Case No: 2306004/2021

EMPLOYMENT TRIBUNALS

Claimant: Ms C McGovern

Respondent: The Commissioner of Police for the Metropolis

Heard at: London South Employment Tribunal On: 21, 22, 23, 24 August 2023 and 25 August 2023 (in Chambers)

Before: Employment Judge T Perry Ms H Bharadia Mr W Dixon

Representation
Claimant: Mr S Gilchrist (Solicitor)
Respondent: Ms R M White (Counsel)

RESERVED JUDGMENT

It is the unanimous Judgement of the Tribunal that:

1. The Claimant's claims of discrimination arising from disability are not well founded and are dismissed.

2. The Claimant's claims of failure to make reasonable adjustments are not well founded and are dismissed.

REASONS

Evidence

1. The Tribunal was provided with a final hearing bundle running to 1180 pages. The Tribunal pre-read those documents referred to in witness statements. The parties took the Tribunal to relatively few further documents in cross examination.

2. The Claimant gave evidence from a witness statement which had been prepared and relied upon for an earlier preliminary hearing in the case.
3. For the Respondent Mr David Walmsley (Police Sergeant and the Claimant's line manager), Mr Brian Sherlock (Police Inspector), and Ms Rachel Williams (at the time a Police Commander) gave evidence from witness statements.
4. The Tribunal had written submissions from both sides and heard short oral submissions.
5. On the first morning of the hearing Ms White on behalf of the Respondent noted that the Claimant had not given evidence in her witness statement regarding why her claim had not been issued earlier. On the second morning the Tribunal considered an application by the Claimant to rely on a second short witness statement addressing this issue. Ultimately, the Tribunal decided not to allow the Claimant to rely on this for the reasons given orally at the time. However, the Tribunal indicated it was likely that it would ask questions to clarify evidence already given by the Claimant regarding her health and the effect this had on when the claim was issued.

The issues

6. It was agreed the hearing would consider liability only.
7. On the first day of the hearing there was a discussion regarding the list of issues agreed before EJ Klimov on 11 and 12 April 2012. Ms White suggested that a number of matters included on the list of issues required an application to amend. Mr Gilchrist on behalf of the Claimant accepted on the second morning that those matters could be considered as background and clarified issues of dates regarding the reasonable adjustments claims. Ultimately, therefore, the issues before the Tribunal were as follows (retaining the numbering from the order of EJ Klimov).

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before **20 July 2021** may not have been brought in time.

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 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?

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

3.1 Did the respondent treat the claimant unfavourably by:

The UPP conduct

3.1.1 On 2 May 2018, the respondent initiating stage 1 of the Unsatisfactory Police Performance / Attendance process ("the UPP");
3.1.2 On 16 May 2018, not allowing the claimant's partner to attend the UPP stage 1 meeting;
3.1.3 On 22 August 2018, the respondent progressing the claimant to stage 2 of the UPP;
3.1.4 On 22 March 2019, the respondent holding stage 2 UPP meeting;
3.1.5 On 5 May 2021, the respondent issuing the extended final written warning to expire on 5 May 2022?

Putting under pressure conduct

3.1.13 On 23 August 2018, Brain Sherlock saying they were obliged to get the claimant to return to work "and nothing is as bad as it seems";

3.1.14 On 13 May 2019, PS Walmsley calling the claimant's partner after the claimant's second surgery telling him that the NHS website states that the recovery period after such surgery is 5 days;

3.1.17 On 7 April 2020, the respondent refusing the claimant's request to work from home.

3.1.18 On 5 May 2021, the respondent stating that the claimant must return to work on a full-time basis and have satisfactory attendance record by 5 May 2022;

3.1.19 In September 2021, the respondent telling the claimant that she must attend Warspite Patrol Base for the next 6 months or else she will lose her job; and

3.1.20 On 20 June 2022, PS Walmsley asking HR "will there be any ramifications if C were to go off sick again"?

3.2 Did the following things arise in consequence of the claimant's disability:

3.2.1 inability of the claimant to return to work from a police office location?

3.3 Was the unfavourable treatment because of this?

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

The respondent says that its aims were:

3.4.1 sickness absence management.

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?

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

4.2 Did the respondent have the following PCPs:
4.2.1 The UPP;
4.2.2 The requirement for police officers to work from a police office location.

4.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she was unable to work from a police office location due to her disability?

4.4 Did the lack of an auxiliary aid, namely a standing desk, put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant was unable to work at a sitting desk without experiencing pain and distress?

4.5 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

4.6 What steps could have been taken to avoid the disadvantage? The claimant suggests:

4.6.1 With respect to the UPP PCP:
4.6.1.1 not initiating the UPP,
4.6.1.2 not escalating the UPP to stage 2,
4.6.1.3 not escalating the UPP to stage 3,
4.6.1.4 not giving the claimant a warning,
4.6.1.5 not giving the claimant the final warning,
4.6.1.6 not extending the final warning for 12 months.
4.6.2 With respect to the standing desk auxiliary aid - providing a standing desk to the claimant shortly after she requested it to be provided in November 2017.

4.6.3 With respect the requirement for police officers to work from a police office location – allowing the claimant to work from home in March 2020.

4.7 Was it reasonable for the respondent to have to take those steps and when?

4.8 Did the respondent fail to take those steps?

Findings of fact

8. The Claimant is a serving Police Constable who commenced employment with the Respondent on 15 February 2015.
9. The Claimant at some point sustained a serious injury to her back. The Claimant confirmed in response to cross examination that she does not know how this happened and cannot say that it happened at work. The Claimant says that incidents at work impacted on her back, in particular falling from a five foot fence in late 2016.
10. In late 2017 the Claimant saw a chiropractor, who advised that the Claimant had a number of issues including a fractured back, Spondyloisthesis, spinal deviation and vertebra slippage and that these issues had likely been there for years. The chiropractor advised against an operation and the Claimant was given a 24 session plan of chiropractic and massage with multiple sessions each week. The Claimant went to her doctor for a second opinion and was sent for x-rays.
11. On 26 October 2017 the Claimant informed her line manager Sergeant David Walmsley about the chiropractor's assessment. The Claimant was referred to Occupational Health (OH) and put on recuperative duties.
12. At around this time the Claimant spoke with her second level line manager, Inspector Brian Sherlock. The Claimant accepted in cross examination that it was at this stage that Inspector Sherlock made a comment to her that "nothing is as bad as it seems."
13. On 1 November 2017 the Claimant emailed Inspector Sherlock thanking him for their chat and stating that he had been right that things were not as bad as they seemed. The Claimant referred to advice that she not sit at a desk as this would make things worse and that her GP would be suggesting she

return to normal duties but with adjustments to her PPE. The Claimant set out her treatment plan with the chiropractor.

14. Later in November 2017 the Claimant spoke to Mr Walmsley regarding repairing the standing desks which were in the Claimant's place of work but were broken and was told this would take several months to arrange.
15. On 23 November 2017 Inspector Sherlock was provided with the OH report dated 20 November 2017. This recommended the Claimant remain in an office role for the next 4 weeks and that she should get up and "mobilise regularly in the office."
16. On 27 November 2017 in advance of a work station assessment the following day, the Claimant raised concerns with Mr Walmsley and Mr Sherlock that she was not able to get up and mobilise enough.
17. On 28 November 2017 Mr Walmsley told the Claimant she would work in the Sergeants office to ensure she took more regular breaks. The Claimant replied the same day to say that her shift patter was not working for her and that her injury was not being treated seriously enough. The Claimant raised issues with depression. After experiencing difficulties during her shift that evening, the Claimant commenced sickness absence on 29 November 2017.
18. The Claimant was initially signed off by her GP until 16 December 2017. Mr Walmsley, as the Claimant's Welfare officer, kept in contact with her during her absence. The Claimant considered the amount of contact from Mr Walmsley later in December 2017 to be excessive given she was signed off but the tone, certainly in early exchanges, was friendly on both sides.
19. On 5 December 2017 the Claimant spoke with OH and was advised that "if she has pain that prohibits her from full duty she should stay off work until there is a diagnosis and treatment." Mr Walmsley was made aware of this advice.
20. On 6 December 2017 the Claimant applied to be removed from night duties.
21. On 15 December 2017 the Claimant was signed off sick by her GP for a further 28 days.
22. On 20 December 2017 the Claimant spoke to OH again to update them on her attempts to get treatment.

23. On 12 January 2018 the Claimant was signed off sick by her GP for a further 56 days. Mr Walmsley and another officer attended her house for a home visit.
24. On 19 January 2018 OH closed the Claimant's file recording her as unfit and recording no likelihood of the Claimant returning in the short term whilst the Claimant waited for referral for an MRI.
25. On 23 January 2018 there was a first case conference attended by the Claimant, her partner at the time Paul Dwyer, her Police Federation representative at the time and Mr Walmsley. The Claimant complained about OH not listening to her. There was a discussion about alternative roles for the Claimant with the possibility of alternative places of work and alternative units mentioned. The Claimant said she could return sooner in a new role working days.
26. On 7 March 2018 Human Resources contacted Mr Walmsley to state that the Claimant was approaching the point where normally Unsatisfactory Performance Procedure (UPP) would be considered as there was no indication of return to work date. Mr Walmsley was asked for his views in due course including whether there were exceptional circumstances.
27. On 8 March 2018 Mr Walmsley replied that he would seek to set a return to work date at a second case conference and would consider UPP if that return date was not met.
28. On 12 March 2018 the Claimant was signed off for a further 84 days.
29. On 22 March 2018 there was a second case conference attended by the Claimant, Mr Dwyer, her Police Federation representative at the time and Mr Walmsley. A timeframe of around 10 weeks was mentioned for a diagnosis. The Claimant was told her absence was unacceptable and was asked to return to return to work on a phased basis from 3 April 2018 doing office work, with 15 minute breaks every hour. The Claimant was told she was not to go sick during the first three months. The Claimant said this was unachievable and that she could not return to shift work. There was a further referral to OH.
30. On 23 March 2018 Mr Walmsley sent the Claimant a Management Action Notification letter stating that her absence was now considered long term and that if she did not return by 1 April 2018 her absence would be formally progressed via the UPP.

