EMPLOYMENT TRIBUNALS

Heard at: Croydon (by video) **On:** 4 to 7 September 2023

Claimant: AB

Respondent: British Transport Police Authority

Before: Employment Judge E Fowell

Mr Anderson

Ms Humphries

Representation:

Claimant Mrs B (Mother)

Respondent Ms Charlotte Goodman of counsel, instructed by Simons Muirhead & Burton LLP

JUDGMENT

1. The claim of unfair dismissal is dismissed on withdrawal.

2. The claim of direct discrimination on grounds of sex is dismissed.

3. Although the claimant had a disability at all material times, the claims of failure to make reasonable adjustments and of discrimination arising from disability are dismissed.

4. There is no order for costs.

REASONS

Introduction

Anonymity

1. This case concerns an allegation of domestic violence made by one police officer against another and which resulted in the accused officer being dismissed. An order

was made on 12 January 2023 for the anonymity of the alleged victim, who is to be referred to as PC RH. That order provides that "that there shall be omitted or deleted from any document entered on the Register, or which otherwise forms part of the public record, including the Tribunal's hearing lists, any identifying matter which is likely to lead members of the public to identify" her.

2. It follows that the claimant's name must also be anonymised to avoid her being identified in turn. He will be referred to simply as AB.

3. A restricted reporting order was also made and prohibits the *publication* in Great Britain of "any matter likely to lead members of the public to identify the complainant or such other persons (if any) as may be named in the Order". That includes PC RH. Again, any publication of the name of the claimant is likely to involve a breach of that order, with potential criminal penalties.

Background

4. By way of background, the two officers worked for British Transport Police (BTP). They were living together and had a heated argument or fight on the evening of 14 November 2019, during which they both made 999 calls and officers from the Metropolitan Police attended. Each of them made allegations against the other but AB was the one arrested and subsequently charged with assault. In due course he appeared before a magistrates court but the proceedings had not been started within the six-month time limit, it seems because of Covid, and so the criminal case was dismissed. An internal disciplinary process was then begun which resulted in his dismissal on 10 June 2021, about 18 months after the incident.

5. That process was conducted under the British Transport Police (Conduct) Regulations 2015, which provide a detailed framework for the misconduct proceedings, including that the decision be reached by an independent panel of three individuals including a legally qualified chair, a suitably senior police officer and an independent panel member.

6. This hearing is therefore an unusual one since we are invited to overturn the conclusions of that panel, a panel which was established to consider whether the relevant professional standards were breached, who were assisted by counsel on each side and which heard the evidence in question over a similar number of days. We should therefore make clear at the outset that we are not hearing an appeal from their conclusions. Our role mainly concerns whether the decision of the panel, and the subsequent decision to refuse a right of appeal, were acts of discrimination.

7. The claims initially presented were for unfair dismissal, sex discrimination and discrimination on grounds of disability, in this case PTSD. However, as a police officer AB was an office holder, not an employee, and so does not have the right to bring a claim of unfair dismissal. That claim was therefore withdrawn at the

preliminary hearing. It does not appear that a separate order dismissing the claim has been issued and so it is included in this judgment.

8. AB is however entitled to pursue his claims of discrimination under the Equality Act 2010. Part V of the Act deals with discrimination at work, and section 42 states that:

> (1) For the purposes of this Part, holding the office of constable is to be treated as employment" …
>
> (a) by the chief officer, in respect of any act done by the authority in relation to a constable or the office of constable;
>
> (b) by the responsible authority, in respect of any act done by the authority in relation to a constable or appointment to the office of constable."

9. This distinction between the actions of the chief officer and the responsible authority is a significant one, to which we will return. For the time being, we note that both of them can be regarded as the employer for the purpose of discrimination claims.

10. Section 39 provides that an employer (A) must not discriminate against a person (B) in a variety of ways, including by dismissing B. It also provides that a duty to make reasonable adjustments applies to an employer.

11. Ancillary provisions are set out in Part 8 of the 2010 Act. Section 120 confers jurisdiction on an employment tribunal to determine complaints relating to contraventions of Part 5. If we find a contravention then by section 124(2) we can make a declaration, order the payment of compensation, or make appropriate recommendations, but we do not have powers to overturn the dismissal or compel BTP to conduct an appeal.

The Regulations

12. It is necessary to describe the regulations in question in some further detail. They were made by the British Transport Police Authority in exercise of the powers conferred by sections 36 and 37 of the Railways and Transport Safety Act 2003. From the list of definitions, the chief constable is the "appropriate authority". The regulations then provide that he or she may delegate functions to an officer of at least the rank of chief inspector: regulation 3(5). (In this case that authority was delegated to Detective Superintendent Peter Fulton, the head of the Professional Standards Department – PSD – who gave evidence before us.)

13. His role then included making an assessment of whether the conduct in question, if proved, would amount to misconduct or gross misconduct or neither: regulation 12. Schedule 1 to the regulations sets out the relevant standards of professional behaviour. The two standards with which we are concerned are as follows:

Honesty and Integrity

Police officers are honest, act with integrity and do not compromise or abuse their position.

Discreditable Conduct

Police officers behave in a manner which does not discredit the police service or undermine public confidence in it, whether on or off duty.

Police officers report any action taken against them for a criminal offence, any conditions imposed on them by a court or the receipt of any penalty notice.

14. Once it is determined that the conduct would, if proved, amount to gross misconduct, the appropriate authority (Detective Superintendent Fulton) then has to appoint a person to investigate the matter to help determine whether there is a case to answer. regulations 13 and 14. (In this case the investigating officer was Temporary Detective Sergeant Dionne Lyon, another member of the Professional Standards Department, who also gave evidence before us.)

