**Case Number: 2203920/2020 & 2207664/2020**

# EMPLOYMENT TRIBUNALS

| Claimant | | Respondent |
|---|---|---|
| **Mr K Hussain** | **v** | **The Commissioner Of Police Of The Metropolis** |

**Heard at:** Central London Employment Tribunal

**On:** 12 – 15, 18 – 20 September 2023 &

21, 22 September 2023 (In Chambers)

**Before:** Employment Judge Brown

**Members:** Ms T Shaah
Mr S Godecharle

**Appearances:**

**For the Claimant:** In person
**For the Respondents:** Ms L Robinson, Counsel

# JUDGMENT

**The unanimous judgment of the Tribunal is that:**

1. **The Respondent did not subject the Claimant to race harassment, disability harassment, direct race discrimination, direct disability discrimination, discrimination arising from disability, indirect disability discrimination or victimisation, nor did he fail to make reasonable adjustments.**

2. **The Claimant's claims therefore fail and are dismissed. A remedy hearing will not take place.**

# REASONS

**Preliminary**

1. The Claimant presented 2 claims in which he brought complaints of direct race discrimination, race and disability-related harassment, direct and indirect disability discrimination, discrimination arising from disability, failure to make reasonable adjustments and victimisation, against the Respondent, for whom he formerly worked as a police officer.

2. He presented his first claim on 22 September 2020 and his second claim on 25 May 2021.

3. The issues in the case had been agreed as follows:

***Jurisdiction***

*1. Are any of the acts relied upon by the Claimant outside the primary time limit?*

*2. If so, did the acts form a continuing act?*

*3. If not, would it be just and equitable to extend time?*

***Disability***

*4. The Claimant relies upon a mental impairment(s): "a number of mental health conditions which include depression, anxiety and Post Traumatic Stress Disorder ("PTSD")". The Respondent concedes that the Claimant was disabled by reason of his anxiety and depression from 19 October 2019, and by reason of Post Traumatic Stress Disorder with symptoms of mixed anxiety and depression from 25 February 2020.*

*5. Was the Respondent aware, or ought the Respondent reasonably to have been aware, at the relevant time of each alleged act of discrimination that the Claimant was so disabled? The Respondent denies that it had knowledge of the Claimant's disability before 25 February 2020.*

*CLAIMS*

***Direct race discrimination***

*6. The Claimant identifies his race as British Pakistani.*

*7. The Claimant's comparator is a hypothetical officer who does not share the Claimant's race.*

*8. Was the Claimant subjected to the following detriments between November 2017 and May 2018:*

*a. Colleagues drawing male and female genitalia in his pocket notebook "on numerous occasions"*

*b. His CS spray being "stolen from his locker"*

*c. His kit missing from his locker "on occasions"*

*d. His emails being accessed*

*e. An email sent on 23 January 2018 to the whole team, implying that the Claimant was in a non-platonic relationship with a male colleague of Asian descent.*

*f. Only having one return to work interview between April 2018 and May 2018?*

*9. If so, did they amount to less favourable treatment?*

*10. Has the Claimant proved primary facts from which, in the absence of any other explanation, the Tribunal could properly and fairly conclude that the difference in treatment was because of his race?*

*11. If so, has the Respondent shown that the treatment was for a non-discriminatory reason?*

***Direct disability discrimination***

*12. The Claimant's comparator is: a hypothetical non-disabled officer.*

*13. Was the Claimant subjected to the detriments relied upon in his direct race discrimination claim?*

*14. If so, did they amount to less favourable treatment?*

*15. Has the Claimant proved primary facts from which, in the absence of any other explanation, the Tribunal could properly and fairly conclude that the difference in treatment was because of his disability?*

*16. If so, has the Respondent shown that the treatment was for a non-discriminatory reason?*

***Discrimination arising from disability***

*17. Was the Claimant's sickness absence something arising in consequence of his disability?*

*18. Was the Claimant subjected to the following unfavourable treatment:*

*a. May 2018- PS Thomas telling him that he was not allowed to take sick leave, that he would have his probation extended, and telling him to resign;*

*b. PS James telling him that he had to come into work or face UPP;*

*c. Being given a Management Action in July 2018;*

*d. Being subject to the UPP Process;*

*e. Being dismissed for poor attendance?*

*19. If so, was the Claimant subjected to that treatment because of his sickness absence?*

*20. Has the Respondent established that the treatment was a proportionate means of achieving a legitimate aim, namely: the efficient management of the Respondent's resources by managing sickness absence and ensuring that officers are capable of providing effective service?*

***Indirect disability discrimination***

*21. The Respondent accepts that it applied the following PCPs:*

*a. The application of UPP to officers because of sick leave*

*b. Issuing WINs requiring officers to return to work by a particular date*

*c. Issuing WINs requiring officers to maintain a satisfactory attendance record following they return to work for a certain period of time*

*d. Instigating the next stage of UPP if an officer has sickness absence within the duration of the validity period of a WIN*

*e. Terminating an officer's appointment due to poor attendance.*

*22. Did the PCPs put, or would they put, persons with the Claimant's disability at a particular disadvantage when compared with persons who do not have the Claimant's disability, namely: the exacerbation of mental illness, an increased likelihood of further absence, the risk of termination.*

*23. Did the PCP(s) put the Claimant at that disadvantage?*

*24. Were the PCP(s) a proportionate means of achieving a legitimate aim, namely: the efficient management of the Respondent's resources by managing sickness absence and ensuring that officers are capable of providing effective service?*

***Failure to make reasonable adjustments***

*25. The Respondent accepts that she applied the following PCPs:*

*a. Issuing WINs requiring officers to return to work by a particular date/issuing WINs requiring officers to return to work and maintain a satisfactory attendance return*

*b. A requirement for satisfactory attendance*

*Did the Respondent apply the following further PCPs:*

*c. Refusing requests for postponement of Stage 1 UPP meetings*

*d. Relocating officers returning from sick leave*

*e. Requiring officers to work night shifts "despite OH advice to the contrary"*

*26. If so did these PCPs place the Claimant at a substantial disadvantage in comparison to non-disabled persons? The substantial disadvantages relied upon by the Claimant are that:*

*a. Officers with disabilities are more likely to feel compelled to attend work when not fit to do so. The Claimant avers that he forced himself to come into work when not fit to do so*

*b. An officer with a disability is more likely to have higher levels of sick leave and more likely to be subject to the UPP process and dismissed as a result. The Claimant was subjected to the UPP process and dismissed for poor attendance.*

*c. An officer with a mental health disability would find it more difficult to attend a UPP1 meeting on their own. The Claimant had to attend the UPP1 meeting on his own and asserts that this caused him difficulty.*

*d. Officers with mental health disabilities are more likely to be adversely affected by longer commutes as a result of relocation. The Claimant says that his commute significantly increased and he was adversely affected.*

*e. Officers with mental health disabilities are more likely to be adversely affected by working night shifts and the Claimant alleges that he suffered a mental health breakdown.*

*If the Claimant was placed at a substantial disadvantage (as alleged), did the Respondent know, or could it reasonably have been expected to know, at the material time, that:*

*a. The Claimant had the alleged disability; and*

*b. The Claimant was likely to be placed at the substantial disadvantage complained of?*

*If so, did the Respondent take such steps as it was reasonable to have taken to avoid the disadvantage? The Claimant says that she did not and relies upon the following adjustments, which he says the Respondent ought to have made:*

*a. Delaying the Stage 1 UPP meeting so that the Claimant's police Federation representative could attend*

*b. Not issuing the Claimant with a WIN requiring him to return to work by a certain date or maintain a specific level of attendance*

*c. Discounting the Claimant's disability-related absences when considering UPP*

*d. Allowing the Claimant to take sick leave while on UPP without progressing to the next stage of UPP*

*e. Allowing the Claimant not to work night shifts*

*f. Discontinuing UPP Stage 3 proceedings*

*g. Waiting for the Claimant to complete EMDR therapy before holding the UPP Stage 3 meeting*

*h. Not terminating the Claimant's appointment*

***Race/disability harassment***

*29. Did the Respondent engage in the following acts:*

*a. PS Thomas failing to make a referral to OH following the Claimant's request on 27 April 2017 (para 9, First Claim);*

*b. PS Thomas extending the Claimant's probation upon his return to work, in August 2017 after sickness absence (para 10, First Claim);*

*c. PS Thomas informing the Claimant that he did not believe he was genuinely sick, in August 2017 (para 10, First Claim);*

*d. PS Thomas telling the Claimant that he should resign and threatening him with consequences if he continued to say that he was ill and had any further sick leave, in August 2017 (para 10, First Claim);*

*e. PS Thomas attempting to include an off-duty incident from 27 March 2017 in the Claimant's PDR, in August 2017 (para 11, First Claim);*

*f. PS Thomas and others from the DPS informing the Claimant that they had received intelligence he was working under the influence of alcohol and taking samples from him, on 22 November 2017 (para 14, First Claim);*

*g. PS Thomas commenting that the Claimant was "slow" during a meeting on 23 November 2017 (para 15, First Claim);*

*h. PS Thomas not approving the Claimant's requests to attend courses for Arabic language, Public Order, and Basic Driving in 2017/2018 (para 15, First Claim);*

*i. PS Thomas refusing to allow the Claimant more than one day of special leave following the Claimant's request in May 2018 (para 18, First Claim);*

*j. PS Thomas informing the Claimant that he should resign from the force and that he would send police units to his home if he called in sick again when the Claimant attended work unfit through alcohol on 27 May 2018 (para 19, First Claim);*

*k. PS Thomas and PS James serving a Management Action requiring the Claimant to return to work on 16 July 2018 or a mutually agreed date (para 21, First Claim);*

*l. PS James informing the Claimant that he was being moved to Bethnal Green in December 2018/January 2019 (para 30, First Claim);*

*m. PS James advising the Claimant not to take sick leave but to use annual leave or spare day, in or around August 2019 (para 32, First Claim);*

*n. PS Thomas attending Bethnal Green, where the Claimant was working, in breach of DPS instructions on 17 October 2019 (para 33, First Claim); and*

*o. PS James requiring the Claimant to work night shifts on 18 and 19 October 2019 (para 32, First Claim)?*

*30. Was this treatment "unwanted conduct" for the purposes of s26(1) EqA?*

*31. If so, was the treatment related to the Claimant's race or disability?*

*32. If so, did the conduct have the purpose or effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, having regard to:*

*a. The perception of the Claimant;*

*b. The other circumstances of the case; and*

*c. Whether it is reasonable for the conduct to have that effect?*

***Victimisation***

*33. The Respondent accepts that the Claimant's grievance of 14 May 2020 and his First Claim were protected acts.*

*34. Did the Respondent dismiss the Claimant because he had done a protected act?*

***REMEDY***

*35. If the Claimant succeeds in any of his claims to what remedy is he entitled either for financial loss or injury to feelings?*

4. This hearing was to consider liability only.

5. The Tribunal raised the issue of *Polkey* with the parties at the outset of the hearing. *Polkey* did not appear in the list of issues, but the witness statements appeared to contain evidence relevant to whether the Respondent would have dismissed the Claimant, in any event, for a non-discriminatory reason. The Respondent did not contend that the issue of contributory fault arose. The parties agreed that "Polkey" issues should not be decided at this hearing, but at the remedy hearing. The Tribunal ordered the Respondent to send the Claimant by 4pm on 15 September 2023 the Polkey issues on which it would rely at a remedy hearing. The Respondent did this.

6. The Tribunal heard evidence from the Claimant. It heard evidence from Parminder Attwell, a Detective Constable who had been the Claimant's Federation Representative at relevant times and Kamran Qureshi, a Police Sergeant who had been the Claimant's Federation Representative at his dismissal hearing. Both those latter witnesses attended pursuant to witness orders. They had not produced witness statements, so the Tribunal heard evidence from them first, so that all parties had the benefit of hearing their evidence before giving their own evidence.

7. For the Respondent, the Tribunal heard evidence from: Alec Thomas, Police Sergeant (now Inspector) and the Claimant's line manager from 2nd January 2017 to 16th July 2018; Luke James, Police Sergeant and the Claimant's line manager from 17th July 2018 to dismissal; Ian Bazyluk, Inspector (now former) and the Claimants second line manager from November 2017 to December 2020; Adrian Usher, Commander (now former) and chair of the Claimant's dismissal Panel; and Thomas Burman, who led the Respondent's HR Policy and Reward Unit grievance team until 26 May 2023.

8. The parties made submissions. The Tribunal reserved its judgment. The parties provided their dates of availably for a provisional remedy hearing.

**Relevant Facts**

9. On 31 May 2016 the Claimant was appointed as a probationer police constable with the Metropolitan Police Service ("MPS"), p1445.

10. During the MPS 24 month probationary period, a probationer is expected to have successfully completed the core competencies set out in their Student Officer Record of Competence (SOROC).

11. During his police training at Hendon, on 14 July 2016, the Claimant was absent from work, sick, with food poisoning. From 10 - 12 August 2016 and on 24 August 2016, he was also absent, sick, with nausea and diarrhoea, p1057.

12. Following his training, the Claimant was based at Stoke Newington Police Station, in Hackney, London. On 2 January 2017 the Claimant was assigned to the Hackney Emergency Response Team, under the supervision of line manager, Sergeant Alec Thomas, p1445. He was again off work, sick, with nausea and diarrhoea from 18 -20 January 2017, p 1057.

13. On 17 February 2017 Sgt Thomas gave the Claimant a Student Officer Development Plan because of his 4 periods sickness absence, p681. He said that an improvement was required and gave the Claimant the objective of not being sick again for the remainder of the first year of his employment.

14. The Respondent's Sickness Absence Management Managers' Guide p2770 provides, "You must take action under the unsatisfactory attendance procedure when it reaches the level shown in the table, "Definition of Unsatisfactory Attendance". Even where you have considered taking action and decided that there are reasons why you will not proceed with informal action or progress unsatisfactory attendance you must explain this to the individual and document your decision making. When considering the circumstances of the case (eg for a disability related absence) you may think it reasonable to use discretion and not issue an action or warning at that particular trigger point".

15. The Sickness Absence Management Managers Guide also defines unsatisfactory attendance for different types of absence problem and sets out how these should be managed. In respect of "Frequent short term absence" it provides that "3 absences in a rolling 12 month period" amount to unsatisfactory attendance. "Informal Action ""IA" must have been considered by the 4$^{th}$ absence in a rolling 12 month. It also provides that moving to the next stage of the "UPP/Unsatisfactory attendance process" must

have been considered by "Each subsequent absence" and that a "Dismissal recommendation" should have been considered by "each subsequent absence".

16. In respect of "Long Term absence", it provides that 29 days' absence in a rolling 12 month period amounts to unsatisfactory attendance. Informal Action must have been considered by 2 months. It also provides that moving to the next stage of the UPP/Unsatisfactory attendance process must be considered at 3 monthly intervals and that a dismissal recommendation must have been considered by the end of the 11th month of absence.

17. The Guide advises that workplace adjustments should be considered for disability related absence. It states that this could be 20 – 25% leeway in absence, or frequency, and that the manager should seek occupational health advice.

18. The Guide also advises that, "In some circumstances you might not take management action for long term absence, for example, where the individual is highly likely to return to work in the near future." P2771.

19. The Claimant told the Tribunal that, between November 2017 and May 2018, colleagues drew male and female genitalia in his pocket notebook "on numerous occasions".

20. Sergeants Alec Thomas and Luke James both told the Tribunal that a pocket notebook is an important document which can be used as evidence in criminal court proceedings and contains sensitive personal data, such as the details of victims of domestic violence and the identities of their children, so that it must not be left unattended. They told the Tribunal that, if a notebook is found unattended, other officers are likely to leave embarrassing drawings in the notebook, to remind its owner of the importance of not leaving it lying around. Sgt James told the Tribunal that this had happened to him during his probation.

21. The Tribunal accepted Sergeants Thomas and James' evidence that drawing on carelessly stored notebooks was a common occurrence.

22. The Claimant also told the Tribunal that, during the same period, his CS spray was stolen from his locker and his kit went missing from his locker.

23. He said that all his possessions, including his notebooks, were locked in his locker and his locker was broken into.

24. On 16 March 2018 the Claimant sent an email to Philip John saying that his CS spray and handcuff keys had gone missing from his bag which he had left in the changing room overnight. He said "… not sure if someone was playing a joke…". P2733.

25. Also on 16 March 2018 the Claimant emailed a Sergeant Wright saying that kit gone missing from his bag at Gravesend, p548.

26. In his grievance the Claimant included a timeline which said, "This has been a concerted effort to get me out of the MET: I had my CS spray taken and returned into my locker one I threatened to report this. I had my boots taken and hidden. …I have had my helmets and caps taken from my locker," p2675 at p2681.

27. The Tribunal was not taken to any messages from the Claimant to his supervisors saying that his locker had been broken into, nor messages asking for his locker to be fixed.

28. Sergeants Thomas and James told the Tribunal that CS spray is a s5 Firearm. It should never be left unattended and unsecured. The CS spray would therefore necessarily be removed if found unattended.

29. They told the Tribunal that other officers would borrow items of kit lying around, such as police hats, if they had forgotten theirs.

30. In the Claimant's student officer development plan dated 25 August 2017, p676, Sgt Thomas had written, "Today I had hoped to speak to you about the above matters. On parade today you were in a very dishevelled state with your shirt clearly not ironed. Myself and PS Lamb have spoken to you previously about your state of dress and hygiene. This is unacceptable, as a police officer you represent the MPS on the front line. It is essential for public confidence that we all look the part. This is a disciplined service." P678.

31. On all the evidence, the Tribunal found that, at the relevant times, the Claimant only complained about CS Spray having gone missing once from a bag which he had left in a room at Gravesend, not in his home Borough. He did not complain, at the time, that his CS spray had been taken from his locker which had been broken into. There was no record of him asking for his locker to be repaired.

32. There was contemporaneous evidence in 2017 that the Claimant was considered, on a number of occasions, to have come to work dishevelled, with his uniform not properly presented. The Tribunal considered that the Claimant's lack of care for his uniform was consistent with him not being careful with his police property.

33. The Tribunal did not accept the Claimant's evidence that his uniform, property and notebooks were carefully stored in his locker and that his locker was broken into.

34. It decided, on the balance of probabilities, that, when the Claimant's property went missing, he had left it unsecured so that his kit had been borrowed, and/or his CS spray appropriately removed and secured. The Tribunal also decided that the Claimant's notebook was defaced when he left it lying around. There was a practice of police officers defacing their colleagues' notebooks when the notebooks were not properly stored. This is what is likely to have happened to the Claimant.

35. The Claimant told the Tribunal that his emails were accessed by others. On 23 January 2018, p 555, the Claimant's email account was used to send an email to his team saying,

    "Now that I have established myself as one of the major team players I feel it necessary to point out a few things to the team.

    Number 1 : Yes my love for Adam is true and we care very much for each other. So much so we're buying turtles for each other.

Number 2: Because of my elite reporting status I will now state that whoever I am working with I will be happy to show myself doing the writing no matter how many statements are needed.

Number 3 : 1 hope to be one day up there and be the greatest officer like Dave (Stock) not Carron. He's not even that good an area car driver anyway. I mean how hard it is to drive an automatic....

And finally I look forward to presenting the team with a loads of cakes tomorrow 23/01/18. If I don't bring cakes in and forget I'll happily do the front officer for a week. . .

Peace out peeps!"

36. It was not in dispute that each officer has their own log on details for computers and that access to particular computer systems is dependent on rank and job role. Accordingly, computer terminals must be logged out of, or screens locked, if they are left unattended.

37. Alec Thomas told the Tribunal that police officers send emails from unlocked terminals, and this is done to anyone who leaves terminals insecure. He told the Tribunal that joking emails had been sent by his colleagues from his own email account, referring to his resemblance to Ed Miliband. Again, he said that this practice, while not condoned, was to remind colleagues to safeguard their sensitive computer access.

38. The Claimant told the Tribunal that he considered that the 23 January 2018 email was not a joke, but was race discrimination, because it implied he was in a non-platonic relationship with another male of South Asian ethnic origin. He said that the email was intended seriously. He said that, while the salutation "Peace out Peeps" appeared not to be serious, this had no bearing on the rest of the email.

39. It was not in dispute that the Claimant was more friendly with the person "Adam" referred to in the email, than with anyone else in the station and that Adam and he had gone on a holiday together. Sgt Thomas told the Tribunal that there had been a photograph on Facebook of the Claimant and Adam on a tropical beach together and that this was probably why the email referred to turtles.

40. The Tribunal decided that the email was clearly intended to be humorous. The salutation "Peace Out Peeps" was silly and ridiculous. The reference to Adam referred to the Claimant's closer friendship with Adam than with other officers in the station. The email also referred to a number of the Claimant's other colleagues, none of whom were said to be of Asian ethnic origin. There was nothing in the email that was anything other than light-hearted.

41. The Claimant was arrested for common assault on 27 March 2017, following an altercation in a Central London Bar called "ZOO" during which he punched another man. While the matter was investigated, the Claimant was placed on restricted duties.

42. Sgt Thomas received an email on 27 March 2017 from Sgt Hoppe, Licensing Sergeant for the area in which ZOO Bar was situated, saying that the Claimant had been

arrested and that the arrest details recorded that the Claimant had used his warrant card as a means of ID to get in. Sgt Hoppe said, "This is totally unacceptable." p674.

43. On 29 March 2017 Sgt Hoppe forwarded to Sgt Thomas an email from the Assistant General Manager of Zoo Bar. The Assistant Manager said of the Claimant, "He normally presents his passport on entry. On a few occasions when he did not have his passport he showed us his warrant card. We had a few issues with him in the past. Nothing serious, minor issues like him getting into an argument with other customers. He did not do anything that warranted his removal from the venue until the incident on Monday morning. Having said that, if we did NOT know he is a serving police officer we would have acted differently in dealing with those issues. The fact that he is a police officer meant he is a "low risk" and as such bouncers warned him about his behaviour instead of removing him." P673.

44. Each Unit in the MPS has a Professional Standards Units (PSU) and an appointed 'Appropriate Authority' ('AA'), which is a statutory role. The AA role is to assess conduct behaviours brought to their attention and decide whether the matter should be dealt with locally, or referred to the central Directorate of Professional Standards ('DPS'). Conduct can be referred to the DPS internally, or by a public complaint, or as the result of a criminal investigation. Even if an officer is not charged, or sentenced, for criminal charges, their behaviour can still be assessed internally by the DPS against the Standards of Professional Behaviour. If there is a potential breach, this may trigger internal investigation and sanctions being applied.

45. The DPS considered the Claimant's arrest for common assault against the MPS Standards of Professional behaviour.

46. Following his arrest, the Claimant began to experience anxiety and depression relating to the incident and worry about his future employment. He visited his GP on a number of occasions between May and September 2017. He was diagnosed with reactive depression, both by his GP on 24 May 2017 and, in a Lambeth Living Well Hub Multi-Disciplinary team meeting on 17 August 2017, by another doctor, Dr Soumitra, p1626. The 24 May 2017 GP notes said, "is undergoing counselling and wanted to know about referral to psychiatrist as suggested by sergeant. Advised … it sounds like a reactive depression and therapy is appropriate.". The MDT notes said, "He has had 6 sessions counselling… IMPRESSION Kaisser appears to be presenting with reactive depressive episode with some anxiety symptoms." The Claimant self-referred to Lambeth Talking Therapies and had counselling during this period, p1626 – 1627. At his request, he was also initially prescribed Zopiclone to treat insomnia. He was prescribed Sertraline in August 2017. It was unclear, on the evidence, for how long the Claimant took Sertraline.

47. On 28 April 2017 the Claimant emailed Alec Thomas saying, "I have attached the Occupational health form to this email, I have been referred to counselling by a GP which I have an appointment for next Friday but I think this is more to make the met aware of ongoing issues of stress and anxiety which hopefully could be managed and dealt with by the services of the NHS. If you could forward this for me this would be greatly appreciated and thank you once again for your support in arranging annual leave." P2754.

48. Sgt Thomas did not refer the Claimant to Occupational Health ("OH") at that time. He told the Tribunal that he had initially offered the Claimant an Occupational Health referral, but the Claimant had declined. Sgt Thomas told the Tribunal that he was not clear what the Claimant was seeking in his email, so he spoke to him in person, for clarity, and the Claimant informed him that he was being treated by the NHS and did not want anything further. Sgt Thomas also told the Tribunal that it is not only a line manager who can make a referral to OH; .any supervisor on the team can do so - as well as a Welfare Officer assigned to an officer who is under investigation. He also said that, in his experience, the Police Federation would be energetic in following up any referral to OH which a manager had failed to carry out.

49. The Tribunal considered that the Claimant's email was, indeed, ambiguous. It suggested that the Claimant was simply informing the MPS that he was being treated by the NHS for stress and anxiety – and not that he wanted any assistance from the MPS, or OH, in relation to it. The Tribunal also noted that there was no follow-up from the Claimant's Welfare Officer, or from the Police Federation, seeking a referral to OH on behalf of the Claimant. The Tribunal therefore accepted Sgt Thomas' evidence that he spoke to the Claimant to clarify what he wanted – but that the Claimant had said he was being treated by the NHS and did not want anything further. It accepted Sgt Thomas' evidence that he did not refer the Claimant to OH following the 28 April 2017 email because the Claimant had indicated that there was no need.

50. The criminal case against the Claimant was not proceeded with. The alleged victim had returned to Mexico. In June 2017 the Claimant was informed that the DPS internal investigation had also resulted in a determination of no case to answer.

51. The Claimant received an email from DC Sollory who had interviewed him in relation to the Zoo bar incident. DC Sollory said, "The 'victim' has returned to Mexico without any intention of coming back. Also I have viewed the CCTV and it clearly shows you were actually the victim and the other person was aggressive towards you." P535.

52. The Claimant remained at Stoke Newington Police Station in Hackney under the line management of Sgt Alec Thomas and, in July or August 2017, restrictions on the Claimant's work, imposed in relation to Zoo Bar incident, were lifted.

53. On 16 July 2017 Claimant did not attend work.

54. The Claimant was invited to a meeting on 17 August 2017 with Inspector Richmond and Sgt Thomas.

55. On 17 August 2017 the Claimant emailed himself with notes of the conversation he had had with Inspector Richmond and Sgt Thomas, p2576. The notes said,

    "I have also been attending counselling and am under a community mental health team to assist me to deal with issues I have been having since I was arrested in march 2017.

    Inspector Richmond stated that … in regards to me being arrested he does not care what the outcome from criminal and dps was, that I was to blame for being drunk… showing my warrant card and getting involved in fights. Inspector Richmond also stated that I should have not had another forces warrant card on my person.

Sgt Thomas stated that I had gone into club …and started speaking to other males girlfriend and had every opportunity to walk away but decided to walk up to the male and punch him in the face and instead of leaving started speaking to officers outside and … subsequently got arrested. Sgt Thomas stated that he has an email from the licensing officer from Westminster stating that officer was arrested. Sgt Thomas also claimed that he there is a statement from security at the venue stating that I had shown my warrant card on numerous occasions and used my police influence to prevent security from taking any action against me on previous occasions where it is alleged that I had been involved in fights. Sgt Thomas stated that I was arrogant bringing met police into disrepute. Sgt Thomas stated that I cannot believe why I wasn't sacked for what happened.

[Inspr] Richmond gave me an ultimatum stating that if I was to claim that I became ill because of that incident then "I can bring it on" two " I can resign from the met police" or three if I wanted to work I should get my head down and work. They talked about lateness and not turning up to work - I already informed them that I have in text authorised from sgt Collins any leave given and when I was late out of reason not in my control sgt Collins was informed of this.

Sgt Thomas stated that I was taking the piss and they believe that I am not truly ill but was responsible for what had happened and that It was dropped due to male leaving for mexico."

56. The Claimant told the Tribunal that, in the meeting, he had informed Inspector Richmond and Sgt Thomas that he had Post Traumatic Stress Disorder arising out of the Zoo Bar Incident and that they had responded that they did not believe him. He said that Insp. Richmond and Sgt Thomas said that he "should resign". The Claimant said, "[I] was threatened with consequences if I continued to say I was ill". He said that Insp. Richmond had said, if he wanted to say he had PTSD, "bring it on" .

57. In Sgt Thomas' statement for the Claimant's grievance made 21 August 2019, p707, he said that Insp Richmond and Sgt Thomas had told the Claimant that his conduct at the Zoo Bar had been wrong and had fallen far below the standards expected of a police officer. The statement said that they had both told the Claimant that the Claimant had had a "lot of leniency" "in terms of days off and early finishes", because of the stress he was under due to the misconduct investigation and potential job loss. Sgt Thomas' statement continued, "INSP Richmond went on to say that if he wanted to go sick, then he we would have to adhere to the UPP for Attendance as we would not afford him any exceptional leniency based upon this incident. INSP Richmond then said that if PC Hussain could not accept the standards of behaviour that are required, he could resign. The third option, the one that we were hoping he would take is that he sorts himself out and takes the job seriously, gets his head down and just works hard."

58. In oral evidence, Sgt Thomas agreed that, during the meeting with Inspector Richmond, the Claimant had stated that he had PTSD. Sgt Thomas agreed that Inspector Richmond had told the Claimant that any sickness would be managed under the Respondent's UPP procedure. He said that, in light of the CCTV of the Zoo Bar Incident, Insp Richmond had said, "If you carry on like this things are going to come unstuck," and, therefore, the Inspector had given the Claimant 3 Options ; Option 1

was resign, or to carry on as he was and become unstuck; Option 2 was to take the sickness option; and Option 3 was to get his head down, "crack on and tighten up."

59. On all the evidence (including the Student Officer Development Plan set out below), the Tribunal decided that Inspector Richmond told the Claimant that he had 3 options, one of which was to resign, if the Claimant could not adhere to the standards required of a police officer. This was in the context of Inspector Richmond and Sgt Thomas genuinely believing, and telling him, in no uncertain terms, that his conduct in the Zoo Bar was unacceptable as a Police Officer and that he could not continue to behave in such a manner.

60. The Tribunal found that Insp Richmond and Sgt Thomas justified their belief that the Claimant's conduct in the Zoo Bar was unacceptable by explaining, with reference to the CCTV footage, in what way the Claimant had escalated and provoked the incident. The Tribunal refers to Sgt Thomas' description of the CCTV footage which he later set out in the Development Plan. Furthermore, the Tribunal found that they also had good grounds for considering that the Claimant's use of his West Midlands warrant card was an abuse of his position; as Sgt Thomas explained in the meeting and recorded in the Student Officer Development Plan.

61. Sgt Thomas told the Tribunal that he had been in the Army Reserves and had received bespoke training in how to recognise PTSD, what incidents can commonly cause it and how best to direct people towards help. He said that he has several friends who suffer from PTSD and had encountered several victims with PTSD as a result of traumatic assaults and sexual offences. The Tribunal accepted his evidence on this – it was not challenged and there was no reason to doubt it.

62. Sgt Thomas also told the Tribunal that, as a result of his knowledge and training, and having witnessed the CCTV footage in which the Claimant struck the first and only blow, he was of the opinion that the events of the Claimant's arrest did not constitute the type of trauma which would typically result in PTSD. Again, the Tribunal accepted his evidence on this – his reasoning was logical and based on his own experience and knowledge.

63. Sgt Thomas denied that he had said that he did not believe the Claimant had PTSD, but told the Tribunal that he had said that, from what he had heard and seen, the Claimant was more likely to be suffering from stress. However, he said that, as he was not a medical doctor, he would refer the Claimant to Occupational Health for an expert assessment.

64. The Tribunal accepted Sgt Thomas' evidence about what he said to the Claimant about his PTSD; it was consistent, both, with what he later wrote in the Claimant's Student Officer Development Plan, p676, and with the fact that he did make an Occupational Health referral for the Claimant in relation to PTSD, p303.

65. Following the meeting Sgt Thomas gave the Claimant a Student Officer Development Plan, p676. In it, he said,

"Firstly, despite the content of this, we are glad to have you back and I'm very relieved that DPS have decided not to pursue this matter. Although I'm glad to have you back, I'm afraid that DPS deciding "No Case to Answer" is not the same as saying that you've

acted correctly. Let me clarify that your conduct has fallen far below what myself, INSP Richmond and the MPS expect.

For a start it is completely unfathomable to me why you would still have in your possession a warrant card from West Midlands Police. A warrant card is arguably the most serious and dangerous thing that the job issue to us … you must have certainly been aware that you're not supposed to have it … You must have also known, that it is completely unacceptable for you to tenure *[sic]* this warrant card which you're not supposed to have as ID when entering a nightclub.

…Let me be absolutely clear, when we show someone our warrant card we are identifying ourselves as police officers and that person will henceforth regard us and treat us as such. By showing staff that you're a police officer, they may assume that they should defer any trouble to you, or that you're expecting free entry or drinks or expect you to grant or receive some kind of favour or preferential treatment all of which are not acceptable. … as you can see the attached excerpt from an email, you have already received preferential treatment form the door staff. …

This conduct is completely unacceptable for a serving officer, for you to act in such a way that bouncers have to warn you about your conduct falls below the standard that we expect from our officers. For you do this having shown your warrant card on entry makes it a hundred times worse as you are tarnishing all of our reputations and that of the MPS.

From now on you are not to show your warrant card to anyone [except] … if you are putting yourself on duty to act in the role of a Police Officer.

…

On the night in question, you have approached a female and a male has taken umbrage at this. You have then continued to engage in this argument which has then resulted in you punching this male. I have viewed the CCTV and will show it to you. I would like to direct your attention to the following times on the clip.

…

05:15 – People are stood between you, appears to be some altercation which you decide to continue.

07:40 – You are seen tapping him on the face with an open hand. This gesture seems extremely provocative and to which the male reacts. I can fathom no lawful reason why you did this.

08:40 – You have your hands behind your back. You do not appear to be in fear of imminent danger as you would later describe.

…

11:40 – You are squaring up to the male in an aggressive manner. Again there is plenty of opportunity for you to withdraw from this conflict.

14:20 – Your hands are behind your back again. You do not appear to be in fear of imminent danger as you would later describe.

14:48 – You are seen to push the male his friends then push him back away from you but you are seen to clearly step towards him trying to continue the conflict. This is despite the exit being behind you and two door-staff being there.

16:00 – You then punch the male in the face. At the time you did so he appeared to have actually turned away from you at the point that you struck him. I cannot fathom any justification for this strike. Throughout this whole incident your back is to the exit and there are two door staff on camera.

In summary; I simply do not know how this has been resolved as no case to answer. The misconduct matter has been dealt with, what I would like to address is your performance. You've identified yourself as a police officer in circumstances where it was completely inappropriate to do so. You have then continued to engage in an altercation with a male when you had ample opportunity to withdraw from it, or seek the help from door-staff who were less than 5 meters away from you. You have pre-emptively struck him (by your own words) when you had no justification to do so. Our code of conduct states that all force used must be justified and proportionate. This clearly wasn't. I will ask you to familiarise yourself with the National Decision Model. As you do you will see that you had clear alternative options of leaving, alerting the door staff.

Since the incident and your return to work you have been absent one occasion on the 16th of July without any notice. Since then you were also late for Parade

…

You informed me in July that your absence on 16th of July, (when you just simply didn't turn up for work) was due to medication which you are on from post-traumatic stress disorder of being arrested. I'm afraid that without medical evidence I'm unable to accept this. I suggested counselling to you during the investigation because you were facing the very realistic prospect of losing your job. This didn't happen and you have now returned to your full duties. You were arrested and detained but no force has been used against you during the arrest or during the incident. From all the evidence I have seen you are the aggressor in the situation. I am not inclined to afford you any leniency on the basis of PTSD unless is documented in an occupational health referral. That said I am not a doctor or psychiatrist and if this something which you genuinely feel is affecting you then I will generate and occupational health referral and you'll be assessed. If confirmed that you are suffering from PTSD then reasonable adjustments and allowances can be made."

66. Sgt Thomas ordered the Claimant to return all property to the West Midlands Police.

67. Sgt Thomas gave evidence at the Tribunal that he believed that the Claimant had not followed the National Decision Model, and had not acted in self-defence, during the confrontation in Zoo Bar. In particular, he said that he saw the Claimant seeking to prolong the confrontation when the Claimant and the other man had been separated. Sgt Thomas also told the Tribunal that he believed that the Claimant's retention of the West Midlands Police warrant card amounted to theft and that his use of it as ID to

enter a club was completely unaccepted for a police officer. He said that he believed that it was important to record these matters as part of the Claimant's probation development, for the Claimant to learn from it.

68. Sgt Thomas was asked about the email from the DC saying that the Claimant had been the victim. He told the Tribunal that he found the language unusual – that officers normally use different, standard wording. They would not normally identify the accused as "the victim" because that would expose the other party to potential civil action – which the police would not seek to do.

69. The Tribunal accepted Sgt Thomas's evidence on all this and why he had included these matters in the Claimant's Student Development Plan, despite the DC's assertion that the Claimant was the "victim". Sgt Thomas gave logical and cogent reasons for his belief that the Claimant had not acted in self-defence. His evidence was supported by the fact that the DPS also suggested (see below) that the Claimant should learn from the CCTV footage of the Zoo Bar incident. As the Claimant was a probationer, the Tribunal accepted that Sgt Thomas, as his manager, wanted him to learn from the incident, so he would not repeat his unacceptable behaviour.

70. The Claimant consulted his Federation Representative, PC Flint, about these matters being included on his Development Plan.

71. PC Flint advised him that the DPS misconduct investigation into the Zoo Bar incident had decided that there was no case to answer against the Claimant, but had suggested that the Claimant would benefit from reviewing the CCTV to highlight learning opportunities. PC Flint said that he had agreed to this. However, PC Flint said that, since the DPS has concluded the matter, it could not be reopened and should therefore not be included in the Claimant's PDR and the development plan. He said, "I believe that the PDR and development plan as it stands now breaches the Misconduct Regulations … The basic premise of a PDR and action plan are to help officers. I think your line management are trying to do that but have inadvertently breached regulations themselves." P556.

72. PC Flint then spoke to Sgt Thomas, who agreed to remove all mention of the Zoo Bar incident from the Development Plan.

73. Instead, on 7 September 2017, Sgt Thomas set out his instructions for the Claimant, in an email, p680, to return property to other constabularies, to research the Police National Decision Model and Pre-Emptive Strike Legislation and not to use his warrant card as ID or to enter licensed premises.

74. Sgt Thomas had also previously raised the issue of extending the Claimant's probation. In the same email, Sgt Thomas said that PC Flint had pointed out that the Claimant had another probationer review in November 2017, so that it would be better to wait until November to see whether an extension was necessary. Sgt Thomas continued, " I'd advise you to get as much of your SOROC done by then. You've missed out on two and a half months of operational policing experience so in order to confirm you at 24 months we'll need to see that you are on track at your 18 month review." P680.

75. On 25 August 2017 Sgt Thomas referred the Claimant to Occupational Health, p303. In the referral, Sgt Thomas described the Zoo Bar incident and said, "It appeared to all of his line managers that he would almost certainly be dismissed from the service. With this prospect hanging over him, he was offered counselling. He declined an occupational health referral stating that he would prefer to use his own GP. After several months, the case against him was not proceeded with … As he was being spoken to about the incident, and his unsatisfactory performance … he stated that he and his doctor felt that he was suffering from post-traumatic stress disorder resulting from his arrest and subsequent detention. PC Hussain has asked to be referred to OH for PTSD. As PC Hussain is on management action for this and other matters we need to establish if he needs to be afforded leniency on the basis of this diagnosis" p304. Sgt Thomas asked, p305, "Is PC Hussain fit to carry out the role of Police Officer?" and, "Does PC Hussain require and adjustments or restrictions in order to do so?", p306.

76. The Tribunal noted that, while the Claimant had told Sgt Thomas that his doctor felt he was suffering from post-traumatic stress, this was not correct. Both doctors who had been consulted about the Claimant's symptoms had diagnosed reactive depression.

77. On 20 September 2017 OH provided a report on the Claimant, p544. The report said, "In my opinion [the Claimant] is fit for full duties," p545, "Post Traumatic Stress Disorder (PTSD) has not been formally diagnosed, further formal assessment and therapy treatment should establish whether the above has this condition." … "PC Hussain is fit to undertake his full operational duties as a Police Officer with no restrictions" … "The Officer is able to undertake his full operational duties including nights, although he appears to be experiencing the benefits of his medication, I understand that he occasionally experiences lapses in his concentration."

78. From the OH notes taken during the consultation with the Claimant, p1554, the OH assessor reviewed the application of the Equality Act to the Claimant and recorded the following: the Claimant did not have a physical or mental impairment; he did not have an impairment which had lasted or was likely to last 12 months; he did not have an impairment which had a significant effect on day to day activities; he did not have an impairment which was likely to recur; he did not have an impairment which would have a significant impact on normal day to day activities without treatment, p1555.

79. The Claimant told the Tribunal that he felt unable to tell OH about his symptoms because he was worried about the effect this might have on his job, because of Sgt Thomas and Insp Richmond's negativity towards him concerning PTSD. He told the Tribunal that Sgt Thomas had lied in the OH referral when he had reported that the Claimant had declined counselling.

80. The Tribunal decided that Sgt Thomas contemporaneous' statement that the Claimant had declined MPS counselling was true. It was consistent with the Claimant having stated, in his own email on 27 April 2017, that he was being treated by the NHS.

81. On 22 November 2017, at the beginning of a shift, a Detective Sergeant and Police Constable from Directorate of Professional Standards (DPS) met the Claimant and told him that they had received information he was under the influence of alcohol, p777.

82. They tested the Claimant for alcohol. The test was negative.

83. The Claimant alleged that he had been reported maliciously for challenging Inspector Richmond and Sgt Thomas.

84. Sgt Thomas told the Tribunal that a number of the Claimant's colleagues had approached Insp Richmond, disclosing that, on at least three occasions, they had noticed PC Hussain drunk at work. Insp Richmond had passed this on to the DPS, who carried out a "With Cause" alcohol Test on the Claimant some time later, p722. He said that he had not been involved at all.

85. The Tribunal accepted Sgt Thomas' evidence. The Claimant did not know who had reported him. Later, when Sgt Thomas suspected the Claimant of being drunk on duty, he tested him himself, using a breathalyser. That suggested that Sgt Thomas would deal with the issue of drinking himself, as the Claimant's manager, rather than referring the matter to DPS. Further, the Tribunal noted that the Claimant's colleagues had, indeed, believed he was drunk at work, p701.

86. In November 2017 Inspector Bazyluk became the Claimant's second line manager, taking over from Inspector Richmond, p1346.

87. On 8 November 2017, Occupational Health contacted the Claimant to obtain an update on his progress. The adviser noted that the Claimant was working normal hours and undertaking operational duties, but had occasional short term concentration lapses, p1551.

88. On 23 November 2017 Sgts Thomas and Wright met with the Claimant to have an informal discussion. Sgt Thomas was encouraging towards the Claimant and told him he would support him to undertake courses. The Claimant told the Tribunal, "PS Thomas made a comment that I was "slow" which I assert was directed at my disability." The Claimant repeated this in oral evidence. He did not explain how the term "slow" was said to be related to his disability.

89. Sgt Thomas told the Tribunal that he told the Claimant that his written work was excellent, but that he could do with being a bit faster in more straightforward areas, such as booking in property and getting reports finished.

90. The Tribunal accepted Sgt Thomas' evidence on this, which explained the context of his comments, as opposed to the Claimant's vague assertion.

91. The Claimant worked full duties without any absences from August 2017 until 24 April 2018, when he was off work until 28 April 2018 with sickness and diarrhoea. He was off work once more from 12 – 15 May 2018 for the same reason. The Claimant told the Tribunal that he was only given one return to work interview following these absences, but that Sgt Thomas knew that the Claimant was suffering from mental health symptoms.

92. Sgt Thomas told the Tribunal that, for short term illnesses involving a minor issue like diarrhoea and vomiting, and where there was no suggestion of an underlying cause for it, he would not give repeated return to work interviews.

93. The Tribunal accepted Sgt Thomas' evidence on this. The Claimant's evidence was contradictory – he repeatedly said in evidence that he felt unable to disclose his mental health condition to Sgt Thomas and that, therefore, on paper he recorded the reasons for his absences as diarrhoea and vomiting. The Tribunal accepted that Sgt Thomas believed that the Claimant was off work in April and May 2018 for stomach issues and not because of any mental health issues. The Claimant had worked full hours, on full duties, since August 2017 and OH had reported that the Claimant was fit to do so. The Tribunal found that there was no indication to Sgt Thomas on 28 April and 12 – 15 May 2018 that the Claimant had any ongoing mental health issues.

94. The Claimant's probationary period was not extended – it remained as 24 months.

95. The Claimant told the Tribunal that Sgt Thomas did not approve his attendance at numerous courses, including Arabic language and Public Order and Basic Driving courses. He said that other colleagues had been given the opportunity to obtain these courses, but he was not supported to attend.

96. Sgt Thomas told the Tribunal that he does not have to authorise Basic Driving and Level 2 Public Order courses. These courses do not cost the Borough any money and there is no limit to the number of staff who can apply. This is different from, for example, a Response Driving Course, in respect of which a Team's Inspector allocates a limited number, based on ability, effort, experience and eligibility. However, Sgt Thomas said that, when the Claimant was on restricted duties as a result of misconduct investigations, he was not permitted to go on outside courses because he could be public-facing. Sgt Thomas also said that the Claimant would need to find the time to attend an equipment fitting for the Public Order course and would need to organise his own eye test for the Basic Driving Course.

97. On 15 December 2017, p685, the Claimant emailed Sgt Thomas, asking if he could attend a public order level 2 fitting on 25 December 2017 and attend an eye test on his "next early turn". Sgt Thomas replied, "Mate happy for you to do it", but pointed out that the fitting was unlikely to be available on Christmas day and said, "if you can find another date then yes all good".

98. The Tribunal considered that this contradicted the Claimant's assertion that Sgt Thomas did not approve his attendance on the Basic Driving and Public Order Courses.

99. Shortly afterwards, on 13 January 2018, the Claimant received an email from a PC Spurrell regarding his public order level 2 course saying, "Thanks mate, there are several on this team waiting for courses and it might be March/April before you can get to Gravesend. I'll get you on the list." P547

100. On 7 August 2019 PC Charlotte London gave a statement saying, "I Made Alec Thomas aware that I wanted to do my Level 2 Public order course as soon as I possibly could, he advised me that I could do it once I was a year in however he has no control over it and I had to personally send an email off to Bob Hudson and organise my own uniform fitting." P701.

101. On 22nd March 2018 the Claimant attended a Public Order Level 2 Course in Gravesend.

102. On 29 November 2027 the Claimant asked Sgt Thomas for approval to enrol on an Arabic Language Course. On 12 December 2017, p546, Sgt Thomas replied, saying that he would not ordinarily support an application for such a course from a probationer.

103. Sgt Thomas gave evidence that an Arabic language course is "niche" and extracurricular, and that the Metropolitan Police Force would not normally support an application from an officer during probation because such a course represents an investment in that person, so the MPS would want the officer to be confirmed in rank before making the investment.

104. There was no evidence before the Tribunal that other probationers were permitted to go on language courses. The Tribunal accepted Sgt Thomas' evidence that probationers were not approved for such courses.

105. On 21 May 2018, the Claimant attended an interview with West Midlands Police in relation to an alleged off-duty sexual assault by him in February 2018. On 22 May 2018 the DPS served him with a notice that he would be investigated in relation to the alleged sexual assault, which had been assessed as potential gross misconduct.

106. On 21 May 2018 the Claimant asked Sgt Thomas for 2 days emergency leave to "get my head back to order". He said that he would "… spend them with my dad during Ramadan and then sort myself out for work." P688.

107. Sgt Thomas allowed the Claimant to take one day off on 22 May 2018, but told him that he would be needed in on 23 May, as he could not be spared, p689. Sgt Thomas told the Tribunal, in evidence, that the unit was understaffed, so the Claimant was required, but he had given him one day off in any event on 22 May.

108. On 27 May 2018 the Claimant texted before his shift saying, "Hi sgt running a bit late northern line not working from Kennington."p690. The Claimant attended work for his 22.00 at 22.10, not in uniform. Sgt Thomas noticed him and asked him why he was late. He saw that his eyes were bloodshot and asked him if he was alright. The Claimant responded that he felt ill and might need to go home and that he was hoping to speak to Inspector Bazyluk.

109. Sgt Thomas believed he smelt alcohol from the Claimant and asked him if he had been drinking. The Claimant admitting to having one drink on the way to work

110. Sgt Thomas administered an alcohol breathalyser test. There was a dispute as to whether the result of the test was valid. The Claimant told the Tribunal that the machine had not been calibrated, so there was no evidence that he was over the limit for work.

111. Sgt Thomas told the Tribunal that the machine used to test the Claimant was a Drago machine, which will not work at all if it is not calibrated properly. He said that the result from a Drago machine is valid in evidence. Sgt Thomas had sought advice from the DPS, who directed him to take one reading and the form he was required to complete only had 1 box. It later transpired that 2 readings were required for the breath test to have been administered in a procedurally correct manner. He told the Tribunal he had acted in good faith.

112. It was not in dispute that the reading on the breathalyser was 32. This was above the alcohol level permitted for a police officer on duty.

113. The Tribunal found the Sgt Thomas administered the test in good faith, using a machine which was working. Sgt Thomas therefore had good grounds for believing that the Claimant had attended work unfit through alcohol. He sent him home on special leave.

114. The Claimant told the Tribunal that, when Sgt Thomas sent him home for alcohol. he informed the Claimant that he should resign from the force and that he would send police units to his home if he called in sick again.

115. Sgt Thomas agreed on evidence that he told the Claimant, "Mate you cannot turn up for work like this. This isn't casual bar work, or holiday repping in Ibiza. This is serious. What we do is important. Turning up drunk like this; is not in any way acceptable. If you think it is then I'm afraid I think you need to find another job."

116. He also agreed that he told the Claimant that he would no longer accept the Claimant's stated reasons for absence, unless they were supported by evidence. He agreed that he told the Claimant that, if the Claimant called in sick to work, then the Claimant could expect a home visit.

117. Sgt Thomas told the Tribunal he had said these things because he considered that the Claimant had lied about the reason he was late for work – he had said that he was delayed on the Northern Line, when, in fact, he had been out drinking with his friends. He would therefore now doubt what he was told about the reason for the Claimant's absences. He told the Tribunal that he had commented to the Claimant that he considered that the Claimant now had zero integrity because of his lies.

118. On 30 May 2018 Sgt Thomas sent a text to the Claimant saying, "As mentioned before, I need you to get all of your sickness notes from the doctor which correlate to your absences."p690.

119. The Tribunal noted that the 30 May 2018 text corroborated Sgt Thomas' evidence that he informed the Claimant that he would henceforth always require a doctor's note to confirm the reason for the Claimant's absences.

120. On 30 May 2018 the Claimant was placed on restricted duties while the DPS investigated the potential gross misconduct sexual assault matter against him, p1398.

121. On 31 May 2018 the Claimant's probationary period ended and he became a police officer.

122. From 31 May 2018 until 4 December 2018 the Claimant was absent from work, certified by GP Fit Notes, which gave the reason for his absence as work related stress and/or anxiety and/or depression, p1057. For example, at p1222, his Fit Note gave the reason for his absence as "work related stress" on 4 June 2018; at p1223, his Fit Note gave the reason for absence as "depression" on 18 June 2018; and at p1224, his Fit Note gave the reason for absence as "depression" on 29 June 2018.

123. On 1 June 2018 Sgt Thomas referred to the Claimant to Occupational Health, p1183. The referral mentioned that the Claimant had 2 impending discipline issues,

in that he had been interviewed by another police force under caution and he had attended work unfit through alcohol. Sgt Thomas referred the Claimant "for support for emotional and alcohol related issues."

124. On 15 June 2018 an OH Report advised that the Claimant had work related stress. It advised, "I anticipate that his condition would Improve when his personal circumstances and work issues are resolved however, I am unable to predict a time frame." p1185

125. On 3 July 2018 the Claimant presented a grievance against Sgt Thomas and Insp Richmond, saying that he had been bullied and discriminated against by them, p318.

126. The Claimant was invited to a case conference on 11 July 2018 to discuss his absence. The Claimant did not attend. On the same day, 11 July 2018, Sgt Thomas wrote to him, noting that the Claimant had been off work continually for 41 days; and that, in the previous 12 months, he had had 3 more days' sickness, making the total 44. Sgt Thomas said, "This is clearly unsatisfactory falling below that standards expected both in terms of long Term Sickness' (29 days) and the Total Absence (10 days) please see the attendance management SOP which I have included as well for your reference." Sgt Thomas said that the Claimant was required to return to work by 16 July 2018, when his sick note expired, and to maintain satisfactory attendance for 12 months from 11 July 2018, p1134, 1132

127. As a result of the Claimant's grievance, on 17 July 2018 Claimant's line manager was changed to Sgt James, p1325

128. On 5 August 2018 Sgt James referred the Claimant to OH again, p1188. The referral said that the Claimant had been seeing his GP, but had now been referred to a psychologist for assessment, suggesting that the diagnosis might be more serious. Sgt James asked for a reassessment by OH.

129. On 15 August 2018 Occupational Health provided a report, saying that the Claimant had informed OH that his GP had diagnosed him with Post Traumatic Stress Disorder and had referred him for a psychiatric assessment through the NHS, p1190. The Claimant had also reported that he was waiting for Cognitive Behavioural Therapy. The OH adviser said that the Claimant was unfit for work and that the case would be closed, but that when the Claimant had been signed back to work, fit, by his GP, the manager could re refer the Claimant for a return to work recuperative plan, p1191. The OH Adviser advised that the Claimant's condition was likely to be classified as a disability in that the Claimant had had an impairment which had lasted, or was likely to last for 12 months and which has a significant impact on his ability to carry out normal day to day activities and was likely to recur, p1191.

130. The Claimant was invited to an Unsatisfactory Performance Procedure Stage 1 meeting on 31 August 2018, p1140.

131. At that meeting, he was issued with a Written Improvement Notice, p1147, requiring him to return to work by 1 October 2018. The Written Improvement Notice set out that the Claimant had had long term absence - 93 days up to 31 August 2018 and frequent short term absence - 106 days total in a rolling 12 month period to 31

August 2018. The Improvement Notice set out what the Respondent would do to support the Claimant; that it would offer recuperative and adjusted duties, offer counselling and would send a GP support letter, p1280.

132. The Claimant had asked to move the date of his UPP1 meeting to 14 September 2018 because his Police Federation representative was only available on the 14 September 2018.

133. By email of 27 August 2018 Sgt James declined to do so. He said that the Claimant had not returned to work on 16 July 2018, but the UPP1 notice had not been issued until a month after that, so that the Claimant had had plenty of time to prepare for the UPP1 meeting. He said that there were now only 3 sergeants on the team, so that the meeting had to take place within Sgt James' working hours, and the date had been chosen to accommodate that. He also commented that Performance and Attendance Management are intended to be positive and supportive processes, aiming to improve performance or attendance. In any event, he said that the delay the Claimant had requested was outside the 5 days allowed by guidance, p561.

134. Home Office Guidance, at point 3.109, allows leeway of 5 days when an alternative UPP stage 1 date is requested, p1892.

135. Sgt James told the Tribunal that the Claimant could have sought another federation representative for the UPP1 meeting. Detective Constable Atwell, who was the Claimant's representative at the time, told the Tribunal that she had not previously been involved with his case and had only recently been asked to attend the UPP1 meeting.

136. The Claimant appealed against the outcome of the UPP1 meeting. On 21 September 2018 his appeal was dismissed, p1154 -1160

137. On 24 September 2018 Sgt James made a further OH Referral on the Claimant's behalf, saying that the Claimant was planning to return to work on 10 October 2018 and asking for a plan for adjusted duties and/or phased return, p366 -7.

138. Also on 24 September 2018 Dr Ashby, Consultant Psychiatrist, provided a report on the Claimant's mental health condition, p1650. She diagnosed that the Claimant had moderate anxiety and depression. She said, "My impression is that he has symptoms consistent with moderate depression and anxiety. Certainly, there was a trauma in the events in 2017, but I think the memories of that day that go round and round are rumination, worry over and over about what happened, rather than flashbacks as such as part of PTSD. He does not strictly meet criteria for PTSD, although I think that thinking about treatment in terms of a trauma focus, is helpful.

139. She suggested a change of medication and that the Claimant continued to be treated by CBT. She said, "At present he does not feel ready to go back to work, but we have discussed how a phased return to work can help with self-confidence, self-esteem, a sense of life having meaning, certainly very protective in depression and will help break to vicious circle of feeling low, worrying about work and what happened, and dropping self-confidence etc. I would certainly support his request for the reasonable adjustment of a move in team and/or line manager, including to work closer to home and am happy to write to occupational health." P1651.

140. OH reported on 10 October 2018, p1193. The report said, “PC Hussain has been off sick with symptoms of psychological ill health since May 2018 as a result of work place matters. His GP referred him for a psychiatric assessment and he has recently been assessed and diagnosed with moderate depression and anxiety and the recommendation was a change of medication and trauma focused CBT. OH advised that the Claimant was likely to be able to return to work in 6 -8 weeks after adjusting to treatment, p1194. On this occasion, the OH report was ambiguous as to whether the Claimant was disabled, in that it said that the Claimant’s condition did not have a significant effect on his ability to carry out normal day to day activities.

141. On 24 October 2018 OH reported that the Claimant was fit to attend meetings with adjustments, p1198.

142. On 9 November 2018 the Claimant was invited to attend a second stage meeting regarding his absence from work, p1168. The invitation set out his Unsatisfactory attendance as follows: “1. Frequent short term absence: 3 periods (200 days) in rolling 12 month period 2. Long term absence: 193 days up to 09/11/2018.”

143. An Unsatisfactory Performance Procedure Stage 2 was held on 26 November 2018, p1174-1177. At the meeting, the Claimant was told that his attendance remained unsatisfactory, but that his GP’s requests for reasonable adjustments would be implemented, to assist the Claimant to return to work.

144. Inspector Bazyluk issued the Claimant with a Final Written Improvement Notice following the Second Stage Meeting, p1175, on 29 November 2018. The Written Improvement Notice (“WIN”) required the Claimant to return to work by 17 December 2018. It said that the Respondent would implement recuperative / adjusted duties to help his return and that consideration would be given to hours and place of work, line manager change and a non-confrontational role, in consultation with OH, p1177.

145. The Final Written Improvement Notice, arising from the UPP2 meeting, identified that the Claimant had had Long term absence - 180 days in total in a rolling 12-month period to 27 November 2018. It required that the Claimant maintain satisfactory attendance after his return to work on 17 December. The period was 12 months from 29 November 2018, which was the date of the letter, p1177.

146. The Claimant was seen by Occupational Health on 10 December 2018. OH recommended recuperative hours, “As per his GP' s recommendation, however, on the 3rd week he works 4 hours per shift for 4 days. 4th week he works 5 hours per shift for 4 days. 5th week he returns to his normal hours.” OH recommended that the Claimant be office-based only whilst on recuperative duties

147. On 4 December 2018 the Claimant returned from sickness absence, on a phased return and recuperative duties. He was also still on restricted duties because of the ongoing disciplinary investigation into the sexual assault allegation against him. That meant that he was not on operational, public facing, duties.

148. On 30 December 2018 Sgt James emailed the Claimant about OH’s proposed return to work plan. He suggested that, for the 3rd week starting 31 December 2018, the Claimant work 2 days, for 4 hours each day, at Southwark Police Station; for the 4th week, starting 7 January 2019, he work 4 days, 4 hours a day, at Southwark Police

Station; in the 5th week, starting 14 January, he work 4 days, 5 hours a day from Bethnal Green Police Station; in the 6th week, he work 4 days a week, 5 hours a day from Bethnall Green and on 6th week, he return to team shift patterns at Bethnall Green, p1266.

149. On 9 January 2019 the Claimant provided a GP Fit Note saying, "The above patient is on phased return and would also need his journey to work minimised". Sgt James referred him back to OH for further advice, p1207. On 21 January 2019 OH reported, p1208, that the Claimant should remain on recuperative duties for a further 4 weeks, at Southwark Police Station.

150. On 30 January 2019 Sgt James sent the Claimant a revised return to work plan p1265, with the Claimant working from Southwark Police Station, not returning to Bethnall Green until 8 March 2019, p1265.

151. The Claimant did resume work at Bethnal Green, still on restricted duties because of the misconduct investigation, from 8 March 2019.

152. He told the Tribunal that he could have continued to work at Southwark Station, entirely remotely, because he was working in the Missing Persons Unit.

153. Sgt James gave evidence that the Claimant was not as gainfully employed at Southwark Station as would have been at Bethnal Green Police Station. The hub at Bethnal Green had work which needed to be allocated, not just the missing persons work which the Claimant was carrying out at Southwark. Sgt James also told the Tribunal that the Claimant's substantive posting was to Stoke Newington Police Station, in the same Police Borough as Bethnal Green, so the Claimant needed progressively to return to his job in that Borough.

154. The Claimant continued to work without incident, but still with restrictions due to the ongoing misconduct investigation, until August 2019, when he told Sgt James that he felt he was having a relapse. On 28 August 2019 Sgt James made an OH Referral for him, p1210, reporting that the Claimant felt he was having a relapse and asking about the Claimant's ability to perform his role.

155. The Claimant missed an OH appointment on 11 September 2019, p1215. On 1 October 2019 OH had a discussion with the Claimant and reported he was experiencing symptoms of stress. The OH report said that the symptoms were, "mainly caused by the ongoing work place investigations which has also placed him on restricted duties and he experience stress with anxiety because of it as well as low morale and confidence." The Claimant said that his current role was not affected by the stress.

156. The report recommended, "due to his disrupted sleep pattern associated with stress from the ongoing investigation it is my clinical opinion that he would benefit for a short period during which he avoids night duties in order to re-regulate his sleep pattern." P1214.

157. The Claimant received the Occupational Health report on 10 October, but did not release it to Sgt James for a period. As a result, Sgt James did not see it until 14 October 2019, p969.

158. The next day, 15 October 2019, Sgt James emailed the Claimant saying that he would remove him from night duty for 6 weeks. He said that he could not implement this until 20 October 2019. He gave his reasons as follows, "due to the short notice and demands placed on the team by Extinction Rebellion Aid this set. There is therefore an overwhelming operational need for you to be with the team for the rest of this set, including our nights on 18+19/10/2019", p969.

159. The Claimant replied, saying that he had found nights hard and asking to come in early and leave early. Sgt Thomas replied, saying that the team was 12 officers below minimum levels due to officers being taken away for Extinction Rebellion protests. He asked the Claimant to attend at 22.00 and said that he would be on shift both nights. Sgt James observed that, once the current nights were over, the Claimant would be removed from nights for almost 7 weeks, p968.

160. On 17 October 2019 Sgt Thomas walked through the Office at Bethnal Green Police Station, p1003. The Claimant and he did not interact at all. There was a dispute of fact as to whether Sgt Thomas had been ordered stay away from the Claimant. No DPS restrictions had been placed on Sgt Thomas.

161. On 18 March 2019 the Claimant's Federation Representative told the Claimant that DPS had advised her that local management had said that the Claimant would be working from Bethnal Green whilst on restricted duties and Sgt Thomas would be working from Stoke Newington, p2740.

162. Insp Bazyluk and Sgt Thomas both agreed, in evidence, that it had been felt to be in the interests of all sides for Sgt Thomas and the Claimant to be working in different locations during the Claimant's grievance. Sgt Thomas said that he had been moved away from managing the Claimant, as good management practice, during the grievance.

163. The Tribunal found that, while the 2 men had been allocated to different locations during the Claimant's grievance, there had been no restrictions placed on Sgt Thomas, in that he had not been ordered to avoid contact with the Claimant.

164. The Tribunal accepted Sgt Thomas' evidence that, on the night in question, the Borough was short staffed and Sgt Thomas was therefore working a double shift, so that, when he finished at Hackney, he went to Bethnal Green to cover the Local Resolution Team there. The Tribunal found that there were no restrictions preventing him from doing so and that he was simply in the same location as the Claimant, but not working with him.

165. On 18 October 2019 the Claimant attended Bethnal Green for night duty. He was and sent home at 02.00 by Acting Sergeant Wiggans, who noticed that he looked pale and drawn and had been lying with his head on the desk. When she spoke to the Claimant, he said he was struggling because it was a night shift and he had told Occupational Health about it. She considered that he was not in a fit state to work, p925

166. On 19 October 2019 Claimant attended night duty late, at 02.00. APS Wiggans and PS James spoke to him in a separate room and thought that he had been drinking alcohol. They arranged for a breath test to be carried out and the Claimant provided

samples of 42 and 43, over the legal limit for driving. The Claimant was sent home, unfit for work through alcohol, p958.

167. Sgt James referred the Claimant to Occupational Heath again on 20 October 2019, p1216. He said that the Claimant had provided samples of breath containing alcohol of a level which might be dealt with as gross misconduct. He asked OH to assess the Claimant's ability to perform his current role, and to identify and address alcohol abuse and any other related issues.

168. The Claimant was on annual leave from 20 October 2019 – 12 November 2019, p1277

169. On 13 November 2019 the Claimant went off work, on certified sick leave, with anxiety and depression, p1770, 1057.

170. The Claimant was seen by Dr K Schuchert-Wuest in Occupational Health, who provided a report in November 2019, p1219. Dr K Schuchert-Wuest said that she understood that the Claimant "had an incident outside work causing him significant mental health issues." She said, "He has received some treatment with limited effect. He has ongoing symptoms with sleep problems, problems to focus, concentrate and memory [sic]. He has anxiety attacks and experiences increased irritability." Dr Schuchert-Wuest reported that the Claimant was unfit for work. She said that she felt he needed further medical support, including MPS counselling while he waited NHS treatment. She also said that she would refer him to an MPS psychiatrist for further advice. She said that she considered that the Claimant had a disability.

171. On 25 February 2020, Dr Pitkanen, a Metropolitan Police Service Consultant Psychiatrist, provided a medical report on the Claimant, p870. Dr Pitkanan recorded that the Claimant had told her, of the Zoo Bar incident, that, "he was intimidated and threatened by a man who then purported himself as being part of a Mexican Cartel and had threatened to have Mr Hussein assassinated. The man then [attacked] Mr Hussain…" and that the Claimant, "thought he would be killed. And when he was investigated at work, he thought he would lose his job." The Claimant reported "flashbacks about three times a week about the Nightclub incident". The Claimant told Dr Pitkanen that, "in October 2019, he was threatened with a UPP if he took more Sick Leave; at the time his GP advised him to be off sick from work. He said he was having Panic Attacks and tried to manage these with alcohol and once when at work he was breathalysed with a positive result." P871.

172. Dr Pitkanen considered that the Claimant had developed "Post-traumatic Stress Disorder (PTSD) from the 2017 assault and the associated events." She said that he also had symptoms of mixed anxiety and depression. She recommended further Trauma-based CBT treatment for him.

173. The Claimant told the Tribunal that, during Sgt James' management of the Claimant, Sgt James had repeatedly threatened that the Claimant would be dismissed if he took sick leave. The Claimant was asked about this in evidence. His answers were vague and he did not explain how these conversations had arisen. He did not describe any particular exchange between Sgt James and him.

174. Sgt James was cross examined about whether he had threatened the Claimant with dismissal if the Claimant took sick leave. However, the Claimant did not put to Sgt James any specific incident when this had happened. Sgt James told the Tribunal, "Commenting generally, from when I became line manager, all our interactions were very positive and all my actions were guided by Occupational Health… throughout I offered him support and advice on the meaning of the UPP and other processes." … "there was no threat – I just reminded him of the consequences of sick leave, ie progress through the UPP stages."

175. The Claimant put to Sgt James that Sgt James sped the Claimant through the UPP process. Sgt James told the Tribunal, "There had been a delay in progressing the UPP1 paperwork, so there had been leniency anyway … Leniency was shown at every stage – it was also my responsibility to prepare paperwork for the UPP3 hearing and there was a considerable delay I while I did that."

176. On 9 March 2020 the Claimant's grievance against Sgt Thomas and Insp Richmond was not upheld, p889.

177. The Claimant remained off work, sick. Having commenced sick leave on 13 November 2019, he was in breach of the UPP2 requirement to maintain satisfactory attendance within the period ending 29 November 2019.

178. Sgt Thomas issued a UPP Stage 3 Notice on 12 February 2020 saying, "I do not consider that sufficient improvement has been made within the terms of the Final Written Improvement Notice. As such … you will be required to attend before a panel at a Stage 3 meeting. The purpose of this meeting will be to consider your attendance…". P1180.

179. A further Occupational Health referral was made for the Claimant on 22 March 2020, p891, in light of the impending UPP3 hearing. OH confirmed that he would be fit to attend a hearing, p1506.

180. On 14 May 2020 the Claimant raised a second grievance p907, p914, against the Department of Professional Standards, in relation to the ongoing gross misconduct investigation, which he asserted was linked to his ill health and the UPP3. He also made complaints in relation to the Discrimination Unit not upholding his previous grievance.

181. The Claimant attended an appointment with Dr Ryan, the MPS Chief Medical Officer, on 4 June 2020, for an assessment for Regulation 28: that is, before any decision would be made on whether the Claimant should be dismissed for continued absence, p931.

182. On 16 June 2020 the Claimant was invited to an Unsatisfactory Performance Procedure Stage 3 meeting, p1041. The letter gave the possible outcomes from the UPP3 meeting: No further action, if it is decided that your attendance has been satisfactory during the period in question; Redeployment; Reduction in rank (in cases of performance only); Dismissal (with a minimum of 28 days' notice); or Extension of a final improvement notice (in exceptional cases)."

183. On 24 June 2020 Dr Ryan provided his Regulation 28 opinion, p1010. He said that Dr Pitkanen had confirmed that the Claimant had developed Post-traumatic Stress Disorder (PTSD) "from the 2017 assault" and the associated events.

184. Dr Ryan confirmed that the Claimant was currently unfit to work, "pending EMDR therapy", "but that he was expected to resume work on recuperative duties within 2/3 months, when following being phased into work on non-operational duties he would in a timely resume unrestricted work." P1010.

185. Dr Ryan said that the trigger for the Claimant's PTSD had been the incident in the pub and related developments. He said, "This incident was non work related. The impact on his working life and subsequent events have been perpetuating factors." P1011.

186. Dr Ryan said, "He has had Met Counselling in 2020, and awaits EMDR through the NHS. The counselling will be completed within 2/ 3 months."

187. In answer to the question when a return to work would be achieved and what would be required to happen before this, Dr Ryan advised, "With resolution of his working relationship, as well as a positive response to EMDR, I am not aware of any barriers that would prevent PC Hussain resuming work in the near future, initially on recuperative duties with a view to restarting fully operational duties before the end of 2020." P1012.

188. The Claimant presented his first claim to the Tribunal on 2 July 2020, p17.

189. The Claimant attended an Unsatisfactory Performance Procedure Stage 3 meeting on 31 July 2020, p1286. He was represented by his Police Federation Representative, Sgt Qureshi, and presented a detailed written submission, prepared with legal advice.

190. Point 3.213 of the Home Office Guidance on the conduct of UPP3 meetings states that the panel must come to a finding as to whether or not the police officer's attendance has been unsatisfactory. Point 3.215 states that, before deciding on the appropriate outcome, the panel must have regard to his personal record and any mitigation or reference put forward.

191. At the hearing, the Claimant contended that there had been an outright dismissal of his mental health condition by his line managers and that he would be able to return to work after treatment, which was due to commence. He said that Sgt Thomas had failed to refer him to Occupational Health in April 2017 and that this had caused his illness to worsen. He said that his current absences had been prompted by Sgt James' refusal to allow him to avoid night shifts on 18 and 19 October 2019, p1284 - 1285.

192. He told the panel that he had complained of discrimination against his previous line managers.

193. After hearing evidence and deliberating, the hearing panel told the Claimant that, on his sick leave record, the panel had found that his attendance had been unsatisfactory and that the UPP procedure had been carried out fairly. The panel said

that it accepted the Claimant's current diagnosis and would consider the Claimant to be a disabled person for the purposes of the hearing, even if he were not, to afford him the most generous MPS guidance on acceptable attendance levels. However, the panel said that, even with a discount of 20-25%, his attendance levels would still not result in the panel finding satisfactory attendance.

194. The panel also stated that it did not believe that, without the 3 month delay to an occupational health referral being made by Sergeant Thomas in 2017, the Claimant's sickness absence would have been brought to satisfactory levels. The panel said that the decision that the Claimant must undertake the 2 night shifts on 18 – 19 October was operationally justifiable. The panel said that the Claimant's level of sick leave was still not acceptable, even on any generous interpretation.

195. On the outcome, the panel said '… all of the evidence that we have seen is that your attendance has been and remains unsatisfactory, and, therefore, our responsibility to the people of London and to the Metropolitan Police, who have employed the UAP system over a number of years to give you the opportunity to demonstrate that you are capable of sustainably being fit for duty, you have not been able to do that'. The panel told the Claimant that he would be dismissed with 28 days' notice.

196. Mr Usher, who chaired the panel, gave evidence at the Tribunal. The Claimant did not put to Mr Usher that the dismissal was an act of victimisation. However, it was clear, on the evidence, that the Claimant had told the panel that he had complained of discrimination by his managers.

197. On 3 August 2020 the Claimant was dismissed for unsatisfactory attendance, with 28 days' notice, with effect from 31 July 2020, by an outcome letter from the Unsatisfactory Performance Procedure Stage 3, p1375.

198. The Claimant did not appeal.

199. He presented his second claim to the Tribunal on 16 December 2020.

**Relevant Law**

**Disability**

200. By *s6 Equality Act 2010*, a person (P) has a disability if – P has a physical or mental impairment, and The impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.

201. The burden of proof is on the Claimant to show that he or she satisfies this definition.

202. *Sch 1 para 12 EqA 2010* provides that, in determining whether a person has a disability, an adjudicating body (which includes an Employment Tribunal) must take into account such Guidance as it thinks is relevant. The relevant Guidance to be taken into account in this case is Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011), brought into effect on 1 May 2011.

203. Whether there is an impairment which has a substantial effect on normal day to day activities is to be assessed at the date of the alleged discriminatory act, *Cruickshanks v VAW Motorcrest Limited* [2002] ICR 729, EAT.

204. *Goodwin v Post Office* [1999] ICR 302 established that the words of the *s1 DDA 1995,* which reflect the words of *s6 EqA,* require the ET to look at the evidence regarding disability by reference to 4 different conditions:

a. Did the Claimant have a mental or physical impairment (the impairment condition)?
b. Did the impairment affect the Claimant's ability to carry out normal day to day activities? (the adverse effect condition)
c. Was the adverse effect substantial? (the substantial condition)
d. Was the adverse effect long term? (the long term condition).

*Adverse Effect on Normal Day to Day Activities*

205. Section D of the *2011 Guidance* gives guidance on adverse effects on normal day to day activities.

206. D3 states that day-to-day activities are things people do on a regular basis, examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food.., travelling by various forms of transport.

207. Normal day to day activities encompass activities both at home and activities relevant to participation in work, *Chacon Navas v Eurest Colectividades SA* [2006] IRLR 706; *Paterson v Metropolitan Police Commissioner* [2007] IRLR 763.

208. The Tribunal should focus on what an individual *cannot do, or can only do with difficulty*, rather than on the things that he or she is able to do – Guidance para B9. *Goodwin v Patent Office* 1999 ICR 302, EAT stated that, even though the Claimant may be able to perform many activities, the impairment may still have a substantial adverse effect on other activities, so that the Claimant is properly to be regarded as a disabled person.

209. If an impairment would be likely to have a substantial adverse effect but for the fact that measures are being taken to treat or correct it, it is to be treated as having that effect - *para 5(1), Sch 1 EqA.* This is so even where the measures taken result in the effects of the impairment being completely under control or not at all apparent - para B13 Guidance.

*Substantial*

210. A substantial effect is one which is more than minor or trivial*, s 212(1) EqA 2010*. Section B of the Guidance addresses "substantial" adverse effect.

*Long Term*

211. The effect of an impairment is long term if, inter alia, it has lasted for at least 12 months, or at the relevant time, is likely to last for at least 12 months.

212. Where an impairment ceases to have an effect but that effect is likely to recur, it is to be treated as continuing, *Sch 1 para 2, EqA 2010.* "Likely" again means, "could well happen".

**Discrimination**

213. *s39(2)( c)&(d) Equality Act 2010*, an employer must not discriminate against an employee by dismissing him or subjecting him to a detriment.

**Direct Discrimination**.

214. Direct discrimination is defined in *s13(1) EqA 2010:*

**"**(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."

215. Disability is a protected characteristic, *s4 EqA 2010.*

216. In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," *s23 Eq A 2010.*

**Victimisation**

217. By 27 EqA 2010,

218. " (1) A person (A) victimises another person (B) if A subjects B to a detriment because—(a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.

219. (2) Each of the following is a protected act—(a) bringing proceedings under this Act;(b) giving evidence or information in connection with proceedings under this A (c) doing any other thing for the purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act."

220. There is no requirement for comparison in the same or not materially different circumstances in the victimization provisions of the EqA 2010.

**Causation**

221. The ET must decide whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?." Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified, para [77].

222. However, if the Tribunal is satisfied that the protected characteristic is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence,

*per* Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. "Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

**Detriment**

223. In order for a disadvantage to qualify as a "detriment", it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC [2003] UKHL 11.*

**Harassment**

224. s26 EqA provides,

"(1) A person (A) harasses another (B) if— (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of— (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…..

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account— (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."

225. In Land Registry v Grant [2011] IRLR 748 at [47] Elias LJ said that words of the statutory definition of harassment , ".. are an important control to prevent trivial acts causing minor upsets being caught by the definition of harassment." In GMBU v Henderson [2015] 451 at [99], Simler J said, "..although isolated acts may be regarded as harassment, they must reach a degree of seriousness before doing so."

226. In Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336, the EAT commented that "Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. Whilst it is very important that employers and tribunals are sensitive to the hurt that can be caused by offensive comments or conduct (which are related to protected characteristics), ".. it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase paragraph [22]."

**Burden of Proof**

227. The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010.*

228. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.

229. In *Madarassy v Nomura International plc.* Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ approved the approach of Elias J in *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865 and confirmed that the burden of proof does not simply shift where M proves a difference in sex/disability and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para 56 – 58 Mummery LJ.

**Discrimination Arising from Disability**

230. *s 15 EqA 2010* provides:

"(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".

231. Simler P in *Pnaiser v NHS England* [2016] IRLR 170*, EAT*, at [31], gave the following guidance as to the correct approach to a claim under *EqA 2010 s 15:*

'(a) 'A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises..

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having

regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) There is a difference between the two stages – the “because of” stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the “something arising in consequence” stage involving consideration of whether (as a matter of fact rather than belief) the “something” was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the “something” leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of “something arising in consequence of the claimant's disability”. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to “something” that caused the unfavourable treatment.''

232. When assessing whether the treatment in question was a proportionate means of achieving a legitimate aim, 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: *Hardys & Hansons plc v Lax* [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60]. 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 objective

assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: *Hardys & Hansons plc v Lax* [2005] IRLR 726, CA.

**Indirect Discrimination, Section 19 EqA**

233. By Section 19 EqA: (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if— (a) A applies, or would apply, it to persons with whom B does not share the characteristic, (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, (c) it puts, or would put, B at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

234. In *Essop v Home Office; Naeem v Secretary of State for Justice* [2017] UKSC 27, [2017] IRLR 558 Baroness Hale identified the essential features of indirect discrimination as follows:- "The first salient feature is that [… there …] is no requirement in the Equality Act 2010 that the claimant show why the PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It is enough that it does". Para [24] A second salient feature is the contrast between the definitions of direct and indirect discrimination. … Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot. A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various […]. They could be genetic, such as strength or height. They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men. They could be traditional employment practices, such as the division between "women's jobs" and "men's jobs" or the practice of starting at the bottom of an incremental pay scale. They could be another PCP, working in combination with the one at issue, …. These various examples show that the reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). Para [26] A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. A fifth salient feature is that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. Para [28] A final salient feature is that it is always open to the respondent to show that his PCP is justified – in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test. Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may

well be very good reasons for the PCP in question – fitness levels in fire-fighters or policemen spring to mind..' Para [29].

235. A PCP will not be proportionate unless it is necessary for the achievement of the objective and this will not usually be the case if there are less disadvantageous means available, *Homer* [2012] ICR 704.

**Reasonable Adjustments**

236. By *s39(5) EqA 2010* a duty to make adjustments applies to an employer. By *s21 EqA* a person who fails to comply with a duty on him to make adjustments in respect of a disabled person discriminates against the disabled person.

237. *s20(3) EqA 2010* provides that there is a requirement on an employer, where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter, in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

238. *Para 20, Sch 8 EqA 2010* provides that an employer is not under a duty to make adjustments if the employer does not know and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the substantial disadvantage

**Discussion and Decision**

239. The Tribunal took into account all its findings of fact and the relevant law when coming to its decisions. For clarity, it has set out its findings on each issue separately.

240. It addressed, first, when the Claimant became a disabled person.

**Disability**

241. The Respondent conceded that the Claimant was disabled by reason of his anxiety and depression from 19 October 2019, and by reason of Post Traumatic Stress Disorder with symptoms of mixed anxiety and depression from 25 February 2020**.** The Claimant contended that he was a disabled person at all times during the period of this claim.

242. The Tribunal decided that the Claimant was not a disabled person at any time in 2017.

243. The Claimant was diagnosed with reactive depression and anxiety, in relation to the Zoo Bar incident. There was no indication in the GP notes, in May – August 2017, or in the Multi-Disciplinary Team notes in August 2017, that his reactive depression was expected to last at least 12 months, at those times. The Claimant was seen by OH in September 2017, when OH advised that he was fit for work without any restrictions. The OH adviser was of the view that the Claimant did not have a physical or mental impairment at all. While the Claimant told the Tribunal that he felt unable to tell OH his symptoms, because he was concerned about the consequences, the Claimant worked full duties without any absences from August 2017 until 24 April 2018. He was then off work until 28 April 2018 with sickness and diarrhoea. He was

off work from 12 – 15 May 2018 for the same reason. Neither of those short absences was related to depression or anxiety.

244. The Tribunal noted that there was no contemporary medical evidence, or any other indication, that the Claimant suffered any detrimental effect on his ability to carry out normal day to day activities after August 2017 and throughout 2018 - until a sexual assault allegation was made against him in May 2018.

245. The Tribunal decided that the Claimant's reactive depression diagnosed in May – August 2017 did not have any adverse effect on his ability to carry out normal day to day activities after August 2017, until May 2018. The Tribunal was not satisfied that the Claimant took regular medication for depression after August 2017. It did not find, therefore, that, without the medication, the effects of the Claimant's reactive depression would have been worse during that period.

246. The Tribunal found that, even if the Claimant had a mental impairment between May 2017 and May 2018, the mental impairment was not likely, at any point in that period, to have a long term substantial adverse effect on his ability to carry out normal day to day activities. Any adverse effect was not likely to last 12 months or more.

247. The Claimant went off work, sick, initially with work related stress, on 31 May 2018. Thereafter he was off work continuously until November 2018. His Fit Note gave the reason for absence as "depression" on 18 June 2018 on 29 June 2018.

248. On 15 August 2018 Occupational Health provided a report, saying that the Claimant was unfit for work. The report did not give any time when the Claimant was likely to be fit to return to work. The OH Adviser advised that the Claimant's condition was likely to be classified as a disability in that the Claimant had had an impairment which had lasted, or was likely to last, for 12 months and which had a significant impact on his ability to carry out normal day to day activities and was likely to recur, p1191.

249. Next month, on 24 September 2018, Dr Ashby, Consultant Psychiatrist, diagnosed that the Claimant had moderate anxiety and depression. There was no date for a likely return to work at that point, either.

250. The Tribunal concluded that, in June 2018, the Claimant's depression condition had recurred, as diagnosed by his GP. The diagnosis was confirmed by Dr Ashby in September 2018. The depression was having a substantial adverse effect on his ability to carry out normal day to day activities, in that he was signed off work completely. Work is a normal day to day activity. The depression had therefore recurred after a year and was having that substantial adverse effect.

251. Where an impairment ceases to have an effect but that effect is likely to recur, it is to be treated as continuing, Sch 1 para 2, EqA 2010. "Likely" again means, "could well happen."

252. The Tribunal considered that, by 15 August 2018, when the depression had recurred and had not resolved promptly, it was likely – in the sense that it "could well happen" – that it would recur again in the future. It was also likely – in the sense that it could well happen - that its substantial adverse effect on normal day to day activities would also continue, or recur, for at least 12 months. The medical advisers were not

saying, in August 2018, that this was a short-term, or reactive, condition. The Tribunal noted that, by 15 August 2018, the OH adviser concluded that the Claimant had an impairment which had a significant and long term adverse effect on normal day to day activities.

253. The Tribunal therefore concluded that the Claimant was a disabled person from 15 August 2018.

254. The Tribunal also decided that the Respondent knew, or could reasonably have been expected to know, that the Claimant was a disabled person on 15 August 2018. The Occupational Health Adviser advised that the Claimant fulfilled the definition of disability on that date.

***Direct Race and Disability Discrimination***

255. The Claimant identifies his race as British Pakistani. The Claimant's comparator is a hypothetical officer who does not share the Claimant's race or disability.

256. The Claimant was not disabled until August 2018. The direct disability discrimination claims before that date fail.

*Was the Claimant subjected to the following detriments between November 2017 and May 2018:*

*a. Colleagues drawing male and female genitalia in his pocket notebook "on numerous occasions"*

257. The Tribunal found that colleagues in the Claimant's workplace would draw on any pocket book which was left unsecured. For example, Sgt James' notebook was also defaced while he was a probationer. The Tribunal was satisfied that the Claimant left his belongings unsecured. It found that the Claimant was not treated less favourably than a hypothetical comparator of a different race when his pocketbook was defaced.

*b. His CS spray being "stolen from his locker"*

258. The Tribunal found, as a fact, that the Claimant's locker was not broken into and items were not stolen from it. Insofar as CS spray was removed, this ought to have been done in respect of any CS spray which was not secured in a locked place. The Claimant left his CS spray in a bag in a changing room, not secured in a locker. The Tribunal found that removal of his unsecured CS spray did not amount to less favourable treatment of the Claimant.

*c. His kit missing from his locker "on occasions"*

259. The Tribunal found that other officers would borrow any kit left lying around. This would happen to any kit which was left unsecured. The Tribunal did not accept that the Claimant's kit had been secured in a locker. He was treated no differently to a non-Pakistani comparator.

*d. His emails being accessed*

260. Again, other officers would send joking emails from email accounts which had been left open. This had happened to Sgt Thomas, for example. The Claimant was not treated less favourably in this regard than a comparator in similar circumstances.

*e. An email sent on 23 January 2018 to the whole team, implying that the Claimant was in a non-platonic relationship with a male colleague of Asian descent.*

261. The Tribunal was satisfied that the 23 January 2018 email was jokey in tone and that the other male of Asian descent was mentioned because he was the Claimant's particular friend. The Claimant was not as friendly with anyone else on the team. The reason the email referred to their relationship and turtles was because they were best friends, who had been on holiday together; race was not any part of the reason. The Tribunal noted that other colleagues also referred to in the email in a jokey manner were not of Asian descent. That reinforced the Tribunal's conclusion that race was not any part of the reason the email was drafted in the way it was. This was not race discrimination.

*f. Only having one return to work interview between April 2018 and May 2018*

262. The Claimant was off work for 2 short periods for vomiting and diarrhoea in April 2018. There was no evidence that other officers, who had been off work on a couple of occasions for minor illnesses, were given a return to work interview on each occasion. The Claimant was not treated less favourably than comparators.

263. All the direct discrimination claims failed.

***Race and/or Disability Harassment***

264. The Claimant was not disabled until 15 August 2018.

*a. PS Thomas failing to make a referral to OH following the Claimant's request on 27 April 2017 (para 9, First Claim);*

265. The Tribunal decided that failing to make the referral was not unwanted conduct – the Claimant made clear that he was simply informing the Respondent and did not want any further action.

266. In any event, the alleged unwanted conduct did not relate to race or disability. The whole reason that Sgt Thomas did not make the referral was that he had clarified with the Claimant what the Claimant had meant by his email. The Claimant made clear that he was being treated by the NHS and he did not require anything further. That was consistent with the Claimant's email which said, " I think this is more to make the met aware of ongoing issues of stress and anxiety which hopefully could be managed and dealt with by the services of the NHS." P2754. There was no connection to race. Even if the Claimant was disabled, the Tribunal found that Sgt Thomas' failure to refer the Claimant was not related to disability, but to the Claimant's own preference for assistance being provided outside the Metropolitan Police.

*b. PS Thomas extending the Claimant's probation upon his return to work, in August 2017 after sickness absence (para 10, First Claim);*

267. PS Thomas did not extend the Claimant's probation. This allegation fails on the facts.

*c. PS Thomas informing the Claimant that he did not believe he was genuinely sick, in August 2017 (para 10, First Claim);*

268. The Tribunal found, as a fact, that Sgt Thomas told the Claimant that, from what he had heard and seen, the Claimant was more likely to be suffering from stress than PTSD; however, as he was not a medical doctor, he would refer the Claimant to Occupational Health for an expert assessment.

269. The Tribunal did not find that Sgt Thomas told the Claimant that he did not believe he was genuinely sick.

270. The Tribunal accepted that the Claimant did not want to be told that he did not have PTSD – so the comment was unwanted in that sense.

271. However, on the facts, Sgt Thomas' comments were not related to the Claimant's race in any way. The comments were entirely related to Sgt Thomas' reasonably informed understanding of the nature and causes of PTSD.

272. If, contrary to the Tribunal's finding on the date of disability, the Claimant was a disabled person at the time, then the conduct was related to disability, in that it related to the correct description of his mental health condition.

273. However, the Tribunal found that the conduct neither had the purpose, nor the effect, of creating an intimidating, hostile, degrading, humiliating or offensive environment. The purpose of the conversation was to encourage the Claimant to learn from the Zoo Bar incident and to put the matter behind him, concentrate on working hard and becoming a good police officer. Given that Sgt Thomas agreed to refer the Claimant to OH, its purpose was also to ensure that any mental health condition was properly identified and appropriately taken into account.

274. It was not reasonable for the conduct to have the effect of creating the prohibited environment, in all the circumstances. Whatever the Claimant's subjective view, a reasonable person in the Claimant's position would have understood that the conversation was intended to ensure his successful development, during his probation, into a police officer. A reasonable person would also have understood that it is appropriate to have mental health conditions properly diagnosed; and that Sgt Thomas did not intend to cause offence, but offered a rational explanation as to why PTSD may not be the correct diagnosis for the Claimant. This was not an act of harassment.

275. *d. PS Thomas telling the Claimant that he should resign and threatening him with consequences if he continued to say that he was ill and had any further sick leave, in August 2017 (para 10, First Claim);*

276. Sgt Thomas did not use these words. Inspector Richmond told the Claimant, "If you carry on like this things are going to come unstuck," and, therefore, the Inspector had given the Claimant 3 Options ; Option 1 was resign, or to carry on as he was and become unstuck; Option 2 was to take the sickness option; and Option 3 was to get his head down, "crack on and tighten up."

277. The Tribunal accepted that the circumstances in which Inspector Richmond said these things was that he and Sgt Thomas genuinely believed that the Claimant had acted inappropriately by prolonging and escalating the confrontation in the Zoo Bar and in misusing his West Midlands warrant card. The Tribunal found that they expressed their views in trenchant terms. The Tribunal found that this was appropriate, given the Claimant's misuse of a police warrant card as I.D. and given that they genuinely and reasonably believed he had not acted in self-defence when he punched a man in a Bar.

278. Even if the words were unwanted by the Claimant, the Tribunal found that they were not related to race or disability.

279. If the Tribunal was wrong in that, it found, in any event, that the purpose of the words was not to create the prohibited environment, but to impress upon the Claimant the importance of not repeating his conduct.

280. Nor did the words have the effect of creating the prohibited environment. It was not reasonable for the conduct to have the effect; the words were clearly intended to encourage the Claimant to comply with standards of a police officer, and to commit himself to his probation period, for the good of his own career.

*e. PS Thomas attempting to include an off-duty incident from 27 March 2017 in the Claimant's PDR, in August 2017 (para 11, First Claim);*

281. The Tribunal accepted that the Claimant did not want Sgt Thomas to include his observations on the Zoo Bar incident in the Claimant's PDR. However, the Tribunal found that Sgt Thomas' conduct in doing so was not related to disability or race. As his manager, Sgt Thomas wanted the Claimant to learn from the incident so he would not repeat his unacceptable behaviour. In the Student Officer Development Plan Sgt Thomas said, "I will ask you to familiarise yourself with the National Decision Model". He clearly intended the Claimant to learn how to conduct himself appropriately in confrontational situations.

*f. PS Thomas and others from the DPS informing the Claimant that they had received intelligence he was working under the influence of alcohol and taking samples from him, on 22 November 2017 (para 14, First Claim);*

282. Sgt Thomas did not report the Claimant to the DPS for drinking. The Claimant's colleagues had told Insp Richmond that they suspected the Claimant had been drinking on 3 occasions. Insp Richmond passed the intelligence to DPS. The Tribunal accepted that the Claimant would not have wanted them to do this. However, the Tribunal found the colleagues' and Inspector Richmond's conduct was not related to disability or race, but was entirely because the Claimant's colleagues believed that he had been drinking before work on a number of occasions. The Tribunal decided, on

the balance of probabilities, that their belief was likely to have been well-founded, given that the Claimant was later proven to have been drinking at work on 2 other occasions. The Tribunal also decided that Inspector Richmond acted appropriately in referring the matter to the DPS, given the seriousness of the allegation. Police officers need to command the trust of the public and are regularly involved in dangerous and confrontational situations. It is completely inappropriate for them to be visibly intoxicated while in uniform. This was not related to the Claimant's race or disability.

*g. PS Thomas commenting that the Claimant was "slow" during a meeting on 23 November 2017 (para 15, First Claim);*

283. The Tribunal has found that Sgt Thomas did not say that the Claimant was generally "slow", in a meeting on 23 November 2017. Sgt Thomas told the Claimant that his written work was excellent, but that he could do with being a bit faster in more straightforward areas such as booking in property and getting reports finished. He did mention the Claimant's alleged disability.

284. The Tribunal found that this was not related race or disability, but was feedback relating to how quickly the Claimant carried out a particular set of work tasks.

*h. PS Thomas not approving the Claimant's requests to attend courses for Arabic language, Public Order, and Basic Driving in 2017/2018 (para 15, First Claim);*

285. PS Thomas approved the Claimant's request for time to attend a fitting for a Public Order course and an eye test. The allegation in this regard was factually incorrect.

286. The only course which Sgt Thomas did not approve was the Arabic Language Course. The Tribunal accepted that the Claimant did not want Sgt Thomas to decline the Claimant's language course. However, the Tribunal accepted Sgt Thomas' evidence that the Metropolitan Police Force would not normally support an application for a language course from an officer during probation, because such a course represents an investment in that person, so the MPS would want the officer to be confirmed in rank, before making the investment.

287. This conduct was therefore not related to race or disability in any way, it was standard practice in relation to all probationers.

*i. PS Thomas refusing to allow the Claimant more than one day of special leave following the Claimant's request in May 2018 (para 18, First Claim);*

288. The Tribunal found that the reason Sgt Thomas did not grant the Claimant more than one day's special leave was that the unit was understaffed. He still gave the Claimant one day, despite this, which was a supportive act by Sgt Thomas. The fact of the understaffing was not related to race or disability in any way. There was no evidence that anyone else, of a different race, for example, was granted any special leave at the time.

289. *Harassment: j. PS Thomas informing the Claimant that he should resign from the force and that he would send police units to his home if he called in sick again*

*when the Claimant attended work unfit through alcohol on 27 May 2018 (para 19, First Claim);*

*and*

*Discrimination Arising from Disability May 2018- PS Thomas telling him that he was not allowed to take sick leave, that he would have his probation extended, and telling him to resign;*

290. The Claimant was not disabled in May 2018, so the discrimination arising from disability allegation must fail.

291. In any event, the Tribunal found that the Claimant had attended work while over the limit for drink at work. The Tribunal found that Sgt Thomas told him that turning up drunk for work was not acceptable and, if the Claimant thought it was, he needed to find another job. Sgt Thomas also believed the Claimant had lied about the reason he was late for work, so he told him he would no longer accept the Claimant's stated reasons for absence, unless they were supported by evidence. He told the Claimant that, if the Claimant called in sick to work, then the Claimant could expect a home visit.

292. The comments were plainly not related to race, but to Sgt Thomas' belief that the Claimant had turned up for work, late, when he had been drinking and had not told the truth about why he was late. Plain speaking about the Claimant's unacceptable conduct was, in the Tribunal's view, entirely appropriate.

293. Even if the Claimant was disabled and his drinking was related to his disability, the comments did not have the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment, nor did they have that effect, in all the circumstances. The comments, from the Claimant's manager, were a direct way of telling the Claimant the standards which were expected of him – that is, not to drink on duty and to be truthful about his absences. It was not reasonable for them to have the prohibited effect, whatever the Claimant's view; they were a wholly proportionate response to the Claimant's behaviour.

*Harassment: k. PS Thomas and PS James serving a Management Action requiring the Claimant to return to work on 16 July 2018 or a mutually agreed date (para 21, First Claim);*

*and*

*Discrimination Arising from Disability.*
*b.PS James telling him that he had to come into work or face UPP;*
*c. Being given a Management Action in July 2018;*

294. The Claimant was not disabled until August 2018. The disability claims in this regard therefore fail.

295. The Claimant had been off work and had more than 29 days' absence when he was given the management action requiring him to return to work. His sickness period therefore met the definition of "Long Term absence" in the Respondent's Guidance.

The Guidance provides that 29 days' absence in a rolling 12 month period amounts to unsatisfactory attendance. Informal Action must have been considered by 2 months. the Claimant had been off work for 46 days when he was given the management action. His absence therefore also exceeded the additional 20 – 25% leeway in absence for disability.

296. The management action plan was not related race: Sgt Thomas and James were following the Respondent's procedure, which is expected to be applied to all officers.

297. The Tribunal found, as a fact, that Sgt James did not give the Claimant an ultimatum to come to work, but explained the UPP policy and that the UPP policy required that he would be called to a meeting if he remained off sick for a protracted period. He simply applied the UPP policy to the Claimant.

298. If the Claimant was disabled, and therefore the management action was related to his disability absence, the Tribunal found that the management action did not have the purpose of creating a prohibited environment. It had the purpose of ensuring that officers maintained satisfactory attendance under the Respondent's policy. Furthermore, it did not have the effect of creating such an environment. It was not reasonable to have that effect because the Claimant was being treated in line with the policy. Indeed, when the management action was applied, he had been off work for well in excess of the trigger point of 29 days, so he had been afforded considerable leeway – that was hardly oppressive. The Tribunal found that the UPP was also a supportive procedure in that, at every stage, the Respondent referred the Claimant to Occupational Health for advice on adjustments and set out what the Respondent would do to help the Claimant return to work. None of this could conceivably have created intimidating, hostile, degrading, humiliating or offensive environment.

299. Regarding the discrimination arising from disability complaint, the Tribunal found that informing the Claimant of the provisions of the UPP policy and applying its first stage to him was a proportionate means of achieving a legitimate aim. The Tribunal found that the Respondent had a legitimate aim – in managing the Respondent's resources efficiently, including managing sickness absence and ensuring that officers are capable of providing effective service. In other words, the Respondent needed to manage sickness, to return officers to their work and / or to ensure that they were not an undue burden on the service or their colleagues by remaining off work on long-term sick leave.

300. The Tribunal found that the requirement of the policy to take action was proportionate – 29 days' sickness is a lengthy period to be away from work. Almost a whole month of absence would naturally necessitate prompting an employee to return to work.

301. The Claimant had 25% more time off, even than that trigger point. The Respondent acted proportionately in that management action was not applied until well beyond the 29 day period, allowing the Claimant additional time to return. The Claimant was referred to Occupational health "for support for emotional and alcohol related issues" before management action was taken, and Occupational Health had reported on 15 June 2018.

302. The "Management Action" was itself a proportionate means of addressing his absence – it was simply a warning that he needed to return to work.

303. PS Thomas and PS James did not harass the Claimant by serving a Management Action requiring the Claimant to return to work on 16 July 2018 or a mutually agreed date, nor did they subject him to discrimination arising from disability.

*Discrimination Arising from Disability*
*d. Being subject to the UPP Process;*

*and*

*Indirect Discrimination The Respondent accepts that it applied the following PCPs:*
*a. The application of UPP to officers because of sick leave*
*b. Issuing WINs requiring officers to return to work by a particular date*
*c. Issuing WINs requiring officers to maintain a satisfactory attendance record following they return to work for a certain period of time*
*d. Instigating the next stage of UPP if an officer has sickness absence within the duration of the validity period of a WIN*

*Alleged Particular disadvantages when compared with persons who do not have the Claimant's disability, namely:*
*the exacerbation of mental illness,*
*an increased likelihood of further absence,*
*the risk of termination.*

*<u>The application of the UPP to officers because of sick leave, (Indirect Discrimination: PCP a. only)</u>*

304. The Claimant was subject to the UPP process. The Tribunal did not accept that the UPP process was likely to exacerbate mental illness, or increase the risk of further absence.

305. As stated above, the UPP process, as applied to the Claimant, included referral to OH at each stage, for advice on adjustments, to return the Claimant to work.

306. The Tribunal noted Dr Ashby's 24 September 2018 advice to the Claimant that, "a phased return to work can help with self-confidence, self-esteem, a sense of life having meaning, certainly very protective in depression and will help break to vicious circle of feeling low, worrying about work and what happened, and dropping self-confidence etc.." P1651.

307. While PTSD was later added to Dr Ashby's diagnosis of depression, the Claimant still continued to have symptoms of mixed anxiety and depression when PTSD was also diagnosed.

308. There was therefore no reason to discount Dr Ashby's opinion on the benefits of returning to work for people with symptoms of depression.

309. The Tribunal therefore found that the UPP, which at all stages sought to help officers to return to work, did not put people with the Claimant's disability at a particular disadvantage by exacerbating the mental illness or increasing the risk of further absence. It did not put the Claimant at the disadvantage, but was potentially beneficial to him and his symptoms of depression. It provided an opportunity for the Claimant to secure adjustments to enable him to return.

310. The Tribunal did find, however, that because of its progressive stages, the UPP had the potential particular disadvantage of risking termination. The Tribunal accepted that people with the Claimant's disability were more likely to be off work and more likely to be at risk of termination.

311. However, the UPP Process has other stages before termination. The UPP1 and UPP2 letters' standard wording provided support to return to work with adjustments, The UPP process also allows 20-25% more absence for disability and permits managerial discretion at each stage: "When considering the circumstances of the case (eg for a disability related absence) you may think it reasonable to use discretion and not issue an action or warning at that particular trigger point".

312. Given its supportive nature, its gradual approach, and the discretion permitted within it, the Tribunal found that the Respondent's UPP process was a proportionate means of achieving the Respondent's legitimate aim. It was not more than was necessary to ensure that officers provided effective service to the public.

*Reasonable Adjustments*
*The respondent accepted that it applied the following PCPs for the purposes of reasonable adjustments*
*a. Issuing WINs requiring officers to return to work by a particular date/issuing WINs requiring officers to return to work and maintain a satisfactory attendance return*
*b. A requirement for satisfactory attendance*

*Disadvantage: a. Officers with disabilities are more likely to feel compelled to attend work when not fit to do so. The Claimant avers that he forced himself to come into work when not fit to do so*

*. <u>PCP: Issuing WINs requiring officers to return to work by a particular date/issuing WINs requiring officers to return to work and maintain a satisfactory attendance return. Indirect Discrimination PCP b. and c. and Reasonable Adjustment Complaint: Group Disadvantage</u>*

313. The Tribunal did not accept that people with the Claimant's disability were more likely than others, or non-disabled people, to feel compelled to come to work pursuant to a WIN. There was no evidence to support that. This PCP did not put disabled people, at that particular, or substantial, disadvantage.

314. *Indirect Discrimination and Reasonable Adjustments:*

*PCP:*

*a. Application of UPP*

*b. Issuing WINs requiring officers to return to work by a particular date*
*c. Issuing WINs requiring officers to maintain a satisfactory attendance record following they return to work for a certain period of time*
*d. Instigating the next stage of UPP if an officer has sickness absence within the duration of the validity period of a WIN*

*Reasonable Adjustment Complaint: Substantial Disadvantage b. An officer with a disability is more likely to have higher levels of sick leave and more likely to be subject to the UPP process and dismissed as a result. The Claimant was subjected to the UPP process and dismissed for poor attendance.*

315. As stated above, the Tribunal did accept that a person with the Claimant's disability may be more likely to be absent from work and have attendance management measures, including dismissal, applied to them. It accepted that issuing WINs requiring return to work, a requirement to maintain attendance, and instigating the next stage if an officer had further sick leave, all were likely to put people with the Claimant's disability at a disadvantage because they were more likely to be off sick and to progress through the UPP stages. That was the case at each stage of the UPP process.

*Reasonable Adjustment Complaint: Was the following a PCP:*

*c. Refusing requests for postponement of Stage 1 UPP meetings*

316. The Tribunal did not accept that the Respondent had a PCP of refusing requests for postponements of UPP1 meetings. In fact, it appeared to have a policy of allowing them, up to 5 days beyond the original date. Further, Sgt James considered and gave a detailed answer to the Claimant's postponement request. That indicated that there was not a practice of simply refusing postponements, but a practice of considering postponements on their merits.

317. *Substantial Disadvantage c. An officer with a mental health disability would find it more difficult to attend a UPP1 meeting on their own. The Claimant had to attend the UPP1 meeting on his own and asserts that this caused him difficulty.*

318. The Tribunal accepted that an officer with a mental health disability would find it more difficult to attend a UPP1 meeting on their own.

*Reasonable Adjustment Sought: a. Delaying the Stage 1 UPP meeting so that the Claimant's police Federation representative could attend*

319. In any event, the Tribunal found that it was not a reasonable adjustment to postpone the Stage 1 UPP meeting to the Claimant's chosen date, for the reasons set out in Sgt James' email of 27 August 2018. Given the lack of Sergeants in the team, the meeting had to take place within Sgt James' working hours. It was not possible to postpone the meeting and maintain the police service in the area. The postponement was simply not practicable. Furthermore, the Claimant could have asked for another representative, particularly given that his chosen one had only recently been asked to assist him, so she was not especially familiar with his case. That would have removed

any disadvantage. Accordingly, it was not reasonable to postpone to accommodate that particular representative, in light of the demands on Sgt James' time.

*Reasonable Adjustments Claim:*
*b. Not issuing the Claimant with a WIN requiring him to return to work by a certain date or maintain a specific level of attendance*
*c. Discounting the Claimant's disability-related absences when considering UPP*
*d. Allowing the Claimant to take sick leave while on UPP without progressing to the next stage of UPP*

320. The Tribunal considered the indirect discrimination and reasonable adjustments complaints by reference to each stage of the UPP process.

321. *Outcome of UPP1*

*b. Not issuing the Claimant with a WIN requiring him to return to work by a certain date or maintain a specific level of attendance*

*d. Allowing the Claimant to take sick leave while on UPP without progressing to the next stage of UPP*

322. The Tribunal accepted that giving the Claimant a date by which he had to return to work put him at greater risk of dismissal, in that he was more likely to remain off work beyond that date than a non-disabled comparator. That was a particular and substantial disadvantage.

323. However, it found that giving the Claimant a date by which he had to return was a proportionate means of achieving a legitimate aim. The UPP1 outcome was dated 31 August 2018, p1140, and he was required to return to return to work by 1 October 2018.

324. The return to work date therefore allowed the Claimant another month in which to recover in order to return. That was not unduly rushed. It was proportionate.

325. A year's monitoring period thereafter was also proportionate. It is not an unduly protracted period. It balances the Respondent's need to ensure a sustained return to regular attendance, with the effect on the disabled person of being subjected to performance management. The Claimant did not suggest an alternative period of improvement, other than a year, which would have been reasonable.

326. On the other hand, the Tribunal considered that it was *not* a reasonable adjustment *not* to give the Claimant a date by which to return. It is reasonable to give a person a date, so that they know what is expected of them. It was also not a reasonable adjustment not to require improved attendance over a period.

327. If no dates for return are given, and no period of improvement specified, it would undermine the whole process of managing absence, in that open-ended absence would be tolerated.

*c. Discounting the Claimant's disability-related absences when considering UPP*

328. The UPP1 Written Improvement Notice set out that the Claimant had had Long term absence - 93 days up to 31 August 2018 and Frequent short term absence - 106 days total in rolling 12 month period to 31 August 2018.

329. That was a very high level of absence – a quarter of the year.

330. In general, the Tribunal considered that it was not reasonable adjustment to disregard all disability related absence. The absence of any officer, whether disabled or not, reduces the policing resource in an area. Some leeway may be reasonable, but ultimately disabled officers do need to return to work to provide the service they are employed to provide.

331. The Claimant did not argue for a particular level of sick leave being permissible when considering UPP1. Essentially, he contended that nearly all his leave should be disregarded.

332. Given that his absence was so high, that was not a reasonable adjustment. The UPP trigger points, plus the 20-25% leeway, represented a reasonable threshold for issuing an improvement notice. The Claimant's absence significantly exceeded that adjusted trigger point.

333. The Respondent did not apply that PCP, it was a particular decision made on one occasion for operational reasons

334. *Outcome of UPP2*

*b. Not issuing the Claimant with a WIN requiring him to return to work by a certain date or maintain a specific level of attendance*

*d. Allowing the Claimant to take sick leave while on UPP without progressing to the next stage of UPP*

335. The UPP2 meeting identified that the Claimant had had Long term absence - 180 days in total in rolling 12-month period to 27 November 2018.

336. That was, again, an extremely high level of absence.

337. The Final Written Improvement Notice ("WIN") was issued on 29 November 2018. It required the Claimant to return to work by 17 December 2018 and maintain satisfactory attendance for a year afterwards. It said that the Respondent would implement recuperative / adjusted duties to help his return and that consideration would be given to hours and place of work, line manager change and a non-confrontational role, in consultation with OH, p1177.

338. The return to work date was more than 2 weeks away and the Respondent offered many adjustments to enable a return. In those circumstances, the Tribunal considered that the return to work date was reasonable and, given the Claimant's very high level of absence, it would not have been a reasonable adjustment *not* to give a return to work date. It refers to the reasons it gave in relation to the UPP1 outcome.

339. The Tribunal also adopts the reasons it gave in relation to the UPP1 in deciding that it was *not* a reasonable adjustment *not* to require satisfactory attendance for one

year. The Tribunal also adopts its reasoning with regard to UPP process, generally, being a proportionate means of achieving at legitimate aim.

*Discounting the Claimant's disability-related absences when considering UPP*

340. It was also not a reasonable adjustment to allow open-ended sick leave without progressing to the next stage of UPP. Again, that would undermine the whole structure and purpose of the UPP sickness management process.

341. *Race/Disability Harassment allegation l. PS James informing the Claimant that he was being moved to Bethnal Green in December 2018/January 2019 (para 30, First Claim);*

342. *PCP: d. Relocating officers returning from sick leave - returning officers to their home boroughs*.

343. The Tribunal did not accept that there was evidence of a PCP that officers returning to from sick leave would be returned to their home boroughs. On the facts, an individual decision was made in respect of the Claimant, according to Occupational Health advice. The practice appeared to be of following Occupational Health advice regarding an individual's need for reasonable adjustments in relation to location, hours of work and so on, when they returned from sick leave.

344. The Claimant had returned to work on 4 December 2018. On 30 December 2018 Sgt James gave the Claimant a phased return to work plan, following OH guidance, including that he would be working from Bethnal Green Police Station from the week beginning 14 January 2019. On 21 January 2019 OH provided a further report, p1208, which this time advised that the Claimant should remain on recuperative duties for a further 4 weeks, at Southwark Police Station. On 30 January 2019 Sgt James sent the Claimant a revised return to work plan p1265, with the Claimant working from Southwark Police Station, and not returning to Bethnall Green until 8 March 2019, p1265.

345. On the facts, Sgt James followed OH advice scrupulously. The Claimant was allowed to remain in Southwark Police Station for the duration of his phased return to work, pursuant to medical advice. There was no medical advice beyond that time that he was at any disadvantage in working from Bethnal Green – OH advised that he was fit to resume normal duties.

346. The Claimant's substantive allocation was to Stoke Newington Police Station. He was allocated to work at Bethnal Green Police Station, in the same Area.

347. In relation to the harassment allegation, the Tribunal found that Sgt James telling the Claimant that he would go back to Bethnal Green from 14 January 2019 was nothing to do with race or disability and everything to do with the fact that he was allocated to Bethnal Green and was therefore a resource allocated to that Area, not to Southwark. Further, there was a hub at Bethnal Green, so that the Claimant could be allocated, not only the missing persons work he was carrying out at Southwark, but anything else within capabilities and restrictions.

348. Even if there was some link to race or disability, the Tribunal found that the effect of Sgt James' telling the Claimant that he would return to Bethnal Green did not have the purpose or effect of creating the prohibited environment. The Tribunal found that Sgt James was simply allocating the Claimant to the Claimant's normal workplace. There had been no indication before 30 December 2018 that he should not do that. Sgt James promptly re-referred the Claimant to OH when the Claimant produced a fit note saying his travel should be restricted while on recuperative duties. Sgt James followed appropriate procedures to the letter. He immediately changed his instructions to the Claimant when OH advice changed. There was no hint, from the evidence, that Sgt James intended to violate the Claimant's dignity or create an oppressive environment for him.

349. In the circumstances, Sgt James' benign intent should also have been obvious to a reasonable person in the Claimant's position. It was not reasonable for its actions to have the effect of creating a harassing environment, even if the Claimant considered it did.

350. Insofar as the Claimant was contending that he should have remained in Southwark indefinitely, out of his own Borough, the Tribunal concluded that he was a resource allocated to Bethnal Green. In any event, as the Tribunal has noted, there was no medical advice beyond 8 March 2023 that he was at any disadvantage in working from Bethnal Green – OH advised that he was fit to resume normal duties. No duty to make reasonable adjustments arose.

351. *Harassment. m. PS James advising the Claimant not to take sick leave but to use annual leave or spare day, in or around August 2019 (para 32, First Claim);*

352. The Claimant did not give evidence about this alleged event. The Tribunal decided, as a matter of fact, that Sgt James was not threatening towards the Claimant, but was supportive and explained to the Claimant how the UPP process worked. The Tribunal concluded that it was reasonable for Sgt James to advise the Claimant how UPP operated and what might trigger another UPP process.

353. Accordingly, the Tribunal found that the purpose of Sgt James' advice to the Claimant on the operation of the UPP process did not have the purpose of creating a harassing environment. In all the circumstances, including the Claimant's perception and whether it was reasonable for a harassing environment to be created, the Tribunal found that it was not created. It was not reasonable for Sgt James' advice to the Claimant regarding the UPP to create the prohibited environment, in the light of their good, supportive relationship..

354. *Harassment. n. PS Thomas attending Bethnal Green, where the Claimant was working, in breach of DPS instructions on 17 October 2019 (para 33, First Claim);*

355. PS Thomas attending Bethnal Green Police Station was nothing to do with race and disability. He was working hard, on a double shift, to deliver a police service to London. He was not acting in breach of instructions. He had no interaction with the Claimant.

356. For the same reasons, his attendance neither had the purpose nor the effect of creating a harassing environment. Taking into account all the circumstances, whatever

the Claimant's feelings, it was not reasonable for PS Thomas' attendance to have that effect.

357. *Harassment o. PS James requiring the Claimant to work night shifts on 18 and 19 October 2019 (para 32, First Claim)?*

*and*

*Alleged PCP e. Requiring officers to work night shifts "despite OH advice to the contrary"*

*Alleged Substantial Disadvantage e. Officers with mental health disabilities are more likely to be adversely affected by working night shifts and the Claimant alleges that he suffered a mental health breakdown.*

*Reasonable Adjustment: e. Allowing the Claimant not to work night shifts*

358. On 15 October 2019, Sgt James emailed the Claimant saying that he would remove him from night duty for 6 weeks. He said that he could not implement this until 20 October 2019, "due to the short notice and demands placed on the team by Extinction Rebellion Aid this set. There is therefore an overwhelming operational need for you to be with the team for the rest of this set, including our nights on 18+19/10/2019", p969.

359. The Tribunal concluded that Sgt James' decision to implement the Claimant's removal from night shift from 20 October 2019 was a decision made on one occasion, for operational reasons. The Tribunal did not find that there was a PCP of requiring officers to work night shifts, despite OH advice to the contrary. Sgt James, in fact, followed OH advice. The relevant OH advice did not give a date by which the Claimant should be removed from night shifts. It simply said, "due to his disrupted sleep pattern associated with stress from the ongoing investigation it is my clinical opinion that he would benefit for a short period during which he avoids night duties in order to re-regulate his sleep pattern." P1214. Sgt James did precisely that – he gave the Claimant a period in which he would not do night shifts.

360. The Tribunal accepted that officers with mental health disabilities associated with stress and anxiety are more likely to be adversely affected by working night shifts – OH advised that it was the Claimant's stress which was affecting his sleep, resulting in a need to regulate his sleep pattern.

361. However, the Tribunal concluded that it was not a reasonable adjustment to permit the Claimant to avoid night shifts before 20 October 2019. OH did not suggest the need was for avoiding nightshifts applied with immediate effect. The Tribunal concluded that that particular adjustment was not required in order to avoid the substantial disadvantage. The OH advice's silence on a start date suggested that a period away from nights, within a reasonable timescale, was enough.

362. In any event, the Tribunal found it that it was simply not possible, given the extreme understaffing in the Borough, and the very short notice given to Sgt James, for the Claimant to be taken away from nights at the same time as maintaining policing service in the Borough, before 20 October 2019. Sgt James made the only adjustment

which was reasonable: removing the Claimant from nights as soon as he could arrange staffing for the next set of shifts.

363. Sgt James requiring the Claimant to work nights on 18 and 19 October 2019 was not harassment. It was certainly not related to race.

364. While the decision may have been related to disability - in that it arose in the context of the Claimant needing a period away from night shift - the Tribunal found that Sgt James' conduct did not have the purpose or effect of creating a harassing environment. Sgt James explained his decision in reasonable and rational terms. He plainly did not have the purpose of harassing the Claimant. While the Tribunal has taken into account the Claimant's view, it concluded that, in all the circumstances, including Sgt James' rational and temperate explanation, it was not reasonable for his decision on night shifts to have the effect of harassing the Claimant.

365. All the Claimant's harassment allegations failed. The Tribunal reiterates that it considered all its findings of fact and all the allegations together before coming to its decision.

366. *Dismissal*

*Discrimination Arising from Disability. Being dismissed for poor attendance.*

*Indirect Discrimination: The Respondent accepted that he had a practice of e. Terminating an officer's appointment due to poor attendance, for the purposes of an indirect disability discrimination. He also accepted, as above, that he applied the following PCPs: a. Application of UPP b. Issuing WINs requiring officers to return to work by a particular date c. Issuing WINs requiring officers to maintain a satisfactory attendance record following they return to work for a certain period of time d. Instigating the next stage of UPP if an officer has sickness absence within the duration of the validity period of a WIN*

*Alleged Reasonable Adjustments:*

*f. Discontinuing UPP Stage 3 proceedings*

*g. Waiting for the Claimant to complete EMDR therapy before holding the UPP Stage 3 meeting*

*h. Not terminating the Claimant's appointment*

*and Dismissal is alleged Victimisation*

367. The Claimant was dismissed with effect from the date of the Stage 3 UPP meeting on 31 July 2020. By that date, he had been off work, sick, since 13 November 2019 – more than 8 months.

368. The Tribunal accepted that he was dismissed for a reason arising from disability, namely his sickness absence.

369. On 24 June 2020 Dr Ryan had advised that the Claimant, "… awaits EMDR through the NHS. The counselling will be completed within 2/ 3 months." In answer to

the question when a return to work would be achieved and what would be required to happen before this, Dr Ryan advised, "With resolution of his working relationship, as well as a positive response to EMDR, I am not aware of any barriers that would prevent PC Hussain resuming work in the near future, initially on recuperative duties with a view to restarting fully operational duties before the end of 2020." P1012.

370. The Tribunal concluded that Dr Ryan's advice regarding a return to work was conditional, both on a resolution of working relationships and on a positive response to EMDR treatment for the Claimant's PTSD.

371. The Tribunal noted that the Claimant had gone well beyond trigger points for management action under the UPP process. Even in this latest bout of sickness, he had had vastly in excess of 29 days' absence in a rolling 12 month period. The guidance advised that the next stage of the UPP/Unsatisfactory attendance process must be considered at 3 monthly intervals. The Claimant had been at stage UPP2 and his new absence had considerably exceeded 3 months.

372. Even allowing 20 – 25% leeway, the Claimant's sickness absence vastly exceeded the trigger points in the UPP process.

373. The Tribunal considered whether the Claimant's proposed adjustments were reasonable, as an alternative to dismissal.

*Waiting for the Claimant to complete EMDR therapy before holding the UPP Stage 3 meeting;*

*Discontinuing UPP3*

374. The Tribunal decided that waiting for the Claimant to complete EMDR therapy before holding the UPP Stage 3 meeting was not a reasonable adjustment. The Claimant's absence was excessive and his return to work was conditional, not only on a positive response to EMDR, but also on resolving workplace relationships. Accordingly, even a successful response to EMDR – which was not guaranteed – would not be enough to return the Claimant to work.

375. Accordingly, that adjustment would not remove the disadvantage of being liable to dismissal under the UPP process for unsatisfactory attendance.

376. Given that the EMDR would not remove the disadvantage, it was not reasonable for the Respondent to sustain a further minimum 2/3 months' absence, before taking a decision on dismissal at a UPP3 meeting.

377. The Tribunal also decided that discontinuing UPP3 was not a reasonable adjustment. The medical advice did not give any real prospect of the Claimant returning to work within any reasonable time. In those circumstances, the Tribunal concluded that it was simply not reasonable for the Respondent to wait any longer before making a decision on the Claimant's continued employment..

378. *Reasonable Adjustment: Not terminating the Claimant's appointment ; Indirect Discrimination; Discrimination Arising from Disability*

379. Put simply, the Tribunal considered that the Respondent had shown that it was a proportionate means of achieving its legitimate aim to dismiss the Claimant. His absence was excessive and far beyond trigger points. There was no real prospect of a return to work in any reasonable period.

380. The legitimate aim was managing the Respondent's resources efficiently, including managing sickness absence and ensuring that officers are capable of providing effective service.

381. The panel decided, '… all of the evidence that we have seen is that your attendance has been and remains unsatisfactory, and, therefore, our responsibility to the people of London and to the Metropolitan Police, who have employed the UAP system over a number of years to give you the opportunity to demonstrate that you are capable of sustainably being fit for duty, you have not been able to do that'.

382. That was a measured and proportionate decision. It balanced the discriminatory effect of dismissal against the need to ensure that officers provide effective service, both for the people of London and for the benefit of their colleagues in the Police Force. It was not a reasonable adjustment not to terminate the Claimant's appointment at that point.

383. The discrimination arising from disability, indirect discrimination and failure to make reasonable adjustments claims all fail in relation to dismissal.

384. Regarding alleged victimisation, the panel gave reasons for its decision which gave no hint that the Claimant's protected act was any part of the decision to dismiss. Mr Usher, who chaired the panel, gave evidence at the Tribunal. The Claimant did not put to Mr Usher that the dismissal was an act of victimisation.

385. The Tribunal was satisfied that the panel's stated reasons for dismissal were its true reasons for dismissal. The Claimant's protected act was no part of the reason for dismissal. The victimisation claim also fail

**Conclusion**

386. The Respondent did not subject the Claimant to race harassment, disability harassment, direct race discrimination, direct disability discrimination, discrimination arising from disability, indirect disability discrimination or victimisation, nor did he fail to make reasonable adjustments. The Claimant's claims therefore fail and are dismissed.

Employment Judge **Brown**

Date: 17 October 2023

SENT to the PARTIES ON

17/10/2023

FOR THE TRIBUNAL OFFICE