31. On 12 April 2018 Mr Walmsley was informed by OH that the Claimant was not fit to work for 12 weeks. Mr Walmsley forwarded this to the Claimant saying that he was seeking advice from HR but was not inclined to start UPP stage 1.
32. On 2 May 2018 Mr Walmsley invited the Claimant to a stage 1 UPP meeting on 15 May 2018. This letter set out the stages of the UPP including the possibility of dismissal at the end of stage 3. It appears to us, given what he had said on 12 April 2018, that Mr Walmsley must have been convinced or felt obliged to start UPP after discussions with HR. The Tribunal understand that this must have been confusing for the Claimant.
33. On 16 May 2018, the Stage 1 UPP meeting took place. The Claimant's partner was not allowed to act as her companion. At the meeting the Claimant stated she needed a standing role and that she could resume a "recoup role".
34. On 17 May 2018 the Claimant was told that her business interest in her partner's Krav Maga martial art business had been suspended.
35. On 24 May 2018 Mr Walmsley emailed the Claimant an improvement notice under the UPP. This provided for the Claimant to return to work by 21 June 2018 to a temporary role at Plumstead police station on a phased return to work. The notice set out that if a return on this basis was not achieved the UPP process might proceed to stage 2. The Claimant messaged Mr Walmsley saying he should not contact her any more stating that she was going to be sacked for her business interests. Mr Walmsley stated that the Claimant was not going to be sacked.
36. On 5 June 2018 Mr Walmsley contacted the Claimant with details about the role it was proposed she return to from 21 June 2018. The Claimant on 6 June 2018 repeated that she wanted no further contact from Mr Walmsley.
37. On 15 June 2018 the Claimant provided a sick note signing her off until 29 June 2018.
38. On 16 June 2018 the Claimant informed Mr Walmsley that she had been diagnosed by an orthopaedic surgeon with unstable spondylothesis.
39. On 28 June 2018 a further referral to OH was made in light of the Claimant's diagnosis. The report indicated no return to work date pending the outcome of treatment with a recuperative plan to be provided closer to any return to work.

40. On 29 June 2018 the Claimant was signed off for a further two months.
41. On 12 July 2018 Mr Walmsley wrote to the Claimant to confirm that following the failure to achieve the attendance required under the improvement notice, after discussion with Inspector Sherlock, the claimant was going to be invited to a UPP stage 2 meeting.
42. On 23 July 2018 the Claimant's business interest in her partner's Krav Maga business was approved.
43. On 22 August 2018 Mr Sherlock texted the Claimant with potential dates for her UPP stage 2 meeting.
44. On 24 August 2018 the Claimant was reported missing but was found at hospital. The Claimant's mental health suffered in the months thereafter. Mr Walmsley and Mr Sherlock started to contact Mr Dwyer temporarily in relation to the Claimant.
45. On 17 September 2018 Mr Dwyer set out details about the Claimant's current condition in a lengthy email. This set out that spinal fusion was an option. There were limited discussions about the possibility of medical retirement.
46. On 26 November 2018 Mr Sherlock wrote to Peter Bodley and HR that he felt sending UPP 2 would be wrong in light of the Claimant's upcoming serious spinal issues. Mr Sherlock queried whether it was any different now the Claimant was off pay to a leave of absence and whether this could halt UPP.
47. In December 2018 the Claimant again had a deterioration of her mental health.
48. At the end of January 2019 the Claimant was signed off sick until 1 June 2019.
49. In February 2019 Mr Walmsley alerted Mr Dwyer that the UPP stage 2 meeting was proposed for 14 or 15 March 2019.
50. The UPP stage 2 meeting took place on 22 March 2019. The Claimant was absent but her Police Federation Representative attended and pointed out that the Claimant's operations were due in April and May 2019 and that the Claimant was not able to guarantee a return date and was seeking a lengthy date that was achievable after surgery. A return date of 7 October 2019 was set.

51. On 23 March 2019 a final written improvement notice was sent reflecting this return to work date.
52. The Claimant had spinal fusion surgery on 24 April 2019 and 13 May 2019. On 13 May 2019 Mr Walmsley called Mr Dwyer and said words to the effect that he had been told that the NHS website said a patient might be up (by which understand on their feet) within 5 days of the operation. Mr Walmsley asked for any update regarding a return to work date. We consider the version of this conversation described by Mr Dwyer at the UPP3 meeting to be accurate. The Claimant was not party to this exchange.
53. The Claimant was referred to OH again in September 2019 and was assessed as unfit to work but that a return might be possible within three months' time "all being well." An alternative area of work was recommended as well as a phased increase in hours and duties, minimalised travel and a height adjustable desk.
54. On 16 September 2019 Mr Walmsley emailed the Claimant to enquire about whether she had a place of work in mind and any thoughts about a possible date of return.
55. On 10 December 2019 Mr Walmsley emailed the Claimant to invite her to return to work on 16 December 2019 at Lewisham police station producing performance data packs with a phased return to work with an assessment to provide specific equipment.
56. The Claimant replied the same day to say that the role was unsuitable. The Claimant said she could not do an administration role, that Lewisham police station was too far away, and that OH had ignored her. The Claimant asked for a role as an officer trainer at Marlow house starting on 6 January 2020. This role was explored by Mr Walmsley but ruled out by those running the team due to the physical requirements of the role.
57. In subsequent correspondence in December 2019 the Claimant asked how to raise a grievance regarding Mr Walmsley and was provided with a route to do so.
58. On 4 February 2020 the Claimant was referred to OH for advice on non office based roles. On that same day, Mr Walmsley and the Claimant appear to have been messaging about the possibility of the Claimant working from home, with Mr Walmsley saying in particular that a permanent role from home was not possible but that ad hoc days were possible.

59. On 2 March 2020 the UPP stage 3 file was submitted for approval.
60. On 12 March 2020 Mr Walmsley spoke to the Claimant who updated on her health and stated that she could not see a realistic possibility of returning to work. Later that day a case conference took place in the Claimant's absence at which Mr Walmsley fed the contents of this call back to HR.
61. The Claimant says that on 21 March 2020 and again on 7 April 2020 her requests for roles working from home were rejected. We have not seen any written evidence of either the requests or the rejections. However, Mr Walmsley in evidence says that it is likely true that there was a rejection because only staff who were shielding or vulnerable could work from home 100% given the developing Covid situation. In submissions, Ms White suggested that there was an agreement on 7 April 2020 that the Claimant could work from home once a laptop could be sourced. We do not accept Ms White's submission as it is inconsistent with Mr Walmsley's evidence. We do accept that IT resources would have been stretched at this time.
62. At a Teams meeting on 25 June 2020 Mr Walmsley and Mr Sherlock offered the Claimant a role working from home. We think this change of heart from the position in April 2020 reflects the changing attitude to working from home brought about by the covid pandemic.
63. On 8 July 2020 an OH consultation declared the Claimant fit for recuperative duties on a phased return to work up to 20 hours a week on day shifts.
64. On 17 July 2020 Mr Walmsley sent the Claimant a letter notifying her that she would be required to attend a stage 3 UPP meeting.
65. On 31 July 2020 the Claimant started working from home on 4 hours a day, three days a week in the My Investigation Support Team (MIST).
66. On 3 August 2020 Mr Walmsley emailed the Claimant regarding the requirements for her role as to attendance levels. He set out that UPP stage 3 would take place but that dismissal was not likely to be the outcome, rather an extended year of review.
67. The Clamant went up to four days a week on 17 August 2020 and five days a week on 31 August 2020.
68. In September 2020 the Claimant moved to doing research on wanted offenders.
69. On 12 October 2020 an OH consultation declared the Claimant fit for recuperative duties for four hours a day on day shifts but recognised the

Claimant was struggling with sitting or standing for more than 5 minutes. There was a subsequent OH consultation on 9 November 2020.

70. On 17 December 2020 the Claimant's UPP file was passed to the Directorate of Professional Standards.
71. In December 2020 and January 2021 the Claimant took receipt of a mouse, keyboard, desk, chair and footrest.
72. On 24 February 2021 there was a subsequent OH consultation requested by the UPP panel regarding the Claimant's ongoing medical issues.
73. On 13 April 2021 there was a case conference at which there was discussion of whether a career break should have been considered earlier on.
74. On 5 May 2021 the Claimant's UPP stage 3 meeting took place, chaired by Commander Williams. During the course of this meeting the Claimant confirmed that a standing desk did not really help her and she mainly had to be on her side.
75. An Extended Final Written warning notice was issued on 5 May 2021. This required the Claimant to return to full time work and maintain satisfactory attendance by 5 May 2022.
76. On 28 July 2021 there was a Teams meeting with the Claimant, Superintendent Lazar, Chief Inspector Bodley, Mr Sherlock and Mr Walmsley. The Claimant confirmed she had an automatic car but that travelling to Lewisham was too far. The Claimant agreed to work at Warspite one day a week. The Claimant expressed her desire to do the Offender Management role and this was agreed with a start date in September 2021. The Claimant wanted a sooner start date.
77. After her first two weeks in role in September 2021 the Claimant confirmed to Mr Walmsley that the journey was longer than anticipated and that she had had some issues with her back. The Claimant did not make any formal complaint about this.
78. From 28 March 2022 the Claimant moved to a role in the disclosure unit, which was fully working from home.
79. On 9 June 2022 the Claimant was informed the UPP process had ended.
80. On 20 June 2022 Mr Walmsley asked HR if there would be ramifications if the Claimant went off sick again.