15. Written notice has to be provided to the officer in question who is to be investigated: regulation 15. Provision is made for an interview to take place and for a report to be prepared for the appropriate authority: regulation 17. If a decision is made that there is a case to answer, a further written notice is given to the officer concerned: regulation 22.

16. Both the officer concerned and the appropriate authority have the right to be legally represented at the hearing: regulation 7. Hence, there is a clear distinction in the regulations between the appropriate authority on the one hand, and the panel conducting the hearing. The PSD is the body within the police authority which exercises these functions, so they are akin to the CPS in a criminal case. They prepare the case for a hearing and appoint suitable counsel, who appears before the panel alongside counsel for the officer accused of misconduct.

17. The hearing then has to be conducted by the three person panel comprising, under regulation 25:

    (a) a chair selected by the appropriate authority who satisfies the judicial appointment eligibility condition on a 5-year basis and has been nominated by the police authority for the purposes of these Regulations;

    (b) a member of a police force of the rank of superintendent or above (provided the member is of a more senior rank than the officer concerned); and

    (c) a person selected by the appropriate authority from a list of candidates maintained by the police authority for the purposes of these Regulations.

18. Then, by regulation 35, "the person or persons conducting the misconduct proceedings" may impose disciplinary action, up to and including dismissal without notice. There is then provision at regulation 36 for a notice of the outcome to be published. Regulation 38 provides a right of appeal to the Police Appeal Tribunal and the permitted grounds of appeal are that:

    (a) the finding or disciplinary action imposed was unreasonable;

    (b) there is evidence that could not reasonably have been considered at the misconduct meeting which could have materially affected the finding or decision on disciplinary action; or

    (c) there was a serious breach of the procedures set out in these Regulations or other unfairness which could have materially affected the finding or decision on disciplinary action.

19. Returning to the distinction in section 42 Equality Act between the chief officer and the relevant authority, the chief officer or chief constable is the appropriate authority, and delegates powers to the PSD. The decisions of the panel on the other hand are a decision of the police authority itself, which made the regulations.

20. We also have to consider the decision of the appeal authority. The appeal was considered on paper by the Chair of the Police Appeals Tribunal, Sam Stein QC, who concluded that there was no arguable ground of appeal. Again, since this was a decision made under the regulations, the police authority is responsible in law if that decision involved unlawful discrimination.

Jurisdiction

21. For many years the position was that such panels enjoyed judicial immunity. However, the Supreme Court decided in **P v Commissioner of Police of the Metropolis (Equality and Human Rights Commission and ors intervening)** 2018 ICR 560, SC, that a police misconduct panel did not have judicial immunity in relation to allegations of discrimination and that a claim against it could be pursued in the employment tribunal. The Court reached this decision in reliance on the EU law principles of effectiveness and equivalence. They held in order to give effect to the claimant's right to protection from discrimination under the EU Equal Treatment Framework Directive 2000/78, section 42 had to be read as providing for liability in relation to acts done by persons conducting a misconduct hearing.

22. Since then, the UK has of course left the EU, after the Brexit implementation period which ended on 31 December 2020. The European Union (Withdrawal) Act 2018 now preserves the effect of EU law in force on that date. However, para 3(1) of Schedule 1 provides that, after 31 December 2020, there is "no right of action in domestic law… based on a failure to comply with any of the general principles of EU law" which includes these principles of equivalence and effectiveness. We were not

however invited to reconsider the issue of jurisdiction in light of this change, and have proceeded on the basis that the principle in **P** continues to apply.

The issues

23. The issues we have to decide were set out at the case management hearing on 3 August 2022. There are time-limit issues given the normal three month rule for bringing a tribunal claim, but the claim was certainly brought within the normal period of the decision to dismiss, which is the main act complained of.

24. The first claim is one of direct sex discrimination. Broadly speaking, AB complains that he was treated very differently to PC RH, who was not arrested or charged or subject to any internal disciplinary proceedings at all. However the alleged acts of discrimination are the decisions of the panel and at the appeal stage, so it is not open to us now to consider whether, for example, the original decision by the Metropolitan Police not to arrest or charge her was an act of sex discrimination. He also raised the fact in the course of this hearing that she had not suffered any internal disciplinary proceedings, as he had, but that is not in fact one of the issues for us to decide.

25. His claim of disability discrimination is based on his PTSD, which he suffered following a serious collision which occurred in the course of his duties in late summer 2019, not long before the incident in question. The car in which he was travelling turned over three times and then hit a lamppost. BTP accepts that this gave rise to his PTSD and that he was disabled at the time of the incident for which he was arrested, but they dispute that he was still disabled at the time of the dismissal. By then, they say, he had been undergoing counselling, his condition had improved, and it no longer had a substantial adverse effect on his ability to carry out normal day-to-day activities.

26. There are two different types of disability discrimination raised here, the first being a claim of discrimination arising from disability under section 15 Equality Act 2010. This involves unfavourable treatment for something arising in consequence of his disability.

27. The final claim is of a failure to make reasonable adjustments. There is a duty to make these adjustments where a provision, criterion or practice of the respondent's put him at a substantial disadvantage in compared with someone without his disability. However, the practice in question is recorded as being the procedure by which the formal interview was carried out by the police, i.e. the Metropolitan Police. That was not a provision, criterion or practice of the respondent's and so, as a matter of law, that cannot be the basis of the claim for reasonable adjustments. The adjustments suggested include that AB ought to have been examined by a doctor before his initial interview, offered a companion at the interview and told of his right to amend his statement afterwards, but again all of the steps concern his interview

by the Metropolitan Police. That claim must therefore be dismissed and is not considered further.

