EMPLOYMENT TRIBUNALS

Claimant: Ms A Paynter

Respondent: Chief Constable of Merseyside Police

HELD AT: Liverpool **ON:** 17, 18, 19 20 & 21 March 2023

BEFORE: Employment Judge Johnson

MEMBERS: Mr B Rowen
Mr P Dobson

REPRESENTATION:

Claimant: Mr C Millet (solicitor)
Respondent: Mr D Tinkler (counsel)
Ms S Williams (solicitor)

JUDGMENT

The judgment of the Tribunal is that:

(1) The complaint of discrimination arising from a disability contrary to section 15 Equality Act 2010 is not well founded which means it is unsuccessful.

(2) The complaint of harassment contrary to section 26 Equality Act 2010 is not well founded which means it is unsuccessful.

(3) The complaint of victimisation contrary to section 27 Equality Act 2010 is not well founded which means it is unsuccessful.

(4) The complaint of failure by the respondent in their duty to make reasonable adjustments contrary to sections 20 & 21 Equality Act 2010 is not well founded which means it is unsuccessful.

(5) The complaint of constructive unfair dismissal brought under Part X Employment Rights Act 1996 is well founded which means that it is successful.

(6) The successful complaint of constructive unfair dismissal will now be listed for a 1 day remedy hearing on a date to be confirmed to consider the quantification of loss. The parties will notify the Tribunal by 4pm on Friday 29 March 2024 of any dates to avoid so that the listing of this remedy hearing can take place.

REASONS

(Provided in accordance with Rule 62 following a request made by the respondent on 26 March 2024)

Introduction

1. These proceedings arose from the claimant's employment as a Crime Scene Investigator (CSI) with the respondent, Merseyside Police. She had worked for almost 20 years in this role when she resigned on 31 January 2022.

2. Her claim concerns allegations of disability related discrimination, harassment, and victimisation during a period from 2018 until 2022. She also claims that her resignation amounted to constructive unfair dismissal.

3. The respondent accepts that the claimant was disabled by reason of MS and that their Occupational Health Unit (OHU), was aware from October 2017 of impairments relating from this primarily involving fatigue and this affected what shifts she could work. Additionally, from October 2021, the respondent accepted that the claimant experienced additional impairments connected with Aspergers (which falls within Autistic Spectrum Conditions), IBS, stress and anxiety. This affected her ability to work in open plan environments with greater *'human traffic'* and which added to her levels of fatigue.

4. The claimant presented a claim form and 'rider' on 25 February 2022 following two periods of early conciliation, indicating complaints of constructive unfair dismissal and discrimination related to sex and disability.

5. The respondent presented a response and grounds of resistance which resisted the complaints brought and argued that some of the allegations were presented out of time.

6. The case was subject to case management before Judge Grundy on 20 June 2022 and the case was listed for a final hearing, with case management orders being made. An amended rider to the ET1 was presented as well as a disability impact statement prior to a preliminary hearing on 13 October 2022 before Judge Slater. The complaints of sexual harassment were considered out of time as well as allegations of direct disability discrimination and discrimination arising from a disability. Further case management orders were also made by Judge Slater at this preliminary hearing, including an order that the claimant reply to the respondent's request for further particulars. These were provided in advance of the final hearing.

Issues

7. The parties were able to agree a final list of issues on the first day of the hearing before evidence was heard during the afternoon. They are outlined below.

Discrimination Arising from Disability (section 15 Equality Act 2010)

i) The claimant relies on the following:

a) On 24 February 2018, the claimant returned from a crime scene at 9:30pm. Upon her arrival, Senior Crime Scene Investigator (SCSI) Delia Taylor requested the claimant to attend a firearm scene located on the Wirral. The claimant objected and said it would not be possible to complete the job before her shift ended at 11:00pm. The claimant was forced to explain her Occupational Health Unit (OHU) restrictions in from of the entire office. SCSI Taylor *'huffed in dismay'* and said the claimant was *'no use to her'* and that she should *'go home'.* (see amended rider to the ET1 at p128 of the bundle).

b) On 25 September 2019, the claimant returned from a crime scene at 9:25pm. SCSI Goodwin said to the claimant and CSI Martin that an assault scene had come in and *'one of you two is going, choose between yourselves'.* The claimant advised it was not possible to complete the scene in the time remaining on shift. SCSI Goodwin yelled in response that it was *'do-able, get it done'.* The claimant suggested attending the scene double crewed. SCSI Goodwin refused again and screamed *'its do-able, get it done, one of you is going.'* (see amended rider to the ET1, p129).

ii) Did SCSI Taylor and/or SCSI Goodwin act as alleged?

iii) If so, was it because of something arising from the claimant's disability? The claimant relies upon her difficulty working night shifts.

iv) If so, were the respondent's actions, a proportionate means of achieving a legitimate aim? The respondent will say that any requirement (as proven) for the claimant to work past her finish was by reason of operational necessity.

Harassment

v) The claimant relies on the same conduct as relied upon in sections i)a) and b) above:

a) On 24 February 2018, the claimant returned from a crime scene at 9:30pm. Upon her arrival, Senior Crime Scene Investigator (SCSI) Delia Taylor requested the claimant to attend a firearm scene located on the Wirral. The claimant objected and said it would not be possible to complete the job before her shift ended at 11:00pm. The claimant was forced to explain her Occupational Health Unit (OHU) restrictions

in from of the entire office. SCSI Taylor *'huffed in dismay'* and said the claimant was *'no use to her'* and that she should *'go home'.* (see amended rider to the ET1 at p128 of the bundle).

b) On 25 September 2019, the claimant returned from a crime scene at 9:25pm. SCSI Goodwin said to the claimant and CSI Martin that an assault scene had come in and *'one of you two is going, choose between yourselves'.* The claimant advised it was not possible to complete the scene in the time remaining on shift. SCSI Goodwin yelled in response that it was *'do-able, get it done'.* The claimant suggested attending the scene double crewed. SCSI Goodwin refused again and screamed *'its do-able, get it done, one of you is going.'* (see amended rider to the ET1, p129).

vi) If SCSI Taylor and/or SCSI Goodwin acted as alleged, was the conduct related to the claimant's disability?

vii) If so, did the conduct have the purpose, or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating, or offensive environment for the claimant?

Victimisation (section 27 Equality Act 2010)

viii) The claimant alleges that on 25, 26 and 27 October 2021, SCSI Taylor gave all late shift staff other than her the chance to leave early at 10:00pm.

ix) Did DCSI Taylor act as alleged?

x) If so, was it because the claimant had lodged a grievance on 17 August 2020? *(It is agreed between the parties that the claimant's grievance was a protected act).*

Failure to make reasonable adjustments (sections 20 & 21 Equality Act 2010)

xi) The provision, criterion, or practice (PCP) relied upon the claimant is the requirement for Scene of Crime Investigators (SCI) staff to parade at Rose Hill. *(It is agreed between the parties that the claimant was informed on 29 November 2021 that she would be required to parade at Rose Hill).*

xii) Did the PCP put the claimant at a substantial disadvantage compared to someone who did not have a disability?

xiii) If so, did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

xiv) If so, what adjustments could have been taken to avoid the disadvantage? *The claimant suggests she should have been permitted to parade at Speke Station.*

xv) Was it reasonable for the respondent to have taken that step?

