EMPLOYMENT TRIBUNALS

Claimant: Mr J Pimienta

Respondent: Commissioner for Police of the Metropolis

Heard at: **London Central Employment Tribunal & via CVP**
On: **16th- 24th November 2023 and 1st – 5th February 2024 (10 days)**

Before: **Employment Judge Singh**
Ms Z Darmas
Mr A Adolphus

Representation
Claimant: In person
Respondent: Mr P Martin (Counsel)

RESERVED JUDGMENT

Unfavourable treatment because of something arising in consequence of disability

The complaints of unfavourable treatment because of something arising in consequence of disability are not well-founded and are dismissed.

Failure to make reasonable adjustments for disability

The complaints of failure to make reasonable adjustments for disability are not well-founded and are dismissed.

Victimisation

The complaints of victimisation are not well-founded and are dismissed.

REASONS

Background

1. The Claimant is employed as a police officer by the Metropolitan Police. He has been employed by them since November 2001.

2. Due to a series of incidents, the Claimant suffers from a back complaint. Due to that, he has been given "NANO" status by the Respondent for several years.

3. NANO stands for "No Aid, No Operations". The NANO status is given to officers who are to be given restricted duties. There could be a number of reasons for this.

4. The Claimant's complaints span over a number of years. The first is from June 2020. The Claimant claims that in June 2020 he was required to carry out a task of clearing up some bunkers at Charing Cross Police Station. The Claimant claims that he should not have been required to carry out this task.

5. The second is from 2021. The Claimant complains that he was "Warned" (that is given a lawful order in the Respondent's vernacular) to complete a task by a superior officer, Inspector McManus, in November 2021. He says he was unable to carry out the task due to working from home due to his back condition.

6. The Claimant claims that because he was unable to complete the task, he was subjected to detrimental treatment by Inspector McManus in December 2021.

7. In February 2022 the Claimant was ordered to again assist in clearing up a police station; this time in Belgravia. Again, the Claimant complains about being required to carry out this task given he has a back condition.

8. The Claimant claims that he made his employer aware in May 2022 that he was intending to pursue a complaint to the Employment Tribunal for Disability Discrimination. The Claimant claims that because he made his employer aware of this, he suffered two detrimental acts.

9. Firstly, the Claimant claims he was instructed not to speak to his line manager, PS Reid. Secondly, the Claimant claims that he was left without a line manager between August 2022 and March 2023.

10. Finally, the Claimant claims that he required a laptop or a larger tablet as an aid to carry out his work. The Claimant claims that the Respondent failed to provided this between March 2021 and January 2023.

The Hearing

11. The Case was originally listed to be heard over 10 days between the 16th November- 29th November 2023. However, due to availability of judges, this was cut down to 7 days, between 16th November and 24th November 2023.

12. At the start of the hearing, it was discussed whether 7 days would be sufficient time to hear the claim. The parties explained that a 10 day listing had been given to take into account the fact that the Claimant required use of a Spanish interpreter and because, due to his back condition, he required frequent breaks. There were also 12 witnesses for the Respondent and 2 for the Claimant.

13. The Respondent however expressed concern about the possibility that the case would be postponed and not heard until a 10 day window became available. This case had been ongoing since May 2022 and the issues stretched back as far as 2021. Delaying into late 2024 would mean the cogency of evidence was likely to be affected.

14. It was agreed that proceeding with the case in the time we had available was the fairest option. There was a possibility that the evidence would at least be heard in the 7 days available, even if submissions and deliberations could not be.

15. Unfortunately this was not to be the case. Due to some interim applications being made and having to be considered and the questioning of the witnesses taking longer than anticipated, we were not able to complete the witness evidence by the 24th November 2023. Three additional days were found in February 2024.

16. There were three witnesses that needed to be heard in February. They each dealt with a singular issue and, as such, it seemed reasonable that their evidence could be heard and that there would also be time for submissions and deliberations within the three days.

17. However, the Claimant's cross examination of the witnesses was at risk of taking an excessive amount of time. When asked how many questions he had for the first witness, the Claimant replied "many", even though he had asked all relevant questions that the panel believed could reasonably be asked. The Claimant stated that an email that had recently been disclosed by the Respondent (which was no more than 2 paragraphs long) had generated 20 questions on its own.

18. The panel believed that this was unreasonable. It was in the interests of justice and fairness that the case did not go part heard again. Therefore, the Claimant was given a strict timetable to question the remaining 2 witnesses and was told to select the most important questions he wanted to ask. The Claimant was able to follow these instructions and the evidence was completed by the 2nd February 2024.

19. The parties were given the opportunity to make oral submissions but both declined and submitted written submissions instead. The Respondent's representative stated that he felt oral submissions would be difficult to give with an interpreter interpreting. The Claimant said that he had prepared written submissions because he had been ordered to do so by me at the previous hearing in November. I did not believe that to be the case as that is not something I would normally instruct an unrepresented party to do, but the Claimant said he preferred to rely upon what he had written only. The panel

did not have any questions regarding the submissions so were able to use the remaining 1.5 days to deliberate.

20. In relation to the hearing itself, as stated above, we heard from 12 witnesses for the Respondent. They were

    a. Inspector Paul Dodds
    b. Inspector Aiveen McManus
    c. Amy Palmer
    d. Brian Hodgson
    e. Inspector Ellen Lovatt
    f. Inspector Lee Scott
    g. Daniel Reid
    h. Inspector Greig Baker-Doyle
    i. Duncan Jackson
    j. Augustine Anyaegbuna
    k. Gail Meyers
    l. Maidei Chireka

21. The Claimant called Alan Sinclair as well as himself to give evidence in support of the claim.

22. There was a joint bundle of 1670 pages. The Claimant had provided his own supplementary bundle which comprised an additional 700 pages.

23. In relation to the interpreters, two issues need to be mentioned. Firstly, there was a question as to how much the Claimant needed to rely upon the interpreter. The Claimant had been working in a public facing role for a significant period of time and therefore had a good command of English. The Claimant was asked if he wanted the interpreter to interpret everything that he said and was said in the hearing, or whether they would be there as a back up only in case there were certain phrases or words that he could not understand or properly communicate.

24. The Claimant said he wanted the interpreter to interpret everything that was said and that he said. Although this would mean slower proceedings, it was accepted by the panel that this is how the hearing would be conducted. However, there were clearly occasions in the hearing where the Claimant understood the question that someone was asking him without waiting for the interpreter or wanted to answer in English directly as he was having difficulty finding the correct term in Spanish.

25. On those occasions, the Respondent's representative insisted that the interpreter was used. Mr Martin stated that this was necessary for consistency and to avoid the Claimant being able to argue that a part of the evidence was not properly put or misinterpreted due to translation issues.

26. Secondly, due to the length of the hearing, it was not possible to have one interpreter for the entire period. The Claimant raised an issue about one of the interpreters used. The Claimant stated that she spoke European Spanish whereas he, and the other interpreters, spoke South American Spanish and there were differences between the two. Although this was highlighted as an issue by the Claimant, it did not impact the proceeding as the Claimant was

able to overcome the difficulty by explaining certain words or phrases to the interpreter. Further, this particular interpreter was only used for a short period of time.

27. In relation to the Claimant's back condition, he asked as a reasonable adjustment to be able to stand for the most part during the hearing. This was accommodated. Further, as stated, there were regular breaks, usually after around 45 minutes or earlier if the Claimant asked.

The claims and issues

28. The claims and issues had been helpfully set out during a preliminary case management hearing by EJ Khan in June 2023.

29. The following liability issues fall to be determined by the tribunal:

(1) Equality Act 2010 ("EQA"), section 6 & Schedule 1: Disability

30. It is agreed that the claimant was disabled at all relevant times by reference to the physical impairment of a back injury and the mental impairments of anxiety and depression, at all material times.

31. Did the respondent know or could it reasonably have been expected to know that the claimant was a disabled person, at all relevant times?

(2) EQA, section 15: Discrimination arising from disability

First claim

32. On 6 December 2021, Inspector McManus, on approaching the claimant at Charing Cross Police Station,

    a. shouted at him as soon as she saw him sitting down, telling him that he should have attended the station on 11 November 2021 to clear some lockers;
    b. called the claimant a liar;
    c. threatened him with disciplinary action;
    d. spoke to his supervisor, PS Reid, who then spoke to the claimant from which the claimant understood that he had been disciplined.

33. If so, was this treatment because of something arising in consequence of his disability? The claimant alleges that the something arising is that he was working from home on 11 November 2021 because of his back injury. It is agreed that the claimant had a chest infection on this date, which was unrelated to his disability.

34. If so, can the respondent show that the alleged unfavourable treatment was a proportionate means of achieving a legitimate aim?

(3) EQA, sections 20 & 21: Failure to make adjustments

First claim

35. The Claimant complains about the following instructions which are said to amount to the PCP of duties which he was or would be expected to perform in his role

    a. On 2 June 2020, Sergeant Baker-Doyle, instructed the claimant to clear up one of the bunkers at Charing Cross Police Station, which he did on 12, 13 and 14 June 2020, without the promised assistance being provided.
    b. On 2 February 2022, Chief Inspector Jackson instructed the claimant to attend Belgravia Police Station to remove some uniform items and documents.
    c. On 2 February 2022, Chief Inspector Jackson, having instructed the claimant to check some motorcycles for weapons and drugs and to return these vehicles to their lawful owners, and being told by the claimant that he was unable to complete this task because it involved heavy lifting, insisted that the claimant undertook this task.

36. Did this PCP put the claimant at a substantial disadvantage in comparison with persons who were not disabled in that:

    a. In respect (a) and (b): the PCP exacerbated the claimant's back injury was exacerbated.
    b. In respect of (c): the PCP exacerbated the claimant's depression and anxiety. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

37. If so, should the claimant's duties have been adjusted to avoid any such disadvantage?

Second claim

38. The claimant also complains about the provision of a smaller tablet /non-provision of a larger tablet or laptop from March 2021.

39. Did this PCP / non-provision of an auxiliary aid [if the respondent agrees that the devices are auxiliary aids then the tribunal will not be required to consider whether the provision of a smaller tablet amounted to a PCP] put the claimant at a substantial disadvantage in comparison with persons who were not disabled in that:

    a . it aggravated the claimant's back injury;
    b . It exacerbated the claimant's depression, as he was unable to perform his duties satisfactorily; and

c . increased his stress, anxiety and depression because of the claimant's concern about the risk of a data security breach, as he was forced to use his own laptop.

40. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

41. If so, should the respondent have provided the claimant with a larger tablet / laptop to avoid any such disadvantage? The claimant relies on the following requests that he made:

    a. A request for a larger (10" Panasonic) tablet on 1 March 2021 via My IT Service Desk which was refused on the same date.
    b. A request for a laptop on 13 April 2021 via My IT Service Desk which were refused on 18 April 2021.
    c. A request for a laptop on 29 April 2021 via My IT Service Desk which was refused on 4 May 2021.
    d. A request for a laptop on 3 June 2021 via My IT Service Desk which was refused on 8 June 2021.
    e. A request for a laptop on 28 July 2022 to PS Reid which the claimant followed up via My IT Service Desk on 29 July 2021 which was refused on 10 September 2021.
    f. A request for a laptop on 22 December 2022 via My IT Service Desk which was refused on 11 January 2023.

(4) EQA, section 27: Victimisation

Second claim

42. Did the claimant do a protected act when he told PS Reid on 12 May 2022 that he was going to register a claim to the Employment Tribunal for disability discrimination and victimisation. The claimant alleges that PS Reid made Inspector Scott aware of the claim.

43. Did the respondent treat the claimant detrimentally as follows?

    a. On 1 August 2022, the claimant was asked by Inspector Scott, under the direction of the respondent's solicitor, not to talk to PS Reid.
    b. On 1 and 2 August 2022, Inspector Scott told the claimant that his new line manager would be Acting PS Morton but this action was not taken and the claimant was without a line manager from August 2022 to 29 March 2023.

44. Did the respondent do those things because the claimant did a protected act?

(5) EQA, section 123: Time limits

45. Are any of allegations deemed to be in time because they are part of the same conduct extending over a period which is in time? The first

claim was presented on 12 May 2022 (and the relevant ACAS early conciliation ("EC") dates are 21 March – 1 May 2022) and second claim on 16 January 2023 (and the relevant ACAS EC dates are 16 January 2023).

46. If not, would it be just and equitable to extend the time for any of these allegations?

The Law

47. The Relevant law is as follows

Discrimination arising from disability

48. Section 15 of the Equality Act 2010 states that it is unlawful for an employer or other person to treat a disabled person unfavourably because of something which arises from, or in consequence of the person's disability. That treatment will be unlawful unless the employer can justify the treatment as a proportionate means of achieving a legitimate aim.

49. Knowledge, or constructive knowledge of the disability is essential as the employer must have this to be liable.

50. In *Secretary of State for Justice and anor v Dunn EAT 0234/16* the EAT identified the following four elements that must be made out in order for the claimant to succeed in a S.15 claim:

    a. there must be unfavourable treatment
    b. there must be something that arises in consequence of the claimant's disability
    c. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability, and
    d. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

51. Given that the claim is about "unfavourable" treatment, rather than "less favourable treatment", there is no requirement for the Claimant to rely upon a comparator.

52. In **T-Systems Ltd v Lewis EAT 0042/15** the EAT thought that the phrase 'something arising in consequence of' the disability should be given its ordinary and natural meaning.

53. In **Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT**, Mr Justice Langstaff, explained that there is a need to identify two separate causative steps for a claim under S.15 EqA to be made out.

    a. the disability had the consequence of 'something', and
    b. the claimant was treated unfavourably because of that 'something'.

54. In **Pnaiser v NHS England and anor 2016 IRLR 170, EAT**, Mrs Justice Simler summarised the proper approach to establishing causation under S.15.

55. First, the tribunal must identify whether the claimant was treated

unfavourably and by whom. It must then determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant.

56. Mrs Justice Simler made clear in **Sheikholeslami v University of Edinburgh** that the question of whether the 'something' arose in consequence of the disability is a question of objective fact for an employment tribunal to decide in light of the evidence presented to them.

57. If it is found that the Claimant suffered unfavourable treatment because of something arising from their disability, the employer can defend their actions if they can show they were a proportionate means of achieving a legitimate aim.

58. The employer must first identify an aim that is legitimate and the treatment of the Claimant must be a proportionate way of achieving that aim.

Duty to make reasonable adjustments

59. Section 20(3) of the 2010 Act provides that the duty to make adjustments arises where an employer's PCP (that is a provision, criterion or practice- a workplace rule or policy or procedure) "puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled". A one-off act can be a PCP for the purposes of a section 20 claim.

60. It is for the disabled claimant to identify the provision, criterion or practice ("PCP") of the respondent on which she relies and to demonstrate the substantial disadvantage to which she was put by that PCP.

61. It is also for the disabled claimant to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage; he need not necessarily in every case identify the step(s) in detail but the respondent must be able to understand the broad nature of the adjustment proposed to enable it to engage with the question whether it was reasonable.

62. There must be before the tribunal facts from which, in the absence of any innocent explanation, it could be inferred that a particular adjustment could have been made: **Project Management Institute v Latif [2007] IRLR 579**.

63. A Tribunal must first identify the PCP that the respondent is said to have applied: **Environment Agency v Rowan [2008] IRLR 20.**

64. There must be a causal connection between the PCP and the substantial disadvantage contended for: as was said in the decision in **Nottingham City Transport Ltd v Harvey UKEAT/0032/12,**

"It is not sufficient merely to identify that an employee has been disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP. Section 4A(i) of the Disability Discrimination Act 1995 provides that there must be a causative link between

the PCP and the disadvantage. The substantial disadvantage must arise out of the PCP."

65. The test of reasonableness is an objective one: **Saveraux v Churchills Stairlifts plc [2006] ICR 524, CA.**

66. Making a reasonable adjustment may necessarily involve treating a disabled employee more favourably than the employer's non-disabled workforce.

67. "Steps" for the purposes of section 20 of the 2010 Act encompasses any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP

68. It is important to identify precisely what constituted the "step" which could remove the substantial disadvantage complained of: **General Dynamics Information Technology Ltd v Carranza [2015] ICR 169.**

69. It can be a reasonable adjustment if there is a prospect that the adjustment would prevent the claimant from being at the relevant substantial disadvantage without there needing to be a good or real prospect: **Leeds Teaching Hospitals NHