the Tribunal (*Jennings v Barts and The London NHS Trust* UKEAT/0056/12, [2013] EqLR 326).

60. When considering whether a Respondent to a claim "could reasonably be expected to know" of a disability, it is best practice to use the statutory words rather than a shorthand such as "constructive knowledge" as this might imply an erroneous test (*Donelien v Liberata UK Ltd* UKEAT/0297/14). The burden, given the way the statute is expressed, is on the employer to show it was unreasonable to have the required knowledge.

61. The EHRC Code gives examples of adjustments which may be reasonable, which include:

    a. making adjustments to premises;
    b. allocating some of the disabled person's duties to another worker;
    c. transferring the worker to fill an existing vacancy;
    d. altering the worker's hours of working or training;
    e. assigning the worker to a different place of work or training or arranging home working;
    f. allowing the worker to be absent during working or training hours for rehabilitation, assessment or treatment;
    g. acquiring or modifying equipment;
    h. providing supervision or other support

Deliberation

62. Applying the law to the facts as set out above, the Tribunal makes the following findings.

Discrimination arising from disability (Equality Act 2010, s.15)

63. The Tribunal considered the allegations at 3.1 of the List of Issues. The first question is, did any of these allegations amount to the Respondent treating the Claimant unfavourably?

    Unfavourable treatment

64. "Unfavourably" is not defined in the Equality Act. The Code at paragraph 5.7 states that it means that the disabled person *"must have been put at a disadvantage".* The Code notes that: *"Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably*".

65. The Code gives examples of unfavourable treatment, including, refusal of a job; dismissal; a shift to night working; or a team move to an open-plan office. It is clear from the examples that the unfavourable treatment may be in consequence of a policy applying to everyone; it does not need to have been targeted at the disabled person.

66. The Tribunal first considered: Did the Respondent treat the Claimant unfavourably by, in December 2018, initiating disciplinary action against the Claimant? It was accepted during the hearing that the correct wording here should be "investigation" rather than "action", as no disciplinary action was actually instigated in December 2018.

67. The Claimant accepted in cross examination that allegations against police officers should be investigated and the public confidence in the police could be undermined if such allegations were not investigated. He also agreed that the allegations against him in the investigating officer's report [115] were extremely serious. He did accept that these incidents needed to be investigated.

68. The Claimant's case is that, notwithstanding the Respondent's statutory duty to investigate complaints involving police officers, this still could amount to unfavourable treatment against him. The Tribunal gave some consideration to a listed amount to unfavourable treatment, but was content to proceed to examine the other elements of the claim on the basis that it was.

69. The Tribunal felt it appropriate to consider the Respondent's refusal to adjourn the disciplinary hearing on 6 November 2019 and 11 November 2019 together. The Tribunal is satisfied that a refusal to adjourn amounted to treating the Claimant unfavourably, and the same could be applied to both times the Claimant's application to adjourn the disciplinary hearing was refused.

70. It is also clear from the code that dismissal would amount to unfavourable treatment and so the Tribunal proceeded to consider the other elements of a claim under s.15 equality act.

Instigation of a disciplinary investigation in December 2018

71. The Tribunal considered the "something(s)" arising in consequence of the Claimant's disability. The Tribunal notes the Claimant does not have a formal diagnosis of PTSD. The Tribunal further notes that "PTSD-like symptoms" are referred to in the Claimant's medical evidence. Where PTSD is mentioned in this judgment, it is in the context of undiagnosed PTSD-like symptoms.

72. The Claimant says the something(s) arising are firstly that he was unable to engage with the misconduct procedure due to his mental health; and secondly the Claimant says that he behaved in that way (i.e. his behaviour towards the two PCSOs on 12 or 13 September 2018, and his behaviour at the Christmas party on 13 December 2018) due to something arising from his disability, in other words disinhibited behaviour. This was to be further clarified by way of further information, which was supplied by the Claimant and is at [102 – 105]. There it was stated that the Claimant feeling overwhelmed / reacting / lashing out as a coping mechanism is the thing arising from his disability.

73. The Claimant says in his Disability Impact Statement:

"As a coping mechanism, I will swear out loud at myself to try and block the visions/flashbacks" [108].

He repeats this in his witness statement at paragraph 21, where he says:

"I swear out loud and at myself to try and block the visions/flashbacks".

At paragraph 22 of his witness statement, he says:

"A common symptom of PTSD, anxiety, stress and depression is feeling overwhelmed and/or distressed".

74. In relation to the third point above, it is not for this Tribunal to determine if this is a common symptom of PTSD, nor is the Tribunal able to do so. Any such opinion would have to come from a qualified medical practitioner, with suitable experience in the relevant field. The Claimant has not put forward any qualified medical opinion to support this contention.

75. The evidence of Dr Campbell is that the Claimant has:

"…fluctuating mental health. Certain words can trigger memories of traumas he has experienced (re-experiencing phenomena), he is frightened to sleep and his sleep pattern can fluctuate and he presented as quite anxious. Though sometimes low in mood, he does not have a persistent depressive picture. He was not actively suicidal." [408]

76. The Claimant refers in his submissions to the Judgment of EJ Leith, given on 18 February 2023. EJ Leith concluded that:

"I find that the Claimant has, since 2015, become overwhelmed on occasion and lost control of his thoughts and emotions." [98]

and

"the effects on the Claimant's life were more than minor or trivial. At worst, they significantly affected his ability to sleep, to eat, and to function in society." [100]

77. The Tribunal thinks is important to note that EJ Leith was making a judgement about whether or not the Claimant was disabled for the purposes of the equality act. EJ Leith was not hearing the substantial merits of the case. Further, EJ Leith made no findings on what it meant for the Claimant to "lose control of his thoughts and emotions".

78. With regards to the Claimant's comments at [108] in his Disability Impact Statement and at paragraph 21 in his witness statement, the Tribunal only has the Claimant's own account on this. In cross examination, however, the Claimant denied that there were any other previous occasions where he had touched someone inappropriately or sworn abusively at colleagues. The Tribunal finds that this is inconsistent with the Claimant assertion that his behaviour towards the two PCSOs on 12 or 13 September 2018, and his behaviour at the Christmas party on 13 December 2018, is typical behaviour of his. It is not supportive of his assertion that he regularly behaves in this way.

79. The Tribunal considered the allegations against the Claimant, of which Allegation 4, which related to the Claimant's conduct at the Christmas party, included the sentence:

"…on being challenged about this behaviour, told them you suffered from PTSD and this behaviour was acceptable because of this condition."

The Tribunal notes that this formed part of the allegations against the Claimant. It was open for the Claimant to accept or deny that he said that. Just because

a third party had alleged that the Claimant had said this does not mean that Respondent would be in a position to know whether or not the Claimant did believe his behaviour was acceptable because of his PTSD, or caused by his PSTD.

80. The Claimant's medical records do not show that there is any history of irritability, disinhibited behaviour or a propensity for offensive language. There is nothing in his medical records to suggest that this behaviour is linked to his PTSD.

81. The Claimant's own evidence is that, as a coping mechanism, he will "swear out loud *at myself*" (Tribunal's emphasis) [108]. The Tribunal does not accept that the Claimant has proved that his abusive behaviour towards others was part of the same coping mechanism.

82. The Tribunal does not find that the Claimant's behaviour towards the two PCSOs on 12 or 13 September 2018, nor his behaviour in respect of inappropriate touching nor his aggressive and abusive language at the Christmas party on 13 December 2018 was something arising from his disability.

83. The Tribunal finds that the Respondent's decision to initiate a disciplinary investigation against the Claimant was because of the Claimant misconduct. The misconduct was not because of anything arising in consequence of the Claimant's disability. The Tribunal finds that there is no causal link between the Claimant's disability and the instigation of a disciplinary investigation. It therefore follows that any unfavourable treatment in relation to issue 3.1.1 was not an act of discrimination.

Refusing to adjourn the disciplinary hearing on 6 and 11 November

84. The Tribunal must begin with considering the "something arising" from the Claimant's disability. The Claimant's case is that he was unable to engage with the misconduct procedure because of his mental health. The Tribunal must therefore consider if the Claimant being "unable to engage with the misconduct procedure" is something that arises in consequence of his disability. If it is, the Tribunal must then go on to decide if the Respondent's refusal to adjourn the disciplinary hearing on 6 and/or 11 November was a decision that the Respondent made due to the Claimant being unable to engage with the misconduct procedure.

85. The Tribunal again refers to the report of Dr Campbell at [408]. Dr Campbell's expert opinion is that, at the time, the Claimant had *"…fluctuating mental health"*. Dr Campbell went on to say that the Claimant was "sometimes low in mood" but that he did not have "a persistent depressive picture".

86. The Tribunal finds that the Claimant was aware of his Disciplinary hearing date by at least 19 September 2018, as there is a GP note [94] referring to his hearing. He must therefore have known about it to be able to inform his GP

about it. He was certainly aware of the date of the hearing following the letter dated 3 October 2019 [136].

87. The Tribunal finds that in the lead up to the disciplinary, in October and early November 2019, the Claimant did have some engagement with his Police Federation representative. At some point between 21 December 2018 and 15 October 2019, the Claimant had been able to communicate his intention to retire on 15 November 2019 to Mr Henley, as this intention is stated in Mr Henley's letter to Mr Cadman of 15 October [139 – 140].

88. When Mr Cadman said that any application to adjourn must be made properly and with cogent medical evidence, the Claimant was able to instruct Mr Henley not to disclose the medical evidence (which at that point consisted of and a report from the mental health crisis team) to the Respondent. It is clear from Mr Henley's emails [147, 149], that this is the clear instruction of the Claimant. The Claimant said in cross-examination that he did not write these emails (which is clearly correct; they are written by Mr Henley) but went on to deny that he said the Respondent could not have access to his medical records. He says he signed papers for the release of his OH records and would have said the Respondent could have his GP records as well. The Tribunal does not find this credible as the Tribunal does not accept that an experienced Police Federation representative, unless specifically instructed to do so, would have taken the unusual step of making an application to adjourn a hearing specifically stating that the supporting medical evidence should be seen by the panel LQC alone and not by the Respondent.

89. The Claimant has not put forward any medical evidence to support his contention that he could not engage in the disciplinary process, either at the time or to this Tribunal. There is no evidence to confirm that the Claimant could not have engaged in the process by way of written submissions. The reasonable adjustment of allowing the Claimant to respond to the allegations by way of written responses is discussed later in this judgment. The Tribunal find it inconsistent that the Claimant is alleging in one of his claims that he was incapable of engaging with the disciplinary procedure in any way, and making a claim that he was not allowed to respond in writing as part of his other claims.

90. The Tribunal is sympathetic to the mental health issues that the Claimant was struggling with at the time of the disciplinary procedure, however the Tribunal finds that the Claimant had fluctuating mental health, as confirmed by Dr Campbell. The Tribunal does not agree with the Claimant's Police Federation representative's comment that *"the Officer is not mentally capable of understanding and as such, has not read the disclosure or material contained within the evidence file"*. The findings of the Tribunal are that the actions of the Police Federation representative show that the Claimant was able to engage with and give some instructions to his representative.

91. The Tribunal does not accept that the Claimant was unable to engage with the disciplinary process as something arising in consequence of his disability. In any event, however, the Tribunal went on to consider if the unfavourable treatment was because of that thing.

92. The Tribunal is not here to revisit the Police Appeals Tribunal decision relating to the decision not to adjourn. The Claimant has to prove that a reason for the treatment was the something(s) arising in consequence. It does not have to be the sole cause but a significant or more than trivial cause (*Pnaiser v NHS England and Anor* [2016] IRLR 170). This Tribunal therefore needs to determine if the Claimant being unable to engage with the disciplinary process was a significant cause for the decision not to adjourn on 6 November and/or 11 November.

93. The Tribunal accepts the Respondent's argument that the Claimant's disability did not mean that he was exempt from having to provide sufficient evidence to satisfy the LQC, Mr Cadman, that the hearing should be adjourned. The burden was still on the Claimant to provide the necessary evidence, and as he was aware of the hearing from at least 19 September onwards, he had sufficient time to do so. The Tribunal is satisfied that Mr Cadman correctly applied the law on whether or not the hearing should be adjourned, both on 6 November, and on 11 November.

94. The Tribunal is satisfied that, even if the Tribunal is wrong about the Claimant being unable to engage with the disciplinary process not being something arising in consequence of his disability, the decision not to adjourn was not because of that thing. The Claimant's applications to adjourn were not supported by the level of medical evidence required by *Levy v Ellis Carr* [2012] EWHC 63 (Ch) and *GMC v Hayat* [2018] EWCA Civ 2796. The decision not to adjourn was made because of the lack of supporting medical evidence in the Claimant's applications, and not because of his being unable to engage in the disciplinary process.

Decision to dismiss

95. The investigation found that the Claimant's conduct amounted to gross misconduct, and the Respondent was therefore entitled to dismiss the Claimant. In the absence of any evidence to mitigate the seriousness of the misconduct, dismissal was a reasonable option. The Tribunal accepts that the Responded was expected to act in accordance with the College of Policing 'Guidance on outcomes in police misconduct proceedings' ("the Guidance"). The Guidance has been set out by the Respondent, and is repeated here.

96. The Guidance states at paragraph 2.3 that the purpose of the police misconduct regime is threefold:

    a. maintain public confidence in and the reputation of the police service
    b. uphold high standards in policing and deter misconduct
    c. protect the public.

97. Paragraph 4.5 of the Guidance states:

"When considering outcome, first assess the seriousness of the misconduct, taking account of any aggravating or mitigating factors and the officer's record

of service. The most important purpose of imposing disciplinary sanctions is to maintain public confidence in and the reputation of the policing profession as a whole. This dual objective must take precedence over the specific impact that the sanction has on the individual whose misconduct is being sanctioned."

98. Paragraph 4.10 of the Guidance states that:

"Culpability denotes the officer's blameworthiness or responsibility for their actions. The more culpable or blameworthy the behaviour in question, the more serious the misconduct and the more severe the likely outcome."

99. The Chief Constable should take any personal mitigation into account, subject to the observation at paragraph 5.4 of the Guidance:

"Personal mitigation can be taken into account, however, its impact will be limited. This applies to all types of police misconduct."

100. The reason for this somewhat harsh approach is explained in the cases of *Salter v Chief Constable of Dorset* [2012] EWCA Civ 1047, and *Williams v Police Appeals Tribunal* [2016] EWHC 2708 (Admin).

101. In Salter, the Court of Appeal stated (as set out in paragraph 6.1 of the CoP guidance):

"As to personal mitigation, just as an unexpectedly errant solicitor can usually refer to an unblemished past and the esteem of his colleagues, so will a police officer often be able so to do. However, because of the importance of public confidence, the potential of such mitigation is necessarily limited."

102. In Williams it was stated (as per paragraph 6.4 of the Guidance):

"…the importance of maintaining public confidence in and respect for the police service is constant, regardless of the nature of the gross misconduct under consideration. What may vary will be the extent to which the particular gross misconduct threatens the preservation of such confidence and respect. The more it does so, the less weight can be given to personal mitigation."

103. The Tribunal is satisfied that there was no causal link between the Claimant's behaviour and his disability. The investigation established that the Claimant's behaviour amounted to gross misconduct. Applying the Guidance to the Claimant's case, in a finding gross misconduct, the normal sanction would be dismissal. Exceptionally, this could be mitigated, but the potential for this to happen is limited, as per the Guidance. The Claimant did not put forward any mitigation during the course of the investigation or the disciplinary process, and the Respondent was therefore unable to consider what the Claimant now says is mitigation. Even if the Claimant's mitigation had been put forward at the time, the Tribunal finds that the effect of this would have been limited, and dismissal would have remained a reasonable option for the Respondent to take.

104. The view of the Tribunal is that the Claimant's claim in respect of discrimination arising from disability (s.15 equality act) in respect of issues 3.1.1, 3.1.2, 3.1.3 and 3.1.4 must therefore fail. If, however, the Tribunal is wrong about the above, the Tribunal did go on to consider if the treatment was a proportionate means of achieving a legitimate aim.

Proportionate means of achieving a legitimate aim

105. The Respondent says that its aims were:
   a. Maintaining public confidence in and the reputation of the Police service;
   b. Upholding high standards in policing and deterring misconduct;
   c. Protecting police officers, staff and the public;
   d. Eliminating discrimination and/or harassment on grounds of sex and sexual orientation.

106. The Claimant's closing argument accepted that these are legitimate aims, but denied that they were referred to by the respective decision makers.

107. The Claimant argued that refusing an adjournment does not help advance the legitimate aims; that is to say, the aims would not have been thwarted if an adjournment was granted. The Claimant further argued that the Respondent had requested a medical report and so it would have been proportionate to have waited for it [410]. The Claimant stresses that Dr Campbell had not seen the Claimant before because this was an urgent referral. Dr Campbell had said he would review the Claimant in three weeks [409] and notwithstanding that there was no definite date for a prognosis, it was disproportionate to for the Respondent not to wait for Dr Campbell's review.

108. The Tribunal does not accept this argument. The Claimant's case for misconduct was to be heard on 11 and 12 November. The Claimant had already informed the Respondent that he was retiring on 15 November. In order to maintain public confidence in, and the reputation of, the Police service, the Police service must be seen to deal appropriately with allegations of misconduct. The Tribunal does not believe that the Claimant would have attended any disciplinary hearing after his retirement, and, with the Claimant having left the Police service, there would be no sanction that the Respondent could impose on the Claimant. The aim would therefore have been thwarted by the adjournment. It was therefore not disproportionate not to wait for Dr Campbell's review. In any event, as there was no definite promise of a prognosis after three weeks. Dr Campbell merely said he would be seeing the Claimant again. The Respondent had no way of knowing when a prognosis could even be given. In those circumstances, the Respondent's actions were not disproportionate.

109. The Claimant further argues that public confidence may well be undermined by refusing adjournments for police officers in a mental health crisis. The Tribunal accepts that the Respondent has an obligation to protect police officers, which includes protecting the Claimant, but this has to be balanced with its obligations to other officers and to the public. The Tribunal considered how the competing needs of the Claimant and Respondent could

be balanced, and finds that the Responded owed a greater duty to other officers and to the public, and so the Respondent's actions were appropriate and reasonably necessary.

110. The Claimant argued that there was no evidence of deliberate non-engagement. The Claimant says he was not thwarting the process or refusing to engage; he was unwell. The Tribunal accepts that the Respondent has not presented any evidence to suggest the Claimant was acting deliberately and this was not put to the Claimant. The Tribunal does not, however, find that this assists the Claimant's case. Whether the Claimant's non-engagement with the process was deliberate or does not alter the proportionality of the Respondent's response.

111. The Tribunal is satisfied that, if the actions of the Respondent did amount to unfavourable treatment because of something arising from the Claimant's disability, then the treatment was a proportionate means of achieving a legitimate aim.

Reasonable Adjustment (Equality Act 2010, ss. 20 and 21)

112. The List of Issues detailed the following PCPs:

a. 4.2.1 A requirement that police officers must not engage in conduct which is abusive, offensive and incompatible with the principles of policing, failing which they will be subject to disciplinary action for misconduct or gross misconduct;

b. 4.2.2 The requirement for police officers accused of misconduct to engage with the misconduct investigation/procedure, by responding to correspondence/requests for information. It is alleged that there was a failure to make adjustments at the early stages of the investigation and on 6 and 11 November 2019.

113. The Claimant's Opening Note stated that 4.2.2 could be better understood by reference to the Claimant's pleaded case, which states:

114. The Force applied a provision, criterion or practice ('PCP') in the form of a requirement for the Claimant to have engaged with the earlier stages of the misconduct investigation/procedure and/or attend the misconduct hearing, failing which the hearing will be conducted in their absence.

115. The Respondent did not challenge this clarification of the PCP. The Respondent admits the two PCPs

Substantial disadvantage

116. The Tribunal must therefore decide if the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that:

117. Regarding PCP 4.2.1, the Claimant was unable to control his moods, think or act rationally, was more prone to act as he did in late 2018 and more liable to be subject to disciplinary proceedings;

118. Regarding PCP 4.2.2, the Claimant's disability made it more difficult for him to comply and was unable to defend the allegations.

119. The Tribunal repeats its findings in relation to discrimination arising from disability above, and in particular the finding regarding the Claimant's behaviour towards the two PCSOs on 12 or 13 September 2018, and his behaviour at the Christmas party on 13 December 2018.

120. The Claimant was not subject to disciplinary proceedings for any allegations such as not thinking rationally, or for swearing at himself, which he said in evidence was a coping mechanism for his PTSD. The Claimant was subject to disciplinary proceedings for his misconduct towards others. There is no evidence to support that this sort of behaviour was part of the Claimant's PTSD and the Tribunal concluded that this behaviour was not as a consequence of the Claimant's disability. A comparator, without the Claimant's disability, behaving as the Claimant did, would be treated in the same way as the Claimant by the Respondent.

121. The Tribunal does not accept that PCP 4.2.1 placed Claimant at a substantial disadvantage compared to someone without the Claimant's disability in that the Claimant was more prone to act as he did in late 2018 and more liable to be subject to disciplinary proceedings.

122. The Tribunal, as noted above, disagrees that the Claimant was "unable" to engage in the disciplinary process, but that is not the Claimant's case here. The Claimant's case is firstly that his disability made it more difficult for him to comply (with the earlier stages of the misconduct investigation/procedure and/or attend the misconduct hearing). The Tribunal does accept that the Claimant was unable to participate in an interview during the investigation period. This is supported by evidence from Nurse Mills from OH.

Reasonable Adjustments

123. The Tribunal has examined the suggested adjustments that the Claimant says could have been taken to avoid the disadvantage.

4.5.1 Not treat the Claimant's actions as misconduct

124. The Tribunal does not accept that this is a reasonable adjustment for the Respondent to have taken. The allegations against the Claimant were serious. There was no evidence or even any suggestion from the Claimant during the investigation process that his behaviour was caused by his disability. As noted above, one of the allegations made against the Claimant was that he had said, on the night of the Christmas party, that his behaviour was acceptable because of his PTSD. Repeating the Tribunals findings above; this was only an allegation, as reported by a member of the public. The Respondent had no

knowledge if the Claimant accepted or denied saying such a thing. There was no suggestion that this was the Claimant's belief, and the Claimant never put forward that suggestion himself throughout the whole of the investigation or disciplinary process. The Tribunal is satisfied that the Claimant was able to give at least some instructions to his Police Federation representative during the investigation and disciplinary procedure, and so if he wished to make a case that his behaviour was caused by his disability then he had opportunity to do so.

125. In any event, the Tribunal does not accept that the Claimant's behaviour towards the PCSOs or towards his colleagues at the Christmas party was as result of his PTSD. There is no medical evidence to support this, and the Tribunal repeats its findings in the section *Instigation of a disciplinary investigation in December 2018*, above.

126. The Tribunal finds it was not reasonable for the Respondent not to treat the Claimant's actions as misconduct.

4.5.2 Adopted a lesser sanction

127. The Tribunal repeats its findings above; namely that the allegations against the Claimant were serious and were not as a result of the Claimant's PTSD. The Tribunal further repeats its findings in the section *Decision to dismiss* above. The investigation found that the Claimant's conduct amounted to gross misconduct, and the Respondent was therefore entitled to dismiss the Claimant. In the absence of any evidence to mitigate the seriousness of the misconduct, dismissal was a reasonable option.

128. It was not reasonable for the Respondent to adopt a lesser sanction.

4.5.3 Not dismissed the Claimant

129. For the same reasons as given above, the Tribunal finds it was not a reasonable adjustment for the Respondent not to dismiss the Claimant.

4.5.4 Allowing or assisting the Claimant to respond to the allegations in writing

130. The Tribunal accepts the evidence of DS Thomson that the Claimant was offered the opportunity, via his Police Federation representative, to respond to the allegations in writing. This is supported by the entry at [450] which says:

"Offered for him to provide a written response if that would be easier on JM."

131. The Tribunal also accepts the evidence of DS Thomson that a response to a Regulation 15 notice (which is not in itself mandatory, but was an option open to the Claimant) can be in any form. A written response from the Claimant would have been accepted by the Respondent.

132. The Tribunal notes that DS Thomson accepted in cross-examination that he ideally wanted a live interview and that he did not think about sending written questions to the Claimant. DS Thomson conceded that he could have sent bullet point style questions to the Claimant, saying that this was "an option". This suggestion, however, was not part of the Claimant's pleaded case as set out in the List of Issues.

133. In any event, the Tribunal finds that the Respondent was under no obligation offer a variety of methods by which the Claimant could respond to the allegations. Nor was the Respondent obliged to chase up a written response to the Regulation 15 notice, as there is no requirement that an officer 'must' reply to such a notice, only 'may'. The Claimant had the option of replying and writing, and could have requested any other reasonable adjustments at the time. He did not do so.

134. The Claimant raised in his evidence that he could not respond to the allegations as he did not have full details from the Respondent to allow him to do so. The evidence of DS Thomson is that all the information to allow the Claimant to respond was sent to Mr Loker. There is an entry on the investigation log dated 28 June 2019 at [450] which says:

"Interview disclosure has been prepared."

The log then goes on to say, on 8 July 2019:

"Pre-interview disclosure document sent to Mark Loker."

135. The Tribunal finds that DS Thomson's account is credible and more probable than not. The Tribunal cannot make any finding on whether or not Mr Loker passed this information on to the Claimant, but the Tribunal is satisfied that the Claimant's representative had all the necessary documentation for the Claimant to be adequately able to respond to the allegations, either in writing or by another means of his choosing.

136. The Tribunal is satisfied that the Claimant was allowed to respond to the allegations in writing. The Respondent therefore did not fail to offer this as a reasonable adjustment.

4.5.5 Engaging proactively with the Claimant's Police Federation representative.

137. The Tribunal is satisfied that there are multiple entries in the investigation / disciplinary log which show that the IO was in communication with the Claimant's Police Federation representative.

138. The Claimant has suggested that would have been reasonable to respond to Nurse Mills (via the Claimant's Police Federation representative if needed) and ask questions about how to overcome the disadvantage. The Tribunal accept the evidence of DS Thomson that OH did not and would not share information about patients with the Respondent. It would not have been

reasonable for the Respondent to pursue what adjustments could have been made with OH. The Claimant, the Claimant's Police Federation representative or OH were in a position to advance any adjustments that were reasonable. The Tribunal accepts the evidence of DS Thomson that any proposed adjustments would have been given due consideration. It was not the part of the Respondent to suggest multiple adjustments with may or may not have benefited the Claimant.

139. The Tribunal is satisfied that the Respondent did engage proactively with the Claimant's Police Federation representative.

4.5.6 Suspending the investigation to enable the Claimant to undergo medical treatment/rehabilitation to the point where he was well enough to engage or participate.

140. The Tribunal repeats its findings in relation to the investigation, above. The allegations against the Claimant were serious, and it was correct that they be investigated. There was no request from the Claimant or from his Police Federation representative to suspend the investigation while it was ongoing. A request to postpone was only made in relation to the disciplinary hearing [139 – 140].

141. There was also no information available to the Respondent at the time of the investigation as to when the Claimant might be well enough to engage in the proceedings. The message from the Claimant's Police Federation representative on 24 July 2019 [452] said that he was trying to arrange a time to meet with the Claimant to "arrange for him to compile a response". There was, therefore, no suggestion that the investigation should be suspended, and indeed it appeared from the Claimant's Police Federation representative that the Claimant was going to be engaging with it.

142. The Tribunal is satisfied that Suspending the investigation to enable the Claimant to undergo medical treatment/rehabilitation to the point where he was well enough to engage or participate was not a reasonable for the Respondent to make, as the Respondent had no knowledge or information as to what sort of treatment/rehabilitation would have required and what the timescale of the suspension would be. The Tribunal also finds it was not a reasonable adjustment as, as far as the Respondent was aware, the Claimant was looking to prepare a written response to the allegations and was not asking for the investigation to be suspended.

143. Finally, the Tribunal is satisfied that allegations such as those made against the Claimant are serious ones and it is in the interest of public confidence in the police that such allegations should be investigated promptly. It would not have been reasonable for the Respondent to have an open-ended suspension of the investigation, and there was no evidence as to when the Claimant would be fit to resume the investigation.

4.5.7 Postpone the disciplinary hearing

144. The request for the disciplinary hearing to be adjourned was first made by Mr Henley on 15 October 2019 in a letter [140] sent to Mr Cadman and the Respondent. The grounds for the adjournment were:

a. The Officers [sic] mental health is fragile; he is receiving treatment for this and fully engaging with the Somerset Partnership, Occupational Health and the NHS. The joint consensus is that the Officer would not be, at present, in a fit state or of sound mind to fully cooperate with the process.
b. The Officer is not mentally capable of understanding and as such, has not read the disclosure or material contained within the evidence file.
c. Because of his condition, he has not been able to receive any legal advice.
d. Any continuance at such a critical stage of his treatment is understood to be detrimental to his current health and any potential recovery.

145. The Tribunal notes that there was no supporting medical evidence with this letter, nor did it say how long the adjournment was being requested for.

146. The request was based on the evidence of nurse Mills of occupational health. Her comment from 16 July 2019, stated:

"In my opinion, from today's encounter, any meeting (interview or otherwise) would negatively impact on Jamie especially if challenging or questioning." [130]

and

"I advise at this time he would not be fit to attend any formal, or informal meetings, within the organisation. I believe any meeting would potentially increase his anxiety to the point where he may not be able to answer questions in a thorough or helpful manner and therefore may be disadvantaged." [394].

147. On 18 October 2019, Nurse Mills wrote:

"In my opinion I still do not feel he would be able to attend a formal hearing at this time. It is difficult to say whether he would be able to undertake an interview as his mood is fluctuating daily, so one day he may be fine with his emotions more intact, whilst another not." [141]

148. Mr Cadman replied to the request for an adjournment, stating it should be made properly and be supported by "cogent medical evidence". The Tribunal is satisfied that the burden to provide this was on the Claimant, and it was not unreasonable of Mr Cadman to expect and application to be made in the correct manner and with supporting evidence.

149. The email from Mr Henley to Mr Cadman of 1 November [150] stated that the attached medical evidence consisted of 1) Medical report from the NHS

Mental Health Team; 2) Email from Avon and Somerset Occupational Health. The email went on to say:

"I have written to the Psychiatrist who is caring for Jamie. I am awaiting a response which will include a prognosis."

150. The Tribunal is satisfied that the Claimant and the Claimant's representative knew of the need to provide a prognosis in support of the application for an adjournment, in accordance with the guidance in *GMC v Hayat* [2018] EWCA Civ 2796

151. Dr Campbell's letter of 4 November 2019 describes the Claimant as:

"He presented as very emotional and often quite overwhelmed and anxious." [408]

152. The reasonable adjustment being argued for was an adjournment to obtain medical evidence to support the assertion of the Claimant's unfitness to attend the hearing, rather than to answer or rebuff any of the allegations against the Claimant.

153. The evidence of Dr Campbell was that the Claimant *"would struggle to attend a hearing"* and to *"represent himself"*. The evidence, as available to the panel on 11 November, did not definitively state either that the Claimant was unfit to attend the hearing, or when he might be fit to do so. The Tribunal notes that this was something that was acknowledged by the Claimant's solicitor at the time of making the application for an adjournment.

154. The Tribunal rejects the argument that the disciplinary panel should have sought a medical report in respect of the Claimant. The disciplinary panel had the benefit of a report from the Claimant's treating psychiatrist, Dr Campbell. The Tribunal finds there was no further duty on the Respondent to seek more medical evidence than they already had.

155. The Tribunal accepts that the Respondent correctly identified and applied the law regarding the nature and standard of the evidence necessary for an application for an adjournment on the grounds of ill health to be successful. There must be evidence that the individual is unfit to participate in the hearing (*Governor and Company of the Bank of Ireland v Jaffery* [2012] EWHC 724). That evidence must identify with proper particularity the individual's condition and explain why that condition prevents their participation in the hearing. That evidence should be unchallenged (*Brabazon-Drenning v UKCC* [2001] HRLR 6). The Tribunal notes the comments in the judgment from *Levy v Ellis Ca*rr [2012] EWHC 63 (Ch) at [36]:

"Such evidence should identify the medical attendant and give details of his familiarity with the party's medical condition (detailing all recent consultations), should identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process, should provide a reasoned prognosis and

should give the court some confidence that what is being expressed is an independent opinion after a proper examination. It is being tendered as expert evidence."

156. There was no prognosis within the report of Dr Campbell dated 4 November 2019. Nor was there any suggestion that a prognosis would be forthcoming when Dr Campbell saw the Claimant again in three weeks' time. The report did not give any clear indication as to when, if ever, the Claimant would be fit to take part in the disciplinary hearing.

157. The Tribunal finds that the medical evidence submitted by the Claimant in support of his application to adjourn the disciplinary hearing fell short of that which would be needed in order for it to succeed. The Tribunal does not accept that the Claimant's disability exempted him from the requirement, established by case law, regarding the standard of his evidence.

158. The Tribunal is further guided by *GMC v. Adeogba* [2016] 1 WLR 3867. The *Adeogba* case states that, regarding whether to adjourn or proceed with a disciplinary hearing, any decision "must also be guided by the context provided by the main statutory objective of the GMC, namely, the protection, promotion and maintenance of the health and safety of the public". "…the fair, economical, expeditious and efficient disposal of allegations made against medical practitioners is of very real importance." Although this case is in respect of a disciplinary hearing for a medical practitioner, not a police officer, the Tribunal is satisfied that the same principles apply. Although the Tribunal is satisfied that the Claimant was not deliberately trying to frustrate the process, the Tribunal is satisfied that, if the hearing had been adjourned, the Claimant would have retired and would not have taken any further part in the disciplinary process.

159. The Tribunal concludes that the panel correctly applied the legal principles applicable to application to adjourn on health grounds. It was reasonable for the panel to conclude that the Claimant had not provided sufficient information to support his application. The panel did allow that the application could be renewed on 11 November; thereby giving the Claimant the opportunity to obtain further evidence. This was reasonable. The Claimant did not provide any further evidence. Adjourning the hearing in light of all the circumstances was not a reasonable adjustment for the Respondent to make.

160. The Tribunal does not consider that Dr Campbell's letter of 4 December 2019 assists the Claimant here. The letter of 4 December was obviously not available at the time of the decision not to postpone the hearing. When looking at a reasonable adjustments claim, the Tribunal must look at what was reasonable at the time and consider what was in the Respondent's knowledge at that time. The adjournment decision "has to be assessed in the light of the material which was before the Tribunal on the date on which the hearing was refused" (*Kilshaw v OSS* [2005] EWHC 1484 (Admin)).

Conclusion

161. For the reasons given above, the Claimant's claims of Discrimination arising from disability (Equality Act 2010, s.15) and Failure to make Reasonable Adjustment (Equality Act 2010, ss. 20 and 21) fail.

Respondent's knowledge

162. As the Claimant's claims in respect of discrimination arising from disability (s.15) and Reasonable Adjustments (ss.20 and 21) fail, the Tribunal has not gone on to consider in detail the Respondent's knowledge of the Claimant's disability. The Tribunal merely observes that the Claimant's mental health was being raised as an issue from the outset of these proceedings, according to DS Thomson, as per paragraph 16 of his witness statement, and that he had the Equality Act at the forefront of his mind, as per paragraph 25 of his statement. With that in mind, it is unclear to the Tribunal why the Respondent disputes knowledge to the extent that it does.

Time Limits

163. The Claimant's claims having failed on their merits, it is not necessary for the Tribunal to consider the time limit issued arising from Section 123(3) of the Equality Act 2010 (*Fuller V London Borough of Redbridge* [2013] UKEAT 0084 13 1207).

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Employment Judge G. King

Date: 13 August 2023
Judgment sent to the Parties on 31 August 2023

For the Tribunal Office