Procedure and evidence

28. One difficulty we had in approaching this case is that we did not hear any evidence from members of the panel. In that sense it is a very different situation from the usual type of claim involving a dismissal which is alleged to be an act of discrimination, where questions can be put to the decision-makers to explore their rationale. From evidence presented by Detective Superintendent Fulton, it appears that on policy grounds panel members do not attend such tribunal hearings since to do so would give the appearance of giving evidence in support of one party to the proceedings, the respondent, whereas their purpose is to remain neutral.

29. The situation is similar to that in which a witness provides a statement but does not attend the hearing to be cross-examined. The statement is admissible in evidence but should be given less weight than if the individual attends in person. How much less weight depends on all the circumstances. Again, the circumstances of this case are unusual in that there is, we accept, a good reason for the failure to attend which would appear incompatible with their judicial role. We do not have individual witness statements but we have the record of their findings which are supplemented by the transcript of the hearing itself which occupies over a hundred pages of the bundle so there is little about the process which cannot be checked.

30. So, to recap, we did hear evidence on the part of the respondent from Detective Superintendent Fulton, (the appropriate authority), Temporary Detective Sergeant Lyon (the investigating officer) and Inspector Richard Willis, who was a Sergeant at the time and AB's line manager throughout these proceedings. On the claimant's side we heard from him and from his mother, who has supported him throughout including attending the scene on the night in question. There were in fact no questions for her.

31. There was also a bundle of 920 pages. Having considered this evidence and the submissions on each side, we make the following findings of fact. Inevitably we cannot deal with every point raised, only those necessary to explain and support our conclusions.

Findings of Fact

32. As we have already made clear there were disputed accounts of what took place on the night of 14 November 2019. It is not in fact necessary for us to attempt to state in every respect which version of events we prefer, but it is necessary to summarise those two different accounts, as subsequently provided to the Metropolitan Police in interview.

RH's account

33. RH said that there had been a change in AB since his accident and that she had become concerned about him. She urged him to visit his doctor who diagnosed him with PTSD in October 2019. They began to have arguments involving name-calling and he would threaten to leave and to take their dog away. On one such occasion in early November he picked up their dog and locked himself in the bathroom. When he came out he shoved her with his left hand and she fell over.

34. 14 November 2019 was the day before AB's birthday. He had arranged to meet a friend at a pub at lunchtime. She joined him later, at about 1945 in the evening, by which time he had had a good deal to drink. She then went home to get some food, leaving him with his friend. When he arrived home he became upset, and said he always got upset around his birthday. She went off to bed and he became cross with her, accusing her of not making enough effort on his birthday, at which point she put up a middle finger at him. He then grabbed it and twisted her hand backward. She said, "you're hurting me" to which he replied, "I don't care, don't you ever swear at me."

35. She then went off to bed but he climbed on top of her and pulled the duvet up over her head, pushing down forcefully on her head before getting up and leaving the room. She was in a state of shock and began to cry. She could hear him on the phone to his mother saying, "get me a taxi, I'm done with her". He then came back in and threatened to take the dog away, at which point she sat in front of the dog's cage to prevent him. She heard him say, "I'm going to make a recording of you, so everyone knows what you are like." There was then a tussle and his phone fell onto the bed. He began to scream "abuser, abuser, you're the abuser", grabbing her wrists and slapping her hands against his head as he said this. He then retrieved the dog and she tried to take the dog away from him. He grabbed her hair and forced her head down towards the ground, then grabbed her shoulders and threw her onto the bed. He then got on top of her and restrained her. While he was doing this he shouted that he was going to hit her hard and then said "I'm going to get a knife" before letting go of her leaving the bedroom. As he left the bedroom he said "I'm going to call the police and they are going to arrest you."

36. She then called the police because she was scared about what he was going to do. He heard her, came back into the bedroom and said, "I've not called the police, hang up the phone". But she carried on with her call. She then heard him in the hallway on the phone to the police. A short while later the police arrived and she panicked and said to them "don't arrest him". She later attended hospital and saw a nurse who noted injuries to her left shoulder and neck.

AB's account

37. AB was arrested at the scene and detained overnight. He gave his account the next day in accordance with the Police and Criminal Evidence Act (PACE). He said that they had been out together the previous evening as it was his birthday, had come home at the end of the evening and gone to bed. He could not recall why they had argued but he had told her that he was going back to his mother's house. They then had a disagreement about the puppy and he said that he was going to take the dog with him. She had become quite distressed at this and was shouting "you're not taking him, you know" so he had grabbed her hands and hit himself on the head several times with them, saying "you know, you're hitting me, hit me". She then grabbed him round the neck and broke his neck chain. At that, he tried to leave with the dog. She was in the way so he pushed her onto the bed. She hit him again so he made a 999 call to the police. He then thought better of this and hung up. However, she then made her own 999 call, so he responded by making his own second call to the police. After he had spoken to the call handler he rang his mother. Police officers arrived shortly afterwards and he told them that she had started screaming at him and then hit him on the shoulder.

Other evidence

38. The police seized AB's mobile phone to view the recording he had made of the incident although that could not be downloaded immediately. It had to be sent off to a forensic laboratory. When it was played it showed the camera shaking as if the two of them were fighting over it, then RH saying "you're not taking him" and AB saying "you just hit me" then "you just smacked me". It was clear that RH had moved towards AB before the struggle with the phone.

39. There was also video footage taken from the Body Worn Video (BWV) on the officers who attended. These recorded that RH was in tears throughout. She said she was not injured but she continued to cry and said that she would lose her job. According to his account, one of the officers made the decision to arrest AB based on her allegations and on her demeanour. Before doing so he asked for confirmation as to who had made the first 999 call and was told that it was RH.

40. The other officer in attendance spoke to AB who told him that she had hit him in the face and broke his neck chain. The video footage also records that as AB was arrested RH was heard to say "I'll drop it, I'll drop it," then "he's going to lose his job" and "it's all my fault."

41. As a result of these events a decision was taken to charge him with assault. Before doing so the relevant 999 telephone records were considered. It now appears that

he did call first and that that initial call only lasted for three seconds. There was no dialogue so this is consistent with his account. The first *recorded* conversation however was from her call in which she told the police that her boyfriend had beaten her up and was trying to take her dog. She sounded upset but was not hysterical or screaming and they could hear him in the background on the phone to the police as well.

42. In that other call, AB was saying that his girlfriend was accusing him of beating her up whereas she had beaten him up. Again, they could hear her on the phone in the background.

43. In his evidence at this hearing AB provided a more detailed account which in various respects was closer to the original account given by RH. He explained, for example, that he had been at the pub with his friend, said she was quite rude on arrival and did not want to stay for a drink. He persuaded her to do so before she went home as it was his round. He then followed her home. In other respects his account is no different to the original one provided to the Metropolitan police.

44. The decision to charge AB was based on a review of all the evidence which was set out in a report to the CPS which begins at page 258. The rationale is set out on page 268. Her account was considered to be very detailed and supported by the medical evidence that she attended hospital with soreness in her shoulder and neck. Reliance was also placed on the fact that she was very upset when officers attended and appeared to be in genuine shock, and also that she wanted them to drop the case and not to take any action." It was also noted that AB had given two different accounts and that he said on the night in question that she had punched him in the face whereas in interview he said that she had hit him on the right shoulder.

45. That evidence was reviewed by a CPS lawyer and a decision was taken on 15 May 2020 that there was a reasonable prospect of conviction. That however was about six months after the offence in question. Shortly afterwards AB was placed on temporary restricted duties. During that period he had been referred for psychological assessment and then in turn to counselling. He was off sick from 26 November before returning on 6 January 2020. He had therefore been back at work for about four months before being placed on these restricted duties.

46. We were given little first-hand information about his court appearance which took place in June 2020. He went off sick again shortly beforehand. When he attended court it was apparent that the prosecution had not been commenced within six months of the offence in question and so the charges were dismissed. He returned to work on 16 August 2020.

47. The usual process in such cases where there is an allegation of misconduct amounting to criminality is to wait for the outcome of the trial before making a

decision about internal misconduct procedures. Once the charges had been dismissed as out of time, consideration was then given to whether or not to discipline AB over this incident. Detective Sergeant Lyon recommended that it should be assessed as misconduct given the CPS assessment that there was a reasonable prospect of conviction.

48. She was then commissioned by Detective Superintendent Fulton to prepare an investigation report. That report was not completed until 25 January 2021. It set out a comprehensive account of the evidence collected by the Metropolitan Police, the rationale for the charging decision, and the subsequent decision by the CPS to prosecute. That report was then passed to Detective Superintendent Fulton. He then concluded from this material, on 10 February 2021, that there was a case to answer. This was done by reference to the two professional standards in question. The main points referred to in connection with the conduct standard was the assessment by the CPS, and in turn the inconsistency they had noted in AB's account.

49. During this period there were serious concerns about AB's welfare. His line manager, Sgt Willis (as he then was) went to visit him at his house shortly after the incident and kept in regular contact with him. When the decision had been taken to charge AB with a criminal offence he had gone to see him in person to break the news rather than leave him to receive a formal letter. That interview had had to take place in a car park but he did all he reasonably could to soften the blow. Throughout this process AB also had a representative appointed from the Police Federation. Between them they dealt with most of the enquiries raised by either the Metropolitan Police or the Professional Standards Department. There was some complaint at this hearing that that had meant that AB's voice was not heard and he lost the opportunity to deal with them directly, but we are satisfied that this approach was considered to be in his best interests and he would have been able to deal directly if he had wanted to do so at the time.

50. One such issue concerned the decision whether or not to attend an interview with the Professional Standards Department. That is a usual part of the process but he was given the option by Detective Sergeant Lyon to rely on his interview with the Metropolitan police and provide a written statement in support. That is what he agreed to do, on legal advice. By that stage counsel had been appointed to support him with the internal enquiry. AB suggested that this decision had effectively been taken out of his hands but it still appears to us to be a decision taken by him, albeit with legal advice.

51. Subsequently he attended a four-day hearing in York commencing on 7 June 2021. The panel were provided with a bundle of 156 pages, which has been reproduced in our bundle from pages 418 to 573. It included statements from AB and RH together with the two police officers who attended at the time, the police officer who conducted the interviews and the record of that interviews. This was supplemented

by the evidence from the 999 calls, the mobile phone and the body worn videos, together with six character references for AB. It was for the panel to decide which witnesses to call and the only witnesses were AB and RH. Evidence was heard from each of them under cross examination.

The panel's conclusions

52. The panel noted that there were allegations of breach of the standards relating to conduct and for honesty and integrity but that counsel for the appropriate authority was not suggesting any dishonesty on the part of AB. Nevertheless, an allegation of lack of integrity was pursued.

53. Their conclusion was that both officers had given truthful accounts of what they perceived happened but that there were "doubtful aspects" of the evidence given by both officers. AB accepted at that hearing that he had consumed alcohol which placed him at six or seven on a scale of intoxication between one and 10. RH was shown during cross examination for the first time the footage recorded on AB's phone. She was unwilling to accept that she had used force to stop him recording her even though that was clearly shown on the footage. On this aspect her answers were considered to be vague and unconvincing.

54. As to his evidence it was noted that he had accepted in his written response that he had grabbed her wrists and use them to strike his own head with her hands and in doing so had assaulted her. They found on the balance of probability that he had also used force or violence in pulling the duvet over her head and briefly holding her under the duvet, and again later when he pushed onto the bed. They were not satisfied that he was acting in self-defence. Those three findings – using her hands to slap his head, pushing her onto the bed and holding her under the duvet – were the only three findings made against him. They also accepted that both parties had used physical force upon each other and that both of them had contributed to the domestic violence.

55. As to the outcome, it was submitted in mitigation that the most serious allegations have not been upheld and that there was provocation. Reliance was also placed on the fact that AB had been suffering from PTSD at the time but that he had since moved on, been redeployed as an officer and had insight into his behaviour.

56. Nevertheless the panel found that he was culpable for the violent acts, that he had chosen to consume alcohol and had become emotional as a result, and it was this which had resulted in a reaction from RH leading to the violence between them. In those circumstances, even though he had not intended to cause any injury, despite his remorse and his previous good character, there was considerable potential to damage public confidence in himself and in the police service. One panel member however felt that a final written warning was the appropriate outcome. The panel

expressed a degree of sympathy with AB but the majority view was that maintaining public confidence in the reputation of the police service required his dismissal.

57. He had a right of appeal and this was considered by his counsel whose advice on appeal has been disclosed in these proceedings, waiving any legal privilege. This advice noted the findings and the permissible grounds of appeal, concluding that there were no grounds to appeal the findings of fact. The inference is that those findings had in fact been quite favourable. The panel had been unimpressed by RH's evidence and had therefore limited their findings to the three points noted above; there was nothing to show that those findings were unreasonable. The only point identified was rather technical – it concerned the distinction between honesty and integrity. Counsel's view was that there was nothing to impugn AB's integrity and so the panel should not have gone on to find a breach of that standard. The fact that more than one standard had been breached added to the seriousness of the breaches as a whole, and so it was arguable that if the conclusion on integrity was wrong, the overall level of sanction ought to be reduced.

58. It is not clear whether AB considered that advice in any detail at the time but he went along with counsel's advice to submit an appeal. That appeal was then considered by Sam Stein QC on the papers, as head of the Police Appeals Tribunal. It was rejected, in short, on the basis that the panel had made clear that in their view the findings on conduct alone were sufficient to justify dismissal.

AB's mental health

59. During this period of about 18 months, as already noted, AB had been receiving counselling and other treatment for his mental health. It is accepted by the respondent that his PTSD amounted to a disability at the time of the incident in question but not that it continued to meet that definition at the time of his hearing.

60. The main evidence as to his mental health is set out in a number of Psychological Assessment Reports from a Dr Caroline Taylor. The first of these is at page 205. It seems that a referral was first made to her on 13 November, the day before the incident in question, and she made an assessment of him on 29 November 2019. Unsurprisingly, in the immediate aftermath of the breakdown of his relationship and his arrest, he was very stressed at his first appointment. She records that the situation was having an impact on his mental health in a number of ways including cognitively, fearing the worst, worrying about finances and the future; emotionally, with symptoms of fear, anxiety, unfairness and sadness; physically, with poor concentration and sleep; and behaviourly, seeking reassurance from others and trying to make plans for the future. All this had impacted him both in the workplace and in his personal life with constant self-doubt, worry, increased vigilance and intrusive thoughts, and also in avoiding blue-light response work, preferring to be a passenger in the car and avoiding talking about his accident. She recorded him as having moderate depression, severe generalised anxiety, moderate

psychological distress and a diagnosis of PTSD. A quantitative tool for assessing the severity of his symptoms was the Work and Social Adjustment Scale (WSAS). This recorded a score of 11/40, which is held to be within the normal range and so "not of clinical concern." We do not interpret this to mean, as was suggested to us, that his symptoms were not clinically significant. Although not altogether clear from the report it seems more likely to indicate that there was no concern about self-harm or even suicide. It is a somewhat difficult document to assess since a good deal of it has been redacted, i.e. the sections relating to mental health issues other than PTSD, since this was the mental health condition relied on as a disability at the preliminary hearing stage. A fairer view might however have been obtained from full disclosure of the relevant evidence. No objection was taken by AB to this redaction during the hearing however. Among the goals of treatment at that stage were to be back at work by the end of the year, to reduce his anxiety level and to go on holiday in the summer. Unsurprisingly in our view, the respondent accepts, on the basis of this report, that he was disabled at the relevant time.

61. This was followed in December 2019 by an Occupational Health report [219-221] which recommended a phased return to work with a graded return to 'blue light' responses once he had resumed full operational duties.

62. On 14 January 2020, after eight therapy sessions, Dr Taylor provided an updated report [229]. By this stage AB was back at work on a phased return and feeling much more confident and free of difficulties than when he had last been seen. His PTSD symptoms were said to have abated to below the level of clinical concern, although of course that phrase had been used previously when it is accepted that he was disabled. On the other hand the WSAS score had reduced to 0, which reflected his perception of his ability to function normally. The course of counselling sessions was set to continue however to "support ongoing recovery as well as a relapse prevention plan to maintain recovery."

63. Once that course of treatment was completed we have little information about AB's mental health during the remainder of 2020 and indeed into 2021. It was in May 2020 that he was told that he would be charged with an offence, and his line manager was sufficiently concerned about this to ensure that he was told in person. As already related, he went off sick on 13 June that year in the run-up to his court appearance and returned to work on 16 August. Shortly afterwards he was placed on light duties and did not return to full duties until February 2021. Shortly afterwards he completed a blue light course with Kent police which he described to us as a personal triumph, given his long-standing PTSD.

64. On 25 May 2021 he was seen again by Dr Taylor [630] and reported that his PTSD symptoms had re-emerged due to the potential threat of losing his job. Over time, he felt that his resilience had reduced and he now felt overwhelmed and unable to cope with going into work. RH was working nearby and he felt that judgements were being made about him by his colleagues, and he was resentful that he was

the one being punished for an event for which they were both responsible. In recent months he had also suffered with the death of his father. The various quantitative measures used record that he had moderately severe depression, severe anxiety, severe psychological distress and some symptoms of PTSD. However, his WSAS score was 11/40. This time his functioning was not described as "of no clinical concern" but "not significantly impaired".

65. AB has of course provided us with a disability impact statement. It does not go into detail about the extent of his symptoms at particular times but it makes clear that he still suffers with PTSD and gives a number of examples of the day-to-day activities which it affects. These include difficulty following a television programme or film, zoning out, struggling to concentrate during intense information or discussions, feeling overwhelmed, needing reassurance or just taking longer with simple day-to-day tasks such as sending an email. He states that he has difficulty in getting to sleep, is very forgetful, forgets appointments and now struggles to socialise and connect with people.

Applicable Law - Disability

66. Turning to the applicable law, we will start with this question of whether AB was disabled at the material times. The test in s.6 Equality Act 2010 is as follows:

> A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

67. Substantial is defined as "more than minor or trivial" and long-term means that it has lasted for 12 months or was likely to do so.

68. Schedule 1 to the Act, at paragraph 5, also provides that:

> Where a person is taking measures to treat or correct an impairment (other than by using spectacles or contact lenses) and, but for those measures, the impairment would be likely to have a substantial adverse effect on the ability to carry out normal day to day activities, it is still to be treated as though it does have such an effect.

69. It was held in **Kapadia v London Borough of Lambeth** 2000 IRLR 14, EAT that such measures include counselling sessions.

70. The Equality and Human Rights Commission (EHRC) provide guidance on this question in their Code of Practice on Employment. This also provides at Appendix 1:

> **What is a 'substantial' adverse effect?**

8. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation.

10. An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse long-term effect on how they carry out those activities. For example, where an impairment causes pain or fatigue in performing normal day-to-day activities, the person may have the capacity to do something but suffer pain in doing so; or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time.

Conclusions – Disability

71. We conclude from all this that AB was disabled by virtue of his PTSD both at the time of the incident in question and at the time of his panel hearing. In view of our other conclusions it is not necessary to decide whether his symptoms were sufficiently severe throughout that period but we are satisfied that he had PTSD throughout and continues to do so. This is well known to be a long-standing condition and although his symptoms may abate or be managed at intervals, the underlying condition itself remains.

72. The respondent's submissions on this aspect appear to expect a much higher degree of incapacity than the statutory definition. Again, the question is whether it had a substantial, i.e. more than minor or trivial, impact on his ability to carry out normal day-to-day activities. The report from Dr Taylor in May 2021 refers to his functioning as being "not significantly impaired", but that suggests a material impact on his ability to function normally, i.e. a more than minor or trivial impact.

73. Regard also has to be had to the other descriptions of his symptoms, and there is reference in this report to him having had a relapse, of having suffered shattered assumptions, and now being overwhelmed by potential threats to himself and his future. There is therefore a strong basis to conclude that he met the test of disability at around the time of his panel hearing, a hearing which would no doubt have increased his levels of stress as it approached, even without considering the fact that the beneficial effects of counselling have to be disregarded.

Discrimination arising from disability - applicable law and conclusions

74. The test under section 15 Equality Act is as follows:

(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."

75. So, this involves unfavourable treatment as a result of something arising in consequence of AB's disability. The unfavourable treatment, as set out in the list of issues settled at the preliminary hearing is as follows:

(a) drawing adverse inferences from inconsistencies in the claimant's account.

(b) finding that the claimant committed misconduct

(c) dismissal, and

(d) rejecting the claimant's appeal.

76. The first of these points is something of an outlier. The finding that he committed misconduct and his dismissal occurred on the same occasion, 10 June 2021. The rejection of his appeal followed on 28 October 2021, the day before his claim form was submitted. The drawing of adverse inferences clearly took place beforehand and is a feature of the investigation report by Detective Sergeant Lyon and the subsequent adjudication by Detective Superintendent Fulton. From this list, it appears to be relied on as part and parcel of the decision-making process rather than a stand-alone allegation of discrimination.

77. It is not clear from a reading of the panel's conclusions that they placed any reliance on this apparent inconsistency. They found that there were three specific acts of misconduct, one of which - grabbing RH by the wrists and slapping his head - was admitted. Although it was expressed as a conclusion, AB also admitted on several occasions during his PACE interview that he pushed her onto the bed. He denied putting a duvet over her head, so that is the only disputed allegation on which they found against him. It is not a case of them finding generally against his account on the basis of this inconsistency since there are several other allegations in her account which were not accepted.

78. But regardless of whether this did play any part in the tribunal's ultimate conclusion, it does not seem to us that this inference can amount to an act of discrimination. The test involves *treating him* unfavourably, which requires some action on the part of the employer or colleague, or a failure to do something. This adverse inference is simply the forming of an opinion or the drawing of a conclusion. If it led to his dismissal or other sanction than that sanction might then be regarded as unfavourable treatment but a statement of this sort in a report by the investigating officer cannot, it seems to us, give rise to a separate claim for damages or other remedy.

79. Turning to the remaining three acts of unfavourable treatment, the next question is whether the panel found against him et cetera because of the "something arising" in consequence of his disability. He points to the following features:

    (a) difficulty in giving a consistent account

    (b) short term memory adversely affected

    (c) difficulty in putting things in chronological order

    (d) being jumpy and edgy

    (e) anxiety.

80. Although section 15 uses the phrase "because of", the anxiety or memory issues etc. do not have to be the main reason for the unfavourable treatment such as dismissal. There need only be a loose connection between the two. It must however operate on the thought processes in question "to a significant extent": **Charlesworth v Dronsfield Engineering** UKEAT/0197/16.

81. The first question is whether these were all features of his disability. There is mention in Dr Taylor's report of 29 November 2019 of him being jumpy and edgy and having anxiety. The other three features - the difficulty with chronology, memory and a consistent account - appear to be closely related. Although they are not specifically referred to in those reports, they are certainly features referred to by AB in the further information he provided as part of this claim. Dr Taylor's reports also referred to the cognitive impact on him of his PTSD including a sense of confusion, together with poor concentration. Making a broad assessment therefore we are prepared to accept that these are all things arising from his disability.

82. We therefore have to attempt an assessment of the extent to which these symptoms of mental confusion played a part in the decision to find against him. No such specific issue was raised before the panel, or indeed in the grounds of appeal. We have considered the submissions made by counsel on his behalf at the misconduct hearing and the only reference made to his PTSD [749] was the following comment:

> "Even setting aside any complications of PTSD or hyper emotionalal space of that room, there are no doubt many things he would have done that night differently."

83. If there were specific features of his disability which had adversely affected his ability to explain himself at the time, here was certainly an opportunity to set them out. The fact that no such point was raised either at the hearing or, e.g. in the PACE interview or in the written submissions before the panel hearing, makes it very difficult to understand how the panel could have been influenced against him

as a result, particularly given that he made admissions about his use of force against RH. At this hearing he said that he did not seek to challenge the findings of misconduct made by the panel. In those circumstances we can see no real connection, loose or otherwise, between the findings of the panel or the sanction imposed and any of these features. Those decisions appear to be squarely based on the evidence presented.

84. If that conclusion is wrong for any reason, there is the defence available to BTP if the treatment in question was a proportionate means of achieving a legitimate aim, in this case maintaining public confidence in the police. Although that defence was relied upon, that seems a misguided approach. It involves adopting the position that if these decisions had in fact been influenced by an irrelevant consideration such as that the claimant was jumpy and edgy at the hearing or in interview, it was nevertheless justified in finding against him. We prefer the view that the panel was not influenced in that way at all.

Direct sex discrimination - applicable law and conclusions

85. The test under section 13 Equality Act is as follows:

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

86. He relies here on the same three points – the finding that he committed misconduct, the dismissal and the refusal of his appeal. The main question therefore is whether these were acts of less favourable treatment than a woman would have received in the same circumstances. The key point here is that all of the circumstances have to be the same, apart from his sex, including the fact that he had been arrested and prosecuted, had made admissions and had the same body of evidence against him.

87. By way of illustration, in the case of **High Quality Lifestyles Ltd v Watts** [2006] IRLR 850 the claimant had HIV and was ultimately dismissed as a result. Having such a disability and being dismissed for having it was not however sufficient to establish direct discrimination. The employer said that the reason for that action was because of the risk of transmission to other members of staff. The Employment Appeal Tribunal concluded that the proper comparator was an employee with a condition involving the same risk of infection to other members of staff. Otherwise, all the material circumstances would not be the same.

88. So, although AB feels aggrieved that RH did not suffer the same, or apparently any, consequences, that was not the question that the panel had to decide. The fact is that by then they were already in very different circumstances. He was the only one who had been arrested, he was the only one to have been charged with an offence, he had been prosecuted by the CPS on the basis that there was a reasonable prospect, on the evidence, of a court finding beyond reasonable doubt

that he was guilty of assault. There were also admissions on his part of the use of force on the night in question. Even if it could be said that the Metropolitan Police were wrong to have come to the conclusion that he was the one mostly to blame, and so arrested him unfairly (and we make no such finding) that was not an act of the BTP. Similarly, they were not responsible for the decision to prosecute him.

89. It also seems in fact that far from instinctively preferring the version of events put forward by RH, it was analysed with care and in some important respects was not followed. RH was also criticised, arguably to a greater extent. The findings against him were limited ones and largely based on admissions. One member of the panel had thought that a warning was enough, and all expressed sympathy for him. All that seems to us entirely appropriate in the circumstances, and it was not a case in which any unnecessary criticism or negative construction was put on his actions. They did not, in short, side with the prosecution. In those circumstances we cannot find that the conclusions reached were in any way influenced by his sex.

90. This panel hearing occurred shortly after the widespread coverage of the case of PC Wayne Couzens, who was found guilty of rape and murder. It was also suggested at this hearing that this affected the environment in which this decision was taken, and may have inclined the panel to take a harsher view of an accused male officer, even though the circumstances of the two cases are so very different. But again, this was not raised or mentioned on either side during that hearing, and we have to say that there is nothing surprising in the circumstances about the panel concluding that there was a breach of the two relevant professional standards. It was, we have to say, discreditable conduct, and it led to his arrest and charge by officers of another force. We have seen nothing to suggest that this would not normally result in the same outcome.

91. All of these comments apply with even more force in the case of the appeal. No mention was made of potential discrimination, and although that was not an express ground of appeal, if there had been grounds for a complaint of discrimination it would come under the first ground of appeal, that it made the conclusions or the penalty unreasonable in the circumstances.

Discrimination Burden of Proof

92. In all this we are mindful of the particular provisions in the Equality Act 2010 at section 136 relating to the burden of proof. This provides that:

> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

93. In **Ayodele v CityLink Limited** [2017] EWCA Civ 1913, the Court of Appeal explained that the first stage required the claimant to prove facts from which the tribunal *could* conclude, having heard the evidence and in the absence of an explanation from the respondent, that discrimination had occurred; and if so, there is a second stage, when the respondent has the burden of proving that this was not the case. That first stage involves hearing all of the evidence, not just the claimant's case, and then making appropriate findings. If those findings suggest that there might have been some discrimination involved, if some explanation is called for from the respondent, the burden shifts to them to prove otherwise.

94. That is in keeping with the previous guidance in **Madarrassy v Nomura** [2007] ICR 867 that it is not enough a claimant to show that he had a protected characteristic and was dismissed - "something more" is required. So the starting point is to consider whether the treatment in question was at all unexpected in the circumstances or out of the ordinary – whether something more is needed to explain it. We have not found anything out of the ordinary in the approach of the PSD or in the panel's conclusions.

95. In **Martin v Devonshire Solicitors** [2011] ICR 352 in which Mr Justice Underhill stated at paragraph 32:

> "It is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

96. That is our view here. We conclude that the findings of the panel fully reflect the evidence presented and were not in any way tainted by discrimination. From AB's point of view, the harm had already been done with the involvement of the Metropolitan Police and the CPS, and we have no criticism or reservation to make about the panel's findings or the penalty imposed, which was clearly done with reluctance.

97. For all of the above reasons the claim is dismissed.

Costs

98. An application has been made for their costs by the respondent. The Employment Tribunals Rules of Procedure, at paragraph 76(1), provide that a tribunal *may* make a costs order and *shall* consider whether to do so where it considers that:

> (a) a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either bringing the proceedings… or the way that the proceedings… have been conducted; or
>
> (b) any claim or response had no reasonable prospect of success.

99. It is said that the claims had no reasonable prospect of success and also that the claimant was unreasonable in pursuing the claims following a succession of three costs warning letters sent to him offering to drop hands and alerting them to the level of costs accrued by the respondent. These were sent following disclosure, following exchange of witness statements and in the run-up to the hearing.

100. After hearing argument we concluded that there had been no reasonable prospects of success in relation to the reasonable adjustments claim, since it concerned allegations against the Metropolitan police. (That claim however does not seem to have given rise to any particular costs since the issue was dealt with briefly in submissions.)

101. Before the same view in relation to the sex discrimination claim. Although AB had a broad sense of injustice about the difference in treatment between him and RH, we were not in a position to review the earlier decisions of the Metropolitan police or the CPS which had given rise to the misconduct hearing, and it was their decision to arrest and charge him that placed him in such a different position. Viewed objectively therefore, that claim too had no reasonable prospect of success.

102. The claim of discrimination arising from disability was less clear-cut. On this issue the respondent was not altogether successful since they argued that he was not disabled at the time of his dismissal. And it is possible to imagine an alternative outcome. Had, for example, more emphasis had been placed on his PTSD at the misconduct hearing, as an explanation for his conduct, and had that emphasis been ignored, it might have called for an explanation from the panel, and without hearing any evidence from them it would have been difficult for the respondent to discharge the burden of proof. It was only after considering the evidence in fine detail that it became clear that the panel based their conclusions squarely on the evidence and submissions presented.

103. However, having concluded that two of the claims had no reasonable prospects of success we need to consider the exercise of our discretion whether or not to award costs, and if so how much.

104. We noted that no offers of settlement had been made by the respondent except for offers to drop hands. In a jurisdiction where costs are not normally awarded that is essentially a request to drop the case.

105. No application was made either for a strike out or deposit order on the basis of the prospects of success. At the preliminary hearing the various issues were simply documented, including the issues relating to the reasonable adjustments claim. That appears to have encouraged AB in his belief that all of the parts of his claim were properly arguable, and he also took from this that he could expect as a result of this process to get an explanation from the Metropolitan police for their charging decision. That appears to have been a misunderstanding on his part, but having

received no discouragement at the preliminary hearing we cannot say that it was unreasonable conduct of proceedings to persist as far as a final hearing.

106. Although the letters from the respondent urged him to take legal advice, it would be a substantial exercise to advise on the merits of success and such advice would have been costly.

107. We also reminded ourselves that in **Saka v Fitzroy Robinson Ltd** EAT 0241/00 the Employment Appeal Tribunal stated that there is very rarely overt evidence of discrimination and it may be difficult for a claimant to know whether or not he or she has any prospect of success until the explanation of the employer's conduct is heard, seen and tested. It followed from this that a costs order against a claimant in a discrimination case was likely to be very rare, even exceptional.

108. In view of that guidance and the lack of any application for a deposit order we did not consider this an appropriate case for the award of costs.

Footnote

109. There is a right of appeal to the Employment Appeal Tribunal if this decision involves a legal mistake. There is more information here https//www.gov.uk/appeal-employment-appeal-tribunal. Any appeal must be made within 42 days of the date you were sent these written reasons.

110. There is also a right to have the decision reconsidered if that would be in the interests of justice. An application for reconsideration should be made within 14 days of the date you were sent these written reasons.

111. A decision may be reconsidered where there has been some serious problem with the process, such as where an administrative error has resulted in a wrong decision, where one side did not receive notice of the hearing, where the decision was made in the absence of one of the parties, or where new evidence has since become available. It is not an opportunity to argue the same points again, or even to raise points which could have been raised earlier but which were overlooked.

Employment Judge Fowell

Date 07 September 2023