The Law The Duty to make reasonable adjustments

81. The Duty of make reasonable adjustments is contained in sections 20 and 21 (and schedule 8) Equality Act 2010. Substantial disadvantage is defined in section 212 Equality Act 2010 as something more than minor or trivial.
82. The duty to make adjustments is, as a matter of policy, to enable employees to remain in employment, or to have access to employment. The duty will not extend to matters which would not assist in preserving the employment relationship. In **Conway v Community Options Ltd** UKEAT/0034/12, *[2012] EqLR 871* it was held that if an adjustment would not enable a return to work, it will not be 'reasonable' for it to be made.
83. The duty to make adjustment arises by operation of law—it is not essential for the claimant himself or herself to at the time have identified what should have been done. The EHRC Code of Practice on Employment (2011) at para 6.24 says that there is no onus on a disabled person to suggest what adjustments should be made.
84. However, the burden of proving the PCP and the substantial disadvantage before the Tribunal rests on the claimant. There must also be an indication before the Tribunal of what adjustments it is alleged should have been made. Once this is done the burden is on the Respondent to show that this could not have reasonably been made. (**Project Management Institute v Latiff** [2007] IRLR 579).
85. The EHRC Code of Practice on Employment (2011) at para 6.28 lists factors which might be taken into account when deciding if a step is a reasonable one to take as follows:
    - *whether taking any particular steps would be effective in preventing the substantial disadvantage;*
    - *the practicability of the step;*
    - *the financial and other costs of making the adjustment and the extent of any disruption caused;*
    - *the extent of the employer's financial or other resources;*
    - *the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and*
    - *the type and size of the employer.*
86. The EHRC Code says ‘It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not

rely on mere generalisations' (Paragraph 5.12). It goes on to say at paragraph 5.21 that ' If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment ,it will be very difficult for them to show that the treatment was objectively justified.

87. As the EAT made clear in **Royal Bank of Scotland v Ashton** [2011] ICR 632 at para 24 whether taking any particular steps would be effective in preventing the substantial disadvantage is an objective test.

"Thus, so far as reasonable adjustment is concerned, the focus of the tribunal is, and both advocates before us agree, an objective one. The focus is upon the practical result of the measures which can be taken. It is not—and it is an error—for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons."

88. The word 'steps' must not be construed unduly restrictively, as the Court of Appeal made clear in **Griffiths v Secretary of State for Work and Pensions** [2016] IRLR 216 at para 65 'In my judgment, there is no reason artificially to narrow the concept of what constitutes a "step" within the meaning of S.20(3). Any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP is in principle capable of amounting to a relevant step. The only question is whether it is reasonable for it to be taken.'

89. Appendix 4 to the **ACAS Guide on discipline and grievances at work** provides guidance on dealing with long term absence stresses the need to maintain regular contact with absent employees and to fully inform them if there is a risk to their employment.

Discrimination arising from disability

90. This right is contained in section 15 Equality Act 2010, which states

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Unfavourable treatment

91. Whether the treatment in issue could be described as 'unfavourable' was the central issue in the case of **Williams v Trustees of Swansea University Pension and Assurance Scheme** [2018] UKSC 65, *i*n which the Supreme Court upheld LJ Bean's statement in the Court of Appeal, that: 'Shamoon is not authority for saying that a disabled person has been subjected to unfavourable treatment within the meaning of s 15 simply because he thinks he should have been treated better'.

Something arising from disability

92. Simler P in **Sheikholeslami v University of Edinburgh** [2018] IRLR 1090*, EAT*, held that:

''*the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence. (See* City of York Council v Grosset [2018] EWCA Civ 1105*,* [2018] IRLR 746*)'.'*

93. The guidance in **Pnaiser v NHS England** [2016] IRLR 170, EAT, is a reminder both that motives are irrelevant (as opposed to the reason why something is done) and that causation for section 15 can be established via a series of links in a chain.

94. The correct approach to causation in claims of under Equality Act 2010 s15 was central to the case of **Dunn v Secretary of State for Justice** [2019] IRLR 298 and that it is not a "but for" causation test but rather a "reason why" test.

Justification

95. In **Homer v Chief Constable of West Yorkshire Police and West Yorkshire Police Authority** [2012] IRLR 601, Lady Hale summarised the position as follows: 'To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so.'

96. Elias J in **MacCulloch v ICI** [2008] IRLR 846, EAT, set out four legal principles with regard to justification, which have since been approved by the Court of Appeal in **Lockwood v DWP** [2013] IRLR 941:

"(1) The burden of proof is on the respondent to establish justification: see Starmer v British Airways [2005] IRLR 862 at [31].

(2) The classic test was set out in Bilka-Kaufhaus GmbH v Weber Von Hartz (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31.

(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardy & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].

(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter.

There is no "range of reasonable response" test in this context: Hardy & Hansons plc v Lax [2005] IRLR 726, CA."

97. *In* ***Buchanan v Commissioner of Police of the Metropolis*** [2016] IRLR 918 HHJ Richardson held however that the ET had erred in accepting justification on the basis that the police force's general procedure had been justified. The EAT drew a distinction between cases where A's treatment of B is the direct result of applying a general rule or policy, and cases where a policy permits a number of responses to an individual's circumstances. Sickness absence likely falls into the second camp and the specific response must be justified not the policy generally.

98. Singh J in the EAT in **Hensman v Ministry of Defence** UKEAT/0067/14/DM [2014] EqLR 670 held that when assessing proportionality, while an ET must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

99. In **Department of Work and Pensions v Boyers** UKEAT /0282/19/AT tribunals were reminded that in assessing the proportionality of the means of achieving a legitimate aim that it is an error of law to focus on the process by which the outcome was achieved. Its analysis should not be based on the actions and thought processes of the respondent's managers but on a balancing of the needs of the respondent in the context of the legitimate aim found to be pursued by the dismissal and the discriminatory impact on the claimant.

100. The Court of Appeal in **City of York Council v Grosset** [2018] IRLR 746, approved the decision of the EAT that the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the ET was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the ET.

101. Whilst the test of justification is different from considerations of reasonableness in Unfair Dismissal, tribunals are helped by the warning given by the EAT in **Birtenshaw v Oldfield** [2019] IRLR 946, that in assessing proportionality they should give a substantial degree of respect

to the judgment of the employer as to what is reasonably necessary to achieve the legitimate aim.

102. The focus in a s 15 case is on whether the unfavourable treatment, such as dismissal, can be justified as a proportionate means of achieving a legitimate aim, and in consequence an unreasonable process does not of itself mean there has been a breach of s 15 – unlike the position in unfair dismissal where an unreasonable procedure is likely to mean the dismissal is unfair even when as a matter of substance the employee 'deserved' to be dismissed.

Time limits

103. Section 123 Equality Act 2010 states, in so far as it is relevant

(1) …Proceedings on a complaint within section 120 may not be brought after the end of—

(a)the period of 3 months starting with the date of the act to which the complaint relates, or

(b)such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

104. As to conduct which 'extends over a period' the Court of Appeal in **Hendricks v Metropolitan Police Commissioner** [2003] IRLR 96, sets out that the burden is on the Claimant to prove, either by direct evidence or inference, that the numerous alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period'.

105. In **South Western Ambulance Service NHS Foundation Trust (appellant) v King** (respondent) - [2020] IRLR 168 Chaudhury P in the EAT stated in the context of a continuing act at [36-38] “It will be necessary, in my judgment, for at least the last of the constituent acts relied upon to be in time and proven to be an act of discrimination in order for time to be enlarged.” Accordingly, the Claimant cannot rely on matters to extend time unless they are actionable.

106. Whilst extension of just and equitable grounds is a broad discretionary power for the Tribunal, it is important to recognise that the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time and 'the exercise of discretion is the exception rather than the rule' (**Robertson v Bexley Community Centre** [2003] IRLR 434, at para 25, per Auld LJ).

107. Per Langstaff J in **Abertawe Bro Morgannwg University Local Health Board v Morgan** UKEAT/0305/13 (18 February 2014, unreported), a litigant can hardly hope to satisfy that burden unless he provides an answer to two questions (para 52):

"The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was."

108. In **Adedeji v University Hospitals Birmingham NHS Foundation** [2021] EWCA Civ 23, the Court of Appeal repeated a caution against tribunals relying on the checklist of factors found in s 33 of the Limitation Act 1980 (which applies to extensions of time for late personal injury claims in the civil courts). The Court of Appeal described that

'The best approach for a tribunal in considering the exercise of the discretion under s 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay"'.

109. That said, the Limitation Act checklist as modified in the case of **British Coal Corporation v Keeble** [1997] IRLR 336 includes as possible relevant factors:

i) the relative prejudice to each of the parties; ii) all of the circumstances of the case which includes:

iii) The length and reason for delay; iv) The extent that cogency of evidence is likely to be affected;

v) The cooperation of the Respondent in the provision of information requested, if relevant; vi) The promptness with which the Claimant had acted once she

knew of facts giving rise to the cause of action, and vii) Steps taken by the Claimant to obtain advice once she knew of the possibility of taking action.

Conclusions Discrimination arising from disability The UPP Conduct

3.1.1 – On 2 May 2018, the Respondent initiating stage 1 of the UPP

110. The Tribunal finds that initiating the UPP process was unfavourable treatment because it was a process that could ultimately lead to the Claimant's dismissal. This is notwithstanding the fact that the UPP is designed to get individuals back to work. The Tribunal does not accept Mr Gilchrist's characterisation of the UPP as a quasi-disciplinary or adversarial process.

111. The UPP was initiated because of something arising from disability, namely the Claimant's inability to return to work.

112. The Tribunal accepts that the Respondent, in applying the UPP, had a legitimate aim, namely the management of sickness absence.

113. The three findings above apply equally to claims 3.1.3-3.1.4.

114. When considering whether initiating the UPP process was a proportionate means of achieving that aim, the Tribunal finds that the Respondent was taking a step that was appropriate and reasonably necessary. The only alternative less than initiating the UPP would have been continuing to manage the Claimant's absences informally. We note that before initiating the UPP there had been two informal case conferences, which had not facilitated a return to work. When balancing the needs of the Claimant against the needs of the Respondent the Tribunal finds that the balance favours the needs of the Respondent. The Respondent has to be allowed to do take formal steps to manage extended absence and stage 1 of the UPP process, having been set out in statute, was the appropriate step to take in May 2018.

3.1.2 – On 16 May 2018 not allowing the Claimant's partner to attend the UPP stage 1 meeting

115. This is a claim that was not pursued with much force before the Tribunal.

116. Whether unfavourable or not, the Tribunal finds that the refusal to allow the Claimant's partner to attend the UPP stage 1 meeting was not because of something arising from disability, it was because the UPP limits attendance at UPP stage 1 meetings to a "Police Friend", a definition which would exclude the Claimant's partner because he was not a serving police officer, staff member or person nominated by a staff association.

3.1.3 – On 22 August 2018, the Respondent progressing the Claimant to stage 2 of the UPP

117. As to proportionality, the Improvement Notice issued after the Stage 1 UPP meeting had required return to work by 21 June 2018. Progression to stage 2 took place on 22 August 2018. There was no substantial delay to the commencement of stage 2. However, at this stage, the most serious of the Claimant's mental health issues had not yet happened. In those circumstances, the Tribunal considers that it was proportionate to proceed to the next stage of the UPP process for largely the same reasons that it had been legitimate to start UPP1 in the first place. The fact that dismissal was an option at stage 3 of the UPP did not in our view outweigh the Respondent's need to formally manage staff absences.

118. The Tribunal accepted Ms Williams' evidence regarding the use of career breaks. Whilst it would seem that a career break might be an option that could be considered for someone faced with what they know will be a long term health issue, in the Claimant's circumstances we do not consider that it would have been more effective than the UPP as a means of either managing the Claimant's sickness absence or engaging with her to return to work. In particular, we note that the Claimant was in receipt of sick pay for a considerable period and went through several rounds of discussions about roles in which she could return to work. Once the Claimant had a significant amount of sickness absence, we accept the evidence that she would have been ineligible for a career break.

3.1.4 – On 22 March 2019, the Respondent holding stage 2 UPP meeting

119. As to proportionality, the Claimant's situation had changed significantly after August 2022 due to her declining mental health. The Respondent was undoubtedly right to delay this meeting significantly until around 10 months after the improvement notice. The timing of the meeting was still not ideal as it was shortly before the Claimant's upcoming major surgeries and the Claimant was unable to attend the meeting and was plainly going to be unable to recover quickly after her surgeries. However, the Claimant had by this point been off work for approaching a year and a half and the holding of this meeting had been substantially delayed. Whilst we note that under the UPP it was possible for any stage of UPP to exceed 12 months in exceptional circumstances (see regulation 10(3)) and whilst the Claimant's situation was pretty exceptional, we consider that holding the UPP stage 2 meeting at this point (even with the Claimant unable to attend) was proportionate because of the need to manage the Claimant's lengthy absence (possibly with a view to dismissal if the surgeries were unsuccessful), because the meeting had been substantially delayed, and because the Claimant could not be dismissed at this stage of the UPP.

120. The Tribunal does not accept the submissions made on behalf of the Claimant either that the Respondent did not take the Claimant's health issues sufficiently seriously or that by operating the UPP the Respondent was seeking to ignore the advice of OH relating to the Claimant. The Tribunal considers that Mr Gilchrist has somewhat overstated in submissions the proposition that OH were continually saying the Claimant was unable to attend work. In fact, it was the Claimant's GP who consistently signed her off work and much of the OH advice appears either less clear cut or, frankly, unhelpfully vague when deciding how to manage the Claimant's absence. The Tribunal considers that at all times the Respondent's staff and officers accepted the serious nature of the Claimant's health issues. Operating the UPP process even at times when it was unlikely that the Claimant was going to return to work in the medium term was not ignoring the medical advice but was simply a proportionate means of managing extended sickness absence.

3.1.5 – On 5 May 2021, the Respondent issuing the extended final written warning to expire on 5 May 2022

121. Technically the extended final written warning was not because of the specific "something arising from disability" advanced by the Claimant, namely the Claimant's inability to return to work because by this point she had returned to work. It might be said to have been issued because of the inability at that time to return to work full time or because in the past she had been unable to return to work.

122. In any event, as to proportionality, the Tribunal considers that given the Claimant had not returned to work full time by such a long time after she had first gone off work sick, it was proportionate for the Respondent to manage the Claimant's return to work under the formal UPP stage 3 process. If anything, there was more justification for applying the UPP at this stage when a return to full time work was envisaged and underway than it had been earlier in the process when the Claimant's absence had made certain parts of the UPP (such as setting a specific date for return to work) somewhat unrealistic.

123. To have abandoned the UPP process at this stage in favour of managing the Claimant's increasing return to work informally, whilst possible, would not in our view have been a more proportionate means of dealing with the situation given the length of time that the Claimant had been off sick.

Pressure to return to work

3.1.13 – On 23 August 2018 Brian Sherlock saying they were obliged to get the Claimant to return to work and "nothing is as bad as it seems".

124. The Tribunal does not accept that either comment amounts to unfavourable treatment. The Respondent was required to seek to get the Claimant back to work and the comment about matters not being as bad as they seem was said in the context of trying to encourage the Claimant.

3.1.14 – On 13 May 2019 PS Walmsley calling the Claimant's partner after the Claimant's second surgery telling him that the NHS website states that the recovery period after such surgery is 5 days

125. The Tribunal has found that what was said was that the website suggested a patient might be "up" after 5 days, not recovered. The Tribunal does not

accept that this call or the comment about the NHS website amount to unfavourable treatment of the Claimant. They were not said because of anything arising from the Claimant's disability but rather out of an attempt to sound positive about the Claimant's condition when speaking to her partner.

3.1.17 – On 7 April 2020 the Respondent refusing the Claimant's request to work from home

126. The Tribunal agrees that this was unfavourable treatment. The Claimant wanted to work from home but was not allowed to do so.

127. The reason for the unfavourable treatment was not, however, something arising from the Claimant's disability. The reason why the Claimant was told that she was unable to work from home was that this was the Respondent's policy at the time.

128. Alternatively, if the requirement of causation is satisfied, the Tribunal finds that the Respondent's refusal was justified in the early phase of the pandemic given the Respondent was facing both an increase in requests for remote working and a corresponding shortage of IT equipment to enable this.

3.1.18 – On 5 May 2021 the Respondent stating that the Claimant must return to work on a full-time basis and have satisfactory attendance record by 5 May 2022

129. This is a duplicate of claim 3.1.5.

3.1.19 – In September 2021 the Respondent telling the Claimant that she must attend Warspite Patrol Base for the next 6 months or else she will lose her job

130. The Tribunal does not accept that a comment such as this was said.

131. What was agreed at the MS Teams meeting on 28 July 2021 was that the Claimant would attend Warspite one day per week. The Claimant agreed to this proposal and was even keen to return to Warspite earlier than September 2021.

132. The Claimant did express some concerns about the journey to Mr Walmsley after he checked in with her shortly after starting but raised no complaint and did not request to stop working from Warspite. For those reasons the Tribunal does not find that working from Warspite was unfavourable treatment.

133. Alternatively, if it was unfavourable treatment, either it was not because of something arising from disability (specifically the Claimant's inability to work from a police location) as the Claimant was working from a police location during this period.

134. Finally, in the context of seeking to get the Claimant back to work at a police location and where she did not complain about the arrangement, the Tribunal considers that the instruction to work at Warspite one day a week was a proportionate means of achieving the legitimate aim of managing the Claimant's sickness absence and enabling a return to work for her.

3.1.20 – On 20 June 2022, PS Walmsley asking HR "will there be any ramifications if C were to go off sick again?

135. The Tribunal does not consider this comment to amount to unfavourable treatment of the Claimant. It was a genuine question asked with no ulterior agenda towards the Claimant.

136. For those reasons the Claimant's claim for discrimination arising from disability is not well founded and is dismissed.

Reasonable adjustments

4.2.1 – The UPP

137. The Tribunal is not satisfied that the UPP placed the Claimant at a substantial disadvantage compared to staff without the Claimant's disability as it would apply equally to a non disabled member of staff who took significant periods of sickness absence.

138. Alternatively, the Tribunal does not consider the steps suggested by the Claimant at 4.6.1 of the list of issues were steps that it was reasonable for the Respondent to have to take. The Claimant suggests that the Respondent not initiate or not pursue the statutory framework provided for it to deal with sickness absence. These suggestions go too far and would not have been a reasonable step to take. Indeed they would have gone against the purpose of reasonable adjustments which is to enable staff to return to work (not to remain off work). By exercising the significant discretion within the UPP including to delay the later stages of the UPP significantly, the Respondent took all the steps that were reasonable to take

to counteract any substantial disadvantage the Claimant might have been put to by the application of the UPP.

4.2.2 – The Requirement for police officers to work from a police office location

139. The Respondent accepts it did apply this PCP. The Claimant was placed at a disadvantage in that she was unable to work from home.

140. The Claimant says that it would have been a reasonable step for the Respondent to allow her to work from home in March 2020.

141. The Tribunal finds that this would not have been a reasonable step for the Respondent to take given it was the early phase of the pandemic and the Respondent was facing both an increase in requests for remote working and a corresponding shortage of IT equipment to enable this. The Tribunal finds that in offering the Claimant a role working from home in June 2020, which commenced in July 2021 the Respondent took all reasonable steps to address the disadvantage.

4.4 – Auxiliary aid – providing the Claimant with a standing desk

142. The Claimant says that it would have been a reasonable step for the Respondent to provide her with a standing desk after she requested one in November 2017.

143. The Respondent has a reasonable period within which to take reasonable steps. Given the Claimant went off sick in November 2017, the Tribunal finds that the Respondent did not have long enough to arrange the standing desk.

144. For those reasons the Claimant's claim for discrimination arising from disability is not well founded and is dismissed.

Time limits

145. The Claimant's claims having failed on the merits there is no need to move on to consider time issues.

_____

Employment Judge **T Perry**

_____

Case No: 2306004/2021

Date 31 August 2023