Constructive unfair dismissal

xvi) The claimant relies on the following:

a) On 24 February 2018, the claimant returned from a crime scene at 9:30pm. Upon her arrival, Senior Crime Scene Investigator (SCSI) Delia Taylor requested the claimant to attend a firearm scene located on the Wirral. The claimant objected and said it would not be possible to complete the job before her shift ended at 11:00pm. The claimant was forced to explain her Occupational Health Unit (OHU) restrictions in from of the entire office. SCSI Taylor *'huffed in dismay'* and said the claimant was *'no use to her'* and that she should *'go home'.* (see amended rider to the ET1 at p128 of the bundle).

b) On 25 September 2019, the claimant returned from a crime scene at 9:25pm. SCSI Goodwin said to the claimant and CSI Martin that an assault scene had come in and *'one of you two is going, choose between yourselves'.* The claimant advised it was not possible to complete the scene in the time remaining on shift. SCSI Goodwin yelled in response that it was *'do-able, get it done'.* The claimant suggested attending the scene double crewed. SCSI Goodwin refused again and screamed *'it's do-able, get it done, one of you is going.'* (See amended rider to the ET1, p129).

c) The claimant alleges that on 25, 26 and 27 October 2021, SCSI Taylor gave all late shift staff other than her the chance to leave early at 10:00pm.

d) Requiring the claimant from 29 November 2021 that she would be required to parade at Rose Hill.

e) Superintendent Vaughan's alleged failure to follow the grievance procedure in respect of the claimant's complaint that she had been treated differently to her colleagues on 25 to 27 October 2021.

f) Superintendent Vaughan's language in his email on 17 January 2022 which the claimant considered sarcastic and inappropriate.

g) Superintendent Vaughan's decision to take no further action in respect of the claimant's complaint dated 29 October 2021, (page 373).

xvii) Did the respondent act as alleged?

xviii) If so, did the same amount to a fundamental breach for the implied term of trust and confidence?

xix) If so, did the respondent's conduct cause the claimant to resign?

xx) If so, did the claimant nonetheless delay too long before resigning so as to affirm her contract?

Time limits

xxi) Did the matters described in i) a) and b) and v) a) and b) form part of ongoing situation or continuing state of affairs which amounted to discrimination?

xxii) If not, is it just and equitable to extend time permit the claimant to bring her claims arising from those matters?

Evidence used

8. The claimant was the sole witness presenting evidence in support of her claim. She had produced statements earlier in the proceedings relating to disability and time limits and these were contained within the final bundle, but her most recently disclosed statement dealt with issues relating to liability issues.

9. The respondent relied upon several witnesses whose evidence was to be heard from day following the completion of the claimant's evidence and in the following order:

   a) Delia Taylor (Crime Scene Investigator Supervisor)
   b) Colette Hargreaves (Crime Scene Investigator)
   c) Clement Forshaw (Crime Scene Investigator Manager)
   d) Jason Goodwin (draftsperson)
   e) Gillian Cooney (Crime Scene Investigator Supervisor)
   f) Jonathan Stewart (Forensics Operations Manager)
   g) Simon Vaughan (Detective Supervisor)
   h) Christine Cooke (Crime Supervisor Investigator)
   i) Michael Lube (Senior Crime Scene Investigator)

10. It was agreed by the parties that there was no need to hear evidence from Ms Cooke and Mr Lube. From day 2, it was also confirmed that Mr Forshaw's evidence was not in issue and he would not need to be called. Mr Goodwin had initially requested that he give evidence remotely by CVP because he had since moved to Cumbria Police, but as it turned out, he helpfully agreed to travel to Liverpool and gave evidence in person.

11. Documents were primarily contained within an agreed final hearing bundle. However, some supplemental documents were also added by the respondent with the agreement of the claimant including a copy of the respondent's grievance procedure.

12. Finally, a chronology and cast list were also provided by the respondent which while not evidence as such, were a helpful aide for the Tribunal when understanding the background to the case.

Findings of fact

13. There was a great deal of evidence heard by the Tribunal and considered during this 5 day hearing. The findings of fact have been made based on what the Tribunal considers on balance of probabilities happened at the relevant time. Apart from some background information to provide a context, the findings of fact focus upon what is relevant to the list of issues before the Tribunal.

The respondent and CSI in particular

14. The respondent is the police service for the County of Merseyside. It operates in the five local authority areas within the County, namely Knowsley, Liverpool, St Helens, Sefton and Wirral.

15. The respondent's headquarters is situated in Liverpool and recently it moved to a new build site close to the north of the city centre.

16. The claimant was employed as a Crime Scene Investigator (CSI) from 2 March 2003. She worked at several locations during her career.

17. CSI carry out the role of preserving evidence produced at crime scenes across the respondent's jurisdiction. They travel to the crime scenes using the respondent's vehicles which are vans designated for this activity only.

18. Originally, the service was spread across the respondent's stations in several locations. However, more recently, there was a decision made to base the whole service at the Joint Command Centre (JCC) at Rose Hill, Liverpool. Rose Hill was centrally located and would act as a hub from where investigators would travel. Naturally, crime scenes could exist across the whole of Merseyside and each scene would have its own requirements in terms of the tasks involved and the time taken to travel there and back. Evidence once secured would be brought back to the CSI office at Rose Hill and stored in an appropriate way. Each scene of crime investigation inevitably required some administrative tasks to ensure evidence was correctly logged, packed and stored.

19. Being part of a law enforcement organisation, which operated 24 hours a day and 7 days a week, CSI operated a shift pattern which involved early shifts from 7am to 2pm, late shift from 2pm to 11pm and a night shift beginning at 11pm until 7am.

20. Ms Taylor explained that the CSI service was divided into 6 teams with each team having a CSI supervisor (SCSI) managing a team, 6 CSIs and 2 assistant CSI posts. The primary task required from CSI was to investigate crime scenes and to secure evidence and identifying available CSI staff and allocating them to attend was a key part of the duty dispatching supervisor's role each shift. This could be a particular challenge if staffing numbers on a shift were below strength and secondary administrative functions might have to be set aside so that investigations could take place without delay.

21. Ms Taylor confirmed that given that the respondent operated in a large Metropolitan area, gun crime could be a problem. Not surprisingly, it would

typically happen in the evening, which meant that jobs to secure firearms from crime scenes would often arise during the final few hours of the late shift. CSI officers on that shift could find themselves busy during this period.

22. Sometimes, it might not be possible to finish the shift at precisely 11pm. However, sometimes CSI officers might be permitted a slightly earlier finish if no additional call outs arose during the final few hours and the night shift was about to take over. However, there always had to be always a minimum number of CSI officers available and the management of these numbers would rest with the shift supervisor working that shift.

23. The respondent had been keen to ensure that the CSI service was compliant with the relevant international ISO standard in accordance with the directions of the Forensic Science Regulator. It was intended that this would be completed by October 2022 and the process required auditing by the UK Accreditation Service. This was the reason why the single location was sought by the respondent and given the geography of Merseyside, a Liverpool city centre hub close to the Mersey tunnels and the major roads into the city was the most suitable location, being built on a brown field site called Rose Hill. The Tribunal accepted the evidence of Mr Vaughan and other managers that the ISO would require each separate CSI location to be refurbished and audited separately at considerable cost. The preservation of evidence from crime scenes was a challenging law enforcement activity where good record keeping, the avoidance of cross contamination and the prevention of tampering were vital. It was not surprising that ISO accreditation would be an expensive and time consuming activity.

The claimant's allegations

24. The claimant (Ms Paynter) was diagnosed with MS in 2017 and the respondent's OHU assessed her on 16 October 2017. It determined that she was disabled and recommended that Ms Paynter should not work night shifts for a period of 6 months. The impairment arising from Ms Paynter's condition caused amongst other things, significant fatigue which affected her ability to work shifts. This was reviewed in an OHU assessment dated 16 April 2021 and the recommendation continued with an adjustment being recommended and applied where she would not work night duties.

25. It is understood from the respondent's witness evidence that while Ms Paynter kept her employer informed of her condition through OHU, she did not openly share information concerning her condition within the workplace. This meant that managers were usually aware of the adjustments and Ms Paynter's need to manage fatigue, but they were generally not aware of the actual condition which caused her impairments.

26. The incidents which form part of the initial allegations took place in 2018 and 2019.

2018 and 2019 incidents

27. The first occurred on 24 February 2018 when Ms Paynter said she was asked to carry out a further job at 9:30pm. She said she had only just recently returned from visiting a crime scene, although Ms Taylor's evidence was that she had returned to the office in Lower Lane several hours earlier. During cross examination, Ms Paynter having considered the available documents confirmed that Ms Taylor was correct in saying that her return to Lower Lane Police Station where she was working at that time, was at 5:30pm or possibly earlier.

28. The significance of this *'return to office'* time was that as the appointed dispatcher that night, Ms Taylor argued that Ms Payntor had 'rested'. The Tribunal understood that this meant that a CSI had been working but had been in the office for some time and had had an opportunity to have a break to have something to eat. The task which was had come into CSI at around 9:30pm was a firearms incident. Not surprisingly, it was a priority call out within CSI because it involved a serious crime, there were potential safety issues which arose from it and there was a need to quickly preserve the evidence. Attending at such a scene involved a firearms officer being present and we accepted Ms Taylor's evidence that these officers were a scarce policing resource. This required a CSI attendance without delay. It was usually not a lengthy activity because once the officer had made the weapon safe, the CSI would simply need to bag and tag the firearm.

29. The challenge faced by attending such a scene of crime, however, was that had the firearm previously been discharged, there would be gunpowder residue present. This could easily get onto the CSI's clothing and equipment. If this happened and a CSI did two firearms jobs in succession it could result in possible cross contamination thereby compromising the integrity of evidence.

30. From a work allocation perspective, this meant that if a firearm related call out happened at the end of a late shift, it was good practice not to carry it over to the next shift as the officers on nights might be fewer in number and could be called to attend further firearms related call outs.

31. However, it is understood that on this occasion, the officer who eventually went to this job, was able to depart shortly after 9:30am and be back at the office before the late shift ended at 11pm.

32. Ms Taylor believed Ms Paynter was the most appropriate CSI available given her rested state. Ms Paynter looked at the location of the call out and declined the job because she did not feel that she could finish the job before her shift ended at 11pm. This was contrary to what Ms Taylor believed. It appeared that Ms Paynter said *'I'll just pass'* and once Ms Taylor got her confirmation that this meant she would not go, Ms Paynter went on to explain that she was too fatigued. There was no dispute that Taylor was aware that Ms Paynter was restricted on her shifts and could not work beyond 11pm unless she agreed to do so.

33. Ms Paynter said that Ms Taylor then *'huffed in dismay'* and said she *'was no use to me'* and sent her home meaning that Ms Paynter's shift finished earlier

than normal. These allegations were only made in Ms Paynter's further particulars in September 2022 and were not raised in an earlier grievance in 2020 where allegations had been made against Ms Taylor by Ms Paynter. Ms Taylor denied that she challenged Ms Paynter in public within the office and in front of colleagues about the restrictions placed upon her working time or her health issues. The Tribunal accepted that Ms Taylor's evidence was not challenged in cross examination. Ms Taylor did provide a contemporaneous email about the incident to her manager Mr Burns at 22:50 that day, (pp301/2). Perhaps not surprisingly, there was no mention made of huffing or using the language alleged by Ms Paynter, but it did raise what appeared to be genuine concerns about her fatigue, the adjustments to be provided and Ms Taylor's understanding that the adjustments would usually expect Ms Paynter to nonetheless be available until the end of her late shifts at 11pm.

34. It was not accepted by Ms Taylor that she huffed but even if she did, it was not unreasonable for a manager to make a gesture of this nature given the work being allocated, her belief that there was time for it to be completed and the way in which the refusal was made by Ms Paynter.

35. There was no dispute that Ms Taylor sent Ms Paynter home once she heard that she was fatigued, but this was not unreasonable either given that Ms Taylor was aware of the restrictions faced by Ms Paynter in relation to work. We did not accept that there was abusive or unreasonable behaviour towards Ms Paynter or that they amounted to anything more than minor or lesser challenges that might take place in a workplace of this nature. The Tribunal did find that Ms Taylor on balance could probably have behaved better towards Ms Paynter but based upon the evidence before us, we were unable to identify that her actions related to Ms Paynter's disability. She was not asking Ms Paynter to work beyond the adjustment. While it was possible for Ms Taylor ask Ms Paynter to work beyond 11 pm with her agreement, this issue did not arise from such a request. Instead, it arose from a late job which Ms Taylor believed to be capable of completion before 11pm. Ms Paynter was not compelled by Ms Taylor to go out on that job once she indicated she said she could not do it and the Tribunal were not asked to consider a scenario where she had to discuss with Ms Taylor either leaving it part finished or working beyond 11pm.

36. The next incident took place on 25 September 2019 and it was accepted that Ms Paynter had returned from a crime scene at around 9:25pm. SCSI Goodwin explained to her and CSI Martin that an attendance was needed at an assault scene of crime. He said that one of them needed to attend and they could choose between themselves as to who this was. The Tribunal acknowledged that this was Mr Goodwin's usual style of management and while it might seem that it gave the CSIs some autonomy over work allocation, it did appear to be a way for Mr Goodwin to avoid making difficult decisions over who should be allocated to a late call out.

37. On this occasion 20 minutes elapsed without a volunteer coming forward and Mr Goodwin then asked the two CSIs if they have decided who was going on the call out. They both expressed their doubts to him that there was sufficient time remaining on the late shift. Instead, they suggested that the two of them

go together, believing that this would ensure the work could be carried out more quickly and before the shift ended. Mr Goodwin refused as he felt that it was a disproportionate use of resources. Eventually, CSI Martin volunteered to go leaving Ms Paynter in the office. As it turned out, Mr Martin completed the call out and returned to the office before the shift finished at 11pm.

38. The allegation is that Mr Goodwin yelled the job was *'doable'* in time and that the CSIs should *'just get it done'.* This was denied by the respondent witnesses. Ms Hargreaves who working in the office at the time argued that she remembered the incident and that there was no shouting despite the allegation not being brought until several years after it took place. She said the event was not unusual in nature and while she acknowledged Mr Goodwin could be firm and direct in his manner, there was nothing out of the ordinary said by him on this occasion.

39. The Tribunal on balance finds Ms Hargreaves' evidence to be surprising. It is more likely that she would have remembered the event out of many other routine events because it was out of the ordinary. Her actual recollection means that on balance some sort of exchange 'of note' took place between Ms Paynter and Mr Goodwin. Ms Paynter's recollection that Ms Hargreaves *'raised her eyebrows at me'* when the exchange took place, sounded credible to the Tribunal given the evidence heard concerning this incident.

40. Both Martin and Ms Paynter were understood to have some restrictions on their hours of work but it did not feature as part of the actual allegations made under sections 15 and/or 26 Equality Act 2010.

41. The Tribunal found that it was legitimate for the respondent to ensure each shift completed its allocated tasks before it ended and that, if possible, work was not left for the night shift to carry out or be left part finished for the night shift to complete. While Ms Paynter argued that she would be targeted by managers with late jobs by certain supervisors, we were unable on balance of probabilities to find that this was actually the case. A lot of work could come in, a dispatcher had to allocate scarce resources and while Ms Paynter could not work beyond 11pm without her consent both these allegations related to a supervisor's belief that the tasks in question could be completed before the shift's end at 11pm.

42. While Mr Goodwin probably did shout at the time of this incident in broadly the way alleged, we were not persuaded that it was targeted solely at Ms Paynter and in any event, it formed part of the lesser blows that would exist in a workplace of this nature. It was not indicative of an ongoing pattern of behaviour directed at Ms Paynter and was not related to her disability. Ms Paynter did believe that she was being targeted because of her adjustments that were in place, but if that was the case, Mr Goodwin would actually have directed her to do the job and not leave it for Mr Martin and her to allocate it between themselves. Moreover, Ms Paynter was not forced to go out for either of the 2018 or 2019 jobs and a colleague was sent instead and was able to finish by or before 11pm.

The claimant's absence and grievance

43. Ms Paynter was then absent from work through stress from 16 November 2019. We did not hear evidence which persuaded us that this related to the two alleged incidents. Ms Paynter was referred to OH on 5 September 2020 and eventually returned to work in March 2021.

44. During this period, she did bring a grievance on 17 August 2020 alleging bullying involving a number of incidents which went beyond the two named in these proceedings as allegations of section 15 discrimination and section 26 harassment under the Equality Act 2010. The allegations included Ms Taylor and it was accepted by the respondent that these amounted to a protected act under section 27 of the Act. Ms Taylor accepted that during the investigation, a number of CSIs criticised her behaviour when statements were taken, but she disputed that she had behaved inappropriately or that she had bullied anyone.

45. The grievance was investigated, determined, and appealed with the respondent's appointed appeal officer concluding that no misconduct could be identified against the staff members concerned. This concluded on 13 July 2021. In terms of the alleged detriments of victimisation, none were identified as having taken place until October 2021, although it is acknowledged that Ms Paynter did not return to work from sickness absence until March 2021.

The impact of the pandemic on work

46. The pandemic reached the UK with the first of a series of national lockdowns beginning in late March 2020 and these did not subside until late 2021. The respondent was forced to delay the implementation of its single hub and ISO accreditation. This meant that CSI unit employees were displaced across sites around Merseyside to provide better social distancing.

47. Ms Paynter was at this stage based at the Liverpool South station in Speke and which was where she would 'parade on'. This slightly anachronistic term was used in policing to describe were an officer or support employee would turn up and begin work and in the case of CSI, collect their van, log onto to the deployment IT system and from where they would then go out to each crime scene. At the end of each day, the parading on location would be where the CSI returned their equipment, van and any evidence and log off from the deployment system.

The claimant's involvement of Detective Superintendent Vaughan

48. On 29 October 2021, Ms Paynter raised a complaint by email with Mr Vaughan who had recently been appointed as the Detective Superintendent managing the Scientific Support unit under which CSI fell, (p373). She said that she could not raise the complaint with John Stewart who would have been CIS unit manager for the following reason:

'Unfortunately, as I don't feel confident bringing my complaint to John Stewart, due to a previous history and following a grievance I submitted about his ineffective management of similar complaints made by myself and other staff. I've been advised to make management aware and document the first instance before submitting a grievance.'

She referred to victimisation by Ms Taylor which she believed related to the earlier grievance that she had made and referred to having tried to distance herself from contact with that manager more recently. However, she referred to working a series of late shifts on 25, 26 and 27 October 2020 and alleged that Ms Taylor *'has given all late shift staff with the exception of myself, an early dart at 10pm.'* She enclosed a series of documents showing extracts from the deployment IT system on the days in question, (pp373(a) to 373(d)). She went on to say that this treatment was having an impact upon her health and contrary to the 'Wellness Action Plan' provided when she returned to work following sickness absence.

49. Being new to this role, Mr Vaughan did not appear to be aware of the history of Ms Paynter's relationship with Ms Taylor and Mr Stewart, but the opening paragraph of Ms Paynter's email of 29 October 2021 clearly made reference to their involvement with her earlier grievance. He replied to her on 2 November 2021 and assumed the grievance had been concluded. While acknowledging what had been said, Mr Vaughan explained that as Mr Stewart was still Ms Paynter's departmental manager:

'…I expect him to sort this out rather than me having to directly intervene. Therefore, I'll instruct Jon [Stewart] to get to the bottom of what had gone on here and get back to me with an explanation. I'll update you in due course. I assure you that I won't tolerate anyone in the dept. being targeted by another member of staff, regardless of their rank/role/position.' (p258).

50. Ms Paynter replied on 3 November 2021 and thanking Mr Vaughan, she simply said that she awaited the outcome of Jon Stewart's enquiries, (p377). While Ms Paynter did not challenge Mr Vaughan's decision to involve Mr Stewart, the Tribunal does not criticise her for not doing so. She had explained the potential conflict to him and he had chosen to ask Mr Stewart nonetheless to deal with the matter. It should be noted that HR were not consulted during this process.

51. The Tribunal found what happened next to be surprising. This was because while Mr Vaughan had asked Mr Stewart to deal with what was (at this stage), an informal grievance, when he forwarded Ms Paynter's email of 29 October 2021 to Mr Stewart on 2 November 2021, he chose to delete the sentences referring to the earlier grievance as follows:

'Unfortunately, as I don't feel confident bringing my complaint to John Stewart, due to a previous history and following a grievance I submitted about his ineffective management of similar complaints made by myself and other staff. I've been advised to make management aware and document the first instance before submitting a grievance.'

He asked Mr Stewart to speak with Ms Taylor and:
'get to the bottom of what's gone on here. At face value this looks to be very unfair on Angela [Paynter], although I appreciate that there may be another explanation. In any case I won't tolerate a member of staff being targeted by another regardless of their rank/role/position'. (pp375/6).

He emailed Ms Taylor on 12 November 2021 and asked her to provide a response to 2 questions concerning the allegation of victimisation which were whether *'…she was the only deployable resource after 22:00hrs'* and *'she remained on duty until 23:00hrs on each night and all other members of staff where [sic] stood down early.'* (p383).

52. Ms Taylor replied within 51 minutes with an extensive and detailed response. It was not clear whether any conversation had taken place between Mr Stewart and Ms Taylor before the email exchange, but she was able to provide information concerning the 3 shifts identified by Ms Paynter. The explanation given by Ms Taylor involved consideration of the documents provided by Ms Paynter and the Tribunal noted at that time, some CSI were already located in the Rose Hill hub and others such as Ms Paynter were based at other stations due to Covid restrictions.

53. Ms Taylor's reply to Mr Stewart was that as Ms Paynter was working remotely from Speke, it was essential that she remained logged onto the IT system for health and safety purposes until she finished her work. Moreover, the disclosed documents provided by Ms Paynter did not cover complete periods until the end of each late shift at 23:00hrs. Ms Taylor explained that just because the deployment system recorded a CSI as being logged off, it did not mean that the person concerned had been allowed to leave work early. However, this is not the same as a denial that they had left work early either with or without her permission.

54. Ms Paynter's allegation was that all late staff other than herself had been given permission to leave early by Ms Taylor. This was only her belief based upon the limited information available and this belief was not supported by evidence of further enquiries being made concerning whether the staff in question had been allowed to leave.

55. Ms Taylor's email reply and subsequent evidence to the Tribunal persuaded us that on balance Ms Paynter's allegation was not well founded, (p382). A few days later on 15 November 2021 Mr Stewart forwarded the reply to Mr Vaughan and said, *'We could do with a chat'.* This email was missed by Mr Vaughan due to him dealing with several busy operational matters and he eventually chased Mr Stewart for a reply on 7 January 2021 as he was conscious, he had not replied to Ms Paynter, (p420).

56. Mr Stewart resent the email on 7 January 2022 and apologised for not sending it earlier even though it was not his fault. Mr Vaughan accepted during the hearing that Mr Stewart had actually sent the email and he had missed it. He also took responsibility for not communicating this oversight to Ms Paynter. In any event, there was a delay in Ms Paynter receiving a reply to this informal grievance, which was sent the following day on 8 January

2022. He recounted what Ms Taylor had said and made his decision that there was no less favourable treatment without asking Ms Paynter for further comments. Mr Vaughan did, however, ask Ms Paynter how she would like to proceed, (pp424-5).

57. Despite Mr Vaughan saying that he felt the grievance policy encouraged grievances to be dealt with at the lowest possible level of management, in the end it was Mr Vaughan who made the decision not Mr Stewart. Moreover, for an issue which he believed to be not so serious, he nevertheless kept his line manager Chief Superintendent Lee Turner appraised of the outcome. Chief Superintendent Turner has since retired from this role but he replied to Mr Vaughan by email on 10 January 2022 stating that *'In my opinion this concludes the issue'.* This meant that the overall manager has given a clear indication that this grievance is concluded, (p426).

58. Ms Paynter did, however, feel that Mr Vaughan's response was unsatisfactory and expressed this view in her email of 14 January 2022, (pp427/8). She noted that 3 months had elapsed since she had raised the complaint and argued that Mr Stewart had taken Ms Taylor's evidence *'at face value'.* She reminded Mr Vaughan that she had questioned Mr Stewart's suitability to investigate when she made the complaint and in a lengthy email, concluded by stating she was not satisfied with the response and had no confidence in Mr Vaughan's desire to investigate the matter. She finished by saying she would taking legal advice concerning legal proceedings. The Tribunal considered that from the available evidence, Mr Stewart had made no attempt to speak with Ms Paynter during this process or indeed engage with anyone else other than Ms Thomas and did not speak with her as requested by Mr Vaughan.

59. This reply was not well received by Mr Vaughan and in his response made the ill advised comment:

'Thank you for your advice regarding how I should have conducted this matter.'

However, he did express his regret for making this sarcastic comment and apologised when giving evidence. He reinforced his belief when replying that he had confidence in Mr Stewart as the CSI unit manager and he did not intend taking matters further. He did however, state that Ms Paynter could further action:

'…*as you see fit within policy and I am happy to make an appointment to see me at Rose Hill Annex to discuss this if you so wish' (pp429-30).*

Ms Paynter was at this point clearly unhappy with the outcome of this process. The reference by Mr Vaughan to policy presumably referred to the grievance procedure even though it was not explicitly stated and he had not contacted HR either. Ms Paynter did not raise a formal grievance or appeal and this was not surprising, given the response received from Mr Vaughan and his reference to her:

'this is not a complaint against the police as you cannot make such a comment against a colleague. Nor is it a grievance as you have not raised it as such'. While Mr Vaughan argued when giving evidence that he was concerned that Ms Paynter was confusing public complaint against the police or an officer/employee, the nature of his reply was confused and left Ms Paynter with the belief that in reality this matter would be treated as closed. Ms Paynter did not resign at this point and this does not take place until 13 days later.

The proposed move of all CSI services to Rose Hill

60. Meanwhile, in the months that elapsed since this complaint began, steps had been taken by the respondent to progress the move of all CSI staff to Rose Hill with the aim that this should take place by 10 January 2022. Ms Paynter was still parading at Speke in late 2021 and was unhappy with this planned move.

61. On 20 October 2021 she sent an email to Ms Cooney and Ms Cooke making a request that Speke remained as her parading station and described it as a reasonable adjustment. Her explanation was that having to parade on duty at Rose Hill would add an hour to each working day. Given her issues with fatigue the additional travel time to Rose Hill could cause her difficulties, especially taking into consideration her IBS and anxiety. She said she had made OHU aware of her conditions and referred to a recent diagnosis of Aspergers with concerns being raised about over stimulation arising from working in an open plan office with additional noise and increased social traffic. She acknowledged the potential costs that this adjustment might have with ISO accreditation as a separate site but she asked whether the adjustment could be informal allowing her to simply use Speke as a place for signing on. She suggested that a colleague might also want to use Speke for these purposes too, (pp361-2).

62. The request was shared with Mr Stewart on 16 November 2021 by Ms Cooke and in turn this was forwarded to Mr Vaughan on the following day, (p385). Mr Vaughan acknowledged that if Ms Paynter had health conditions requiring adjustments, these would need to be considered, but was unwilling to confirm that Ms Paynter would be allowed to remain in Speke beyond the next few months into early 2022. He made Ms Paynter aware of the situation and she sent a further formal reasonable adjustments request to Ms Cooney and Ms Cooke on 16 November 2021, (p384). By this stage at least 4 managers were aware of the request being made.

63. The respondent felt that there was a difficulty with the request. This had been communicated by Ms Cooney to Ms Paynter on 20 October 2021 and she explained that the respondent's ISO accreditation would require all separate CSI sites to be accredited. This would come with a significant additional cost in terms of refurbishment and annual accreditation. This was why the matter had to be referred to the respondent's Command. However, this communication to Ms Paynter was not a rejection of the request. In her email of 16 November 2021 Ms Paynter argued that simply using Speke to parade

on would not mean that this location would become a regulated hub for the purposes of ISO accreditation.

64. Mr Stewart responded to her on 29 November 2021 (following Ms Paynter chasing Mr Vaughan for an update the previous day), refusing the request for reasonable adjustments. The response was worded in a slightly confusing way but essentially, it said that additional travel expenses arising from the move would be met by the respondent, ISO accreditation required the move, a quieter desk selected by Ms Paynter could be provided and she would be able to retain her current work vehicle which she found to be comfortable. In effect he was not allowing her to remain in Speke but was willing to explore adjustments within Rose Hill. He also confirmed he would arrange an OHU referral.

65. Mr Vaughan sent a further email the next day saying he was aware of Mr Stewart's reply and assured Ms Paynter that she would be supported with the relocation, (pp390/1). Ms Paynter said the reply did not help her and said she would need to look at medical redeployment and Mr Stewart said he would do what he could to make Rose Hill comfortable for her and in the meantime would make an OHU referral, (p393).

OHU referral and resignation

66. The OHU referral was completed by Ms Cooney on 1 December 2021, referring to Ms Paynter's recent diagnosis of Aspergers and also asking for consideration to be made for redeployment on medical grounds, (pp394-5). Ms Cooney's evidence was that she sent this document to the OHU but there was no evidence before the Tribunal that OHU processed the referral and no appointment took place or report produced before Ms Paynter's resignation.

67. Nothing further took place concerning reasonable adjustments before Ms Paynter resigned. This is not surprising as during this period she remained in Speke and management would clearly want to first see the opinion of an OH physician as to what adjustments should be considered and whether medical redeployment was appropriate.

68. There was no doubt that the respondent's mind was made up regarding parading not being permitted at Speke. The ISO accreditation was a major long term project with the goal of achieving a central CSI unit in one location at Rose Hill. While Ms Paynter made creditable attempts to persuade management that she could continue to remain at Speke for parading on purposes without triggering a requirement of it being ISO accredited, the Tribunal heard convincing evidence that the respondent believed it would be necessary as this would be where she left her van and equipment. However, no attempt was made to query this with ISO once the adjustments request had been made.

69. During late 2021 and early 2022, Ms Paynter was exploring alternative employment opportunities outside of the respondent and at the beginning of 2022 she was progress with an application to work with HMRC. The C1 document produced on day of the hearing confirmed that a formal offer of

employment by HMRC was made on 26 January 2022 for the role of HO Generic Compliance Caseworker (Liverpool), which was situated in Liverpool city centre not far from Rose Hill. This offer was accepted and Ms Paynter started work in this role on 21 March 2022.

70. Ms Paynter sent a lengthy email to the respondent's HR team on 31 January 2022 and confirmed that she would be giving notice of her resignation of employment with an effective date of termination being 20 March 2022. She referred in her email to complaints being made concerning victimisation and other matters and in relation to victimisation complained that the rejection of her complaint by Mr Vaughan was predetermined. She felt that she had suffered a repudiatory breach of contract and she was entitled to resign without notice or with a shorter notice period, (pp432-3). Her employment terminated on 20 March 2022 as requested.

Law

Disability

71. Section 6 of the Equality Act 2010 provides that a person has a disability if she has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on her ability to carry out day-to-day activities.

72. Section 212 provides that *substantial* means more than minor or trivial.

73. Schedule 1 of the Act provides that the effect of an impairment is *long-term* if it has lasted for at least 12 months, it is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected.

74. An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to correct it and but for that it would be likely to have that effect.

75. When considering whether a Claimant is disabled within the meaning of the Equality Act 2010, the Tribunal must consider the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011) issued by the Secretary of State which appears to it to be relevant.

Section 15 Equality Act 2010

76. Section 39(2) of the Equality Act 2010 provides, amongst other things, that an employer must not discriminate against an employee by dismissing him or subjecting him to any other detriment.

77. Section 15 of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. However, this kind of

discrimination will not be established if A shows that he did not know, and could not reasonably have been expected to know, that B had the disability.

Harassment (s26 Equality Act 2010)

78. Section 40 of the Equality Act 2010 provides that an employer must not, in relation to employment by him, harass an employee. The definition of harassment is set out in section 26(1) of the Equality Act 2010. A person (A) harasses another (B) if:

(a) A engages in unwanted conduct related to a protected characteristic (disability in this case); and

(b) the conduct has the purpose of effect of: -

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

79. Section 26(4) provides that 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.

Thus, the test contains both subjective and objective elements. Conduct is not to be treated as having the effect set out in section 26(1)(b) just because the complainant thinks it does. The Tribunal is required to take into account the Claimant's perception, the other circumstances of the case, and whether it is conduct which could reasonably be considered as having that effect.

Victimisation (section 27 Equality Act 2010)

80. Under section 27(1), a person (A) victimises another (B) if A subjects B to a detriment because:

(a) B does a protected act.

(b) A believes B has done, or may do, a protected act.

81. Each of the following is a protected act under section 27(2):

(a) Bringing proceedings under the Equality Act 2010.

(b) Giving evidence or information in connection with the 2010 Act.

(c) Doing any other thing for the purposes of or in connection with the 2010 Act.

(d) Making an allegation (whether express or not) that A or another person has contravened with the 2010 Act.

82. Under section 27(3), the giving of false evidence or information or making a false allegation is not a protected act if the evidence or information given or the allegations made, are in bad faith.

Reasonable adjustments (ss20 &21 Equality Act 2010)

83. Sections 20, 21 and 39(5) read with Schedule 8 of the Equality Act 2010 provide, amongst other things, that when an employer applies a provision, criterion or practice ("PCP") which puts a disabled employee at a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled, the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

84. Paragraph 20 of Schedule 8 provides that an employer is not expected to make reasonable adjustments if he does not know and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage.

Time limits in EQA complaints (s123 Equality Act 2010)

85. Section 123(1) of the Equality Act 2010 provides that a complaint may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Tribunal thinks just and equitable. Under section 123(3) conduct extending over a period is to be treated as done at the end of the period; and failure to do something is to be treated as occurring when the person in question decided on it. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something (a) when P does an act inconsistent with doing it; or (b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

86. In Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123(1)(b) there is no presumption that they should do so unless they consider it just and equitable in the circumstances to do so. A Tribunal cannot hear a complaint unless the Claimant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule. In accordance with British Coal Corporation v Keeble [1997] IRLR 336 a Tribunal may have regard to the following factors: the overall circumstances of the case; the prejudice that each party would suffer as a result of the decision reached; the particular length of and the reasons for the delay, the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the Respondent has cooperated with any requests for information; the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action; the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action. The relevance of each factor depends on the facts of the individual case and Tribunals do not need to consider all the factors in each and every case; see Department of Constitutional Affairs v Jones [2008] IRLR 128.

Burden of proof in discrimination cases (section 136 EQA)

87. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

88. If the Claimant does not prove such facts, his or her claim will fail.

89. If, on the other hand, the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of his or her protected characteristic (disability in this case), then the Claimant will succeed.

Constructive Unfair Dismissal

90. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

91. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 it was held that in order to claim constructive dismissal an employee must establish:

(i) that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach);

(ii) that the breach caused the employee to resign – or the last in a series of events which was the last straw; (an employee may have multiple reasons which play a part in the decision to resign from their position. The fact they do so will not prevent them from being able to plead constructive unfair dismissal, as long as it can be shown that they at least partially resigned in response to conduct which was a material breach of contract;

(iii) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

92. All contracts of employment contain an implied term that an employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Malik v BCCI [1997] IRLR 462. A breach of this term will inevitably be a fundamental breach of contract; see Morrow v Safeway Stores plc [2002] IRLR 9.

93. In Croft v Consignia plc [2002] IRLR 851, the Employment Appeal Tribunal held that the implied term of trust and confidence is only breached by acts and omissions which seriously damage or destroy the necessary trust and

confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach of the implied term is very much left to the assessment of the Tribunal as the industrial jury.

Discussion

Disability (section 6 Equality Act 2010)

94. It was accepted by the respondent that Ms Paynter was disabled within the meaning of section 6 by reason of multiple sclerosis (MS) which was diagnosed from 2017 and notified to the respondent's OHU at that time.

95. It was accepted that while individual managers did not know Mr Paynter's precise medical condition, they were aware from 2017 that she was restricted in terms of shifts being excluded from working night shifts and at the material time when working late shifts, she could not work beyond 11pm (being the usual shift finish time), without her consent.

96. The Tribunal did hear evidence that Ms Paynter would sometime come in early before a late shift began and effectively work overtime, but this was her decision and not imposed on her by management.

97. Additionally, from October 2021, Ms Paynter informed her managers of a diagnosis of Aspergers as well as symptoms arising from IBS and anxiety. The emphasis in relation to these conditions, was the impact that they could have upon Ms Paynter being overwhelmed and that this would add to the levels of fatigue already experienced through her previously existing condition of MS.

98. Effectively, the respondent had knowledge of the limitations arising from the impairment of fatigue from October 2017.

Discrimination Arising from Disability (section 15 Equality Act 2010)

99. In relation to the first allegation which took place on 24 February 2018, the Tribunal accepted that Ms Paynter was asked to attend a firearm scene of crime at 9:30pm. However, we found that this arose following a period in the office and while Ms Paynter may have been engaged on other activities, was rested in way described by managers and available to be deployed. Ms Taylor genuinely believed the job could be completed before the late shift ended at 11pm. However, in any event once the refusal took place, she did not order Ms Paynter to go and instead allocated the job to another CSI.

100. Ms Taylor made the request being aware of Ms Paynter's adjustment and restrictions and not because of them. Ms Taylor may not have been fully aware of the reasons why the adjustments were in place, but we were satisfied that she knew they were related to a medical condition. Even if made to do the job, she believed it could be completed before her shift finished. Ms Taylor may well have huffed in dismay as alleged, but we found that if it had happened, it was not raised as a grievance by Ms Paynter and

was only outlined in her further particulars provided following the commencement of proceedings. Indeed, if Ms Taylor did say this, we find that it was a minor 'blow' which was not related to her disability. Ms Paynter suffered no detriment and by being sent home she was not made to stay in work while suffering from fatigue.

101. None of this amounted to unfavourable treatment. For it to have been unfavourable treatment, Ms Taylor would have had to require Ms Paynter to attend the job and had it not been possible for her to complete it and return before 11pm, then insisting that she continue working until the task was done. This was of course not the case and no compulsion was involved.

102. In relation to the incident on 25 September 2019, it was accepted that Ms Paynter had recently returned to the office and Mr Goodwin asked her and Mr Martin to decide who would attend another job. Ultimately, it was Mr Martin who went and no pressure was exerted upon Ms Paynter individually by Mr Goodwin for her to go on the job in his place. While we found on balance, that Mr Paynter did shout or at least raise his voice at either both of them or just Ms Paynter at a later point, we do not accept that this was unfavourable treatment relating to her disability. Again, she was not made to attend the job and no reference was made by Mr Goodwin concerning Ms Paynter's adjustments or her refusing to attend a particular job.

103. While it is unnecessary to consider the question of legitimate aim (considering the above findings), the Tribunal accepted that it was sometimes necessary for CSIs to continue working beyond their normal shift finish time to complete a job and ensure evidence was preserved.

Harassment

104. Ms Paynter relied upon the previous section 15 Equality Act 2010 allegations in relation to this complaint.

105. In relation to 24 February 2018, Ms Paynter was not forced to do the late job that she was asked to do by Ms Taylor, she was not challenged about her health issues within the office and on balance it was unlikely that Ms Taylor reacted in the way described.

106. If there was anything which could be related to Ms Paynter's disability, it concerned her being sent home by Ms Taylor before her shift ended after she informed her of fatigue and this was a reason for Ms Paynter refusing the job requested of her.

107. The Tribunal were unable to conclude that any of the conduct even if it happened as alleged was carried out with the purpose of violating Ms Paynter's dignity. Even if it had the effect upon her, we do not accept that a reasonable person would conclude that it would have had that effect. The decision to send Ms Paynter home was actually a reasonable step for a manager to take knowing that fatigue was an impairment which restricted Ms Paynter's working pattern. She was not required to carry out the job in

question and in any event Ms Taylor had a reasonable belief that it could be finished before the end of the shift.

108. Similarly, in relation to the 25 September 2019 incident, Ms Paynter was not required to work the late job and this could not amount to treatment relating to her disability.

109. The Tribunal did accept that that Mr Goodwin raised his voice towards either Ms Paynter or Mr Martin, but it was not related to her disability as there was no evidence that it was said in the context of her adjustments concerning shifts.

110. We accepted that what was said by Mr Goodwin and how it was said did not have the purpose of violating Ms Paynter's dignity or creating an intimidating etc, environment. However, we accept that it may well have had this effect upon Ms Paynter and it was reasonable for her to feel that way. However, in this case, as we do not accept that it was connected with Ms Paynter's disability, this complaint cannot succeed.

Victimisation (section 27 Equality Act 2010)

111. It was accepted that the grievance lodged on 17 August 2020 amounted to a protected act for the purposes of section 27 Equality Act 2010.

112. The detriment alleged was that Ms Taylor on 25, 26 and 27 October 2021, gave all late shift staff other than her the chance to leave early at 10:00pm.

113. While we understand that given the history between Ms Paynter and Ms Taylor with the earlier grievance and the additional factor of Ms Paynter working in another location from Rose Hill, she may well have felt marginalised from her colleagues. This would have left her feeling vigilant concerning management decisions made by Ms Taylor. She did have a suspicion that she was being treated less favourably by her and understandably felt that Ms Taylor had grounds for doing so.

114. The problem, however, was that while she was able to access data on the IT system, Ms Taylor provided a convincing explanation to demonstrate that the date in question did not support the conclusions reached by Ms Paynter. On balance therefore we were unable to find that Ms Taylor acted as alleged. The detriments are not proven and could not be connected with protected act.

Failure to make reasonable adjustments (sections 20 & 21 Equality Act 2010)

115. The provision, criterion, or practice (PCP) relied upon the claimant is the requirement for Scene of Crime Investigators (SCI) staff to parade at Rose Hill and in these proceedings, it was *agreed between the parties that the Ms Paynter was informed on 29 November 2021 that she would be required to parade at Rose Hill.* However, this PCP while proposed to take place, had not

actually been activated in relation to Ms Paynter before she resigned and she continued to parade on at Speke. Accordingly, it was the prospect of being moved to Rose Hill which amounted to the PCP in this complaint.

116. Ms Paynter said the PCP would put her at a disadvantage for several reasons. The first was the additional travel time from her home in south Liverpool to Rose Hill in Liverpool compared with Speke. This appeared to relate to increased levels of fatigue.

117. The respondent was aware of the alleged disadvantage because she raised requests for reasonable adjustments to be allowed to continue to parade at Speke in October and November 2021.

118. Although the Tribunal accepted that there would have been a disadvantage in the change of location, we did not find that this would have crossed a threshold for it to become substantial. Ms Paynter resided in South Liverpool. The initial commute to Speke involved a shorter journey than the journey to Rose Hill in central Liverpool. However, the system of parading on simply meant that this was the point where a person reported for duty and collected their equipment. Afterwards they could be dispatched to any location in Merseyside. However, Ms Paynter would be constrained by her shift and would stop work when the shift ended. In the context of a working day, the travel time from home to Speke and back compared with the travel time into Liverpool and back home, would not be significant. The journeys were both confined to the central and south Liverpool area and the travels to crime scenes over the working day would place greater demands upon Ms Paynter when compared with the slightly increased duration of commute into Rose Hill and which may place her nearer to crime scenes elsewhere in Merseyside.

119. Even if it was a substantial disadvantage, the Tribunal on balance did not accept that to allow parading in Speke would be a reasonable adjustment. The respondent had clearly made a high level decision to centralise its CIS function at HQ Annex in Rose Hill and the expense of this combined with the difficulties of maintaining a separate ISO accredited site at Speke would have been disproportionate. There was no evidence to suggest that ISO would have allowed Speke to fall outside regulation for the purpose of parading and if carried out Ms Paynter would still need to leave a CSI vehicle and equipment at that site as well as potential storage for evidence.

120. The respondent had not shut the door to adjustments per se but had simply declined to allow the Speke parading on adjustment and both Mr Stewart and Mr Vaughan had expressly confirmed in correspondence that they would explore adjustments at Rose Hill. Once OH were instructed, we accept that the respondent would have taken any recommendations into account when considering further the question of reasonable adjustments, but Ms Paynter decided to resign before that happened.

<u>Constructive unfair dismissal</u>

121. In terms of the two earlier allegations on 24 February 2018 and 25 September 2019, the Tribunal repeats its findings already made and would emphasise that at its highest, the claimant was faced with the lesser blows in a workplace which a reasonable employee should absorb as part of their day to day activities. She was asked to carry out jobs late on in her shift with the genuine intention of them being completed before 11pm. She refused and no sanctions were imposed.

122. In addition, in relation to the allegations used in relation to this complaint (and already identified as victimisation detriments attributed to Ms Taylor on 25, 26 and 27 October 2021) the Tribunal were unable to find evidence that Ms Taylor gave all late shift staff other than Ms Paynter the chance to leave early at 10:00pm. The investigation which took place following Ms Paynter raising a complaint with Mr Vaughan was of a very poor quality, but the evidence available to the Tribunal did not demonstrate that what was alleged took place as described by Ms Paynter.

123. Requiring the claimant from 29 November 2021 to parade at Rose Hill was a reasonable step for the respondent to take for the reasons given above in this judgment. However, in relation to the complaint of constructive unfair dismissal, we do not accept that this amounted to unreasonable behaviour by the respondent and did not amount to a fundamental of the implied term of trust and confidence.

124. This therefore leaves the Tribunal to consider the allegation made in relation to the management of the grievance, in respect of the claimant's complaint that she had been treated differently to her colleagues on 25 to 27 October 2021. The Tribunal has already indicated that the grievance was not handled well. The evidence clearly shows that there was a very poor understanding by management of their grievance policy, how it should be managed and who should be involved when a member of staff lodges a grievance at every level. This was a case where the support of HR would have greatly assisted all parties.

125. Superintendent Vaughan's language in his email on 17 January 2022 was considered by the claimant as sarcastic and inappropriate. Not only did the claimant consider this to be so, but Mr Vaughan with hindsight agreed that this was the case and this was supported with an extensive apology to Ms Paynter when he gave evidence this week.

126. The final allegation was that Superintendent Vaughan decided to take no further action in respect of the claimant's complaint dated 29 October 2021. While his initial response in his initial discussion email dated 8 January 2022 suggested to Ms Paynter that she could meet with him to explore what next steps might take place, he responded poorly to Ms Paynter's reply of 14 January 2022 where she expressed her unhappiness with the process. This was his reply of 17 January 2022 and in this email, he suggested to Ms Paynter that this was the end of the matter. This view was supported by Chief Superintendent Turner's email which had been sent to Mr Vaughan that he had concluded this issue.

127. The Tribunal accepted that the three allegations relating to the grievance amounted to a fundamental breach of the implied term of trust and confidence between employer and employee. This was because Ms Paynter had experienced, a failure by Mr Vaughan to acknowledge a potential conflict of interest, delays in the process, a dismissive and sarcastic response to her disappointment in the outcome decision and a clear discouragement that a challenge would take matters further. This left her feeling that there was nowhere else within the organisation where she could go. She clearly was considering her position at this time and these fundamental breaches ending with Mr Vaughan's reply on 17 January 2022 entitled her to resign without notice.

128. However, we are still left with the question of whether the respondent's unreasonable conduct caused Ms Paynter to resign? The Tribunal accepted that in late 2021 and early 2002 she was looking at alternative jobs. She did not resign of course until she received her offer on 26 January 2022.

129. While the Tribunal accepted that the offer of an alternative job was a factor in Ms Paynter making the decision to resign, her resignation was nonetheless, at least partially and significantly related to the identified fundamental breaches.

130. The final email Mr Vaughan sent was at 16:55 on 17 January 2022 and the resignation did not take place 31 January 2022. Several weeks elapsed before Ms Paynter decided to give her notice. However, considering the history of this case, the steps that were still in progress concerning adjustments and OH, we did not find that Ms Paynter delayed too long before resigning. Her resignation email made clear reference to failures in the grievance process as being a significant cause in her decision to resign and there was a significant connection between the repudiatory conduct and the decision to resign.

Time limits

131. The two allegations made in relation to sections 15 and 26 Equality Act 2010 took place in 2018 and 2019 and occurred much longer than 3 months before the date when the first early conciliation certificate was presented to ACAS. They were out of time under s123 of the 2010 Act.

132. The Tribunal has been asked to consider however, whether it is just and equitable to extend time under section 123. Essentially, Mr Millet submitted that in exercising its discretion the Tribunal should consider that in terms of balance, the prejudice to the respondent in rejecting the extension request to the claimant is greater than the prejudice suffered by the respondent by allowing the extension of time. Naturally, the respondent resists the request.

133. In relation to the 2019 allegation made against Mr Goodwin, this was an isolated matter and did not form part of any subsequent matters raised by Ms Paynter in these proceedings. It did not form part of any continuing act,

the time elapsed before ACAS was first notified was simply too long and it is not connected with the other allegations relied upon by Ms Paynter. There was no reason why she could not have raised this matter as a complaint much earlier before she resigned. Even though she had a period of absence, she was nonetheless able to participate in internal complaints and OH matters with the respondent during this time. She was back at work from March 2021 and ACAS were not first notified until 18 December 2021. Considering the time elapsed, it was simply too long to make it just and equitable to extend time in relation to this allegation.

134. In terms of the 2018 allegation, this was made against Ms Taylor who has been identified by Ms Payntor as someone with whom she has issues throughout the period considered in the findings of fact. However, this allegation did not materialise in the terms identified in the list of issue until the further particulars had been provided following the presentation of the claim on 25 February 2022. She brought an earlier grievance relating to Ms Taylor on 17 August 2020 and the appeal process rejecting the grievance was exhausted on 13 July 2021. It was from this date that Ms Payntor could be expected to turn her mind to a Tribunal complaint. She knew how to bring complaints using internal processes and there was no evidence to suggest that she was unaware that a complaint of discrimination or harassment under the Equality Act 2010 could be brought in the Employment Tribunals. On this basis she simply left matters for too long and it would not be just and equitable to extend time to allow this complaint to proceed.

Conclusion

135. Accordingly, and in summary, the decisions reached by the Tribunal are as follows:

(a) The complaint of discrimination arising from a disability contrary to section 15 Equality Act 2010 is not well founded which means it is unsuccessful.

(b) The complaint of harassment contrary to section 26 Equality Act 2010 is not well founded which means it is unsuccessful.

(c) The complaint of victimisation contrary to section 27 Equality Act 2010 is not well founded which means it is unsuccessful.

(d) The complaint of failure by the respondent in their duty to make reasonable adjustments contrary to sections 20 & 21 Equality Act 2010 is not well founded which means it is unsuccessful.

(e) The complaint of constructive unfair dismissal brought under Part X Employment Rights Act 1996 is well founded which means that it is successful.

136. The successful complaint of constructive unfair dismissal will now be listed for a 1 day remedy hearing on a date to be confirmed to consider the quantification of loss.

137. The parties will notify the Tribunal by 4pm on Friday 29 March 2024 of any dates to avoid so that the listing of this remedy hearing can take place.

Employment Judge Johnson

Date: 11 April 2024
When written reasons were completed

(Original judgment delivered on 21 March 2024)

JUDGMENT SENT TO THE PARTIES ON
Date: 25 April 2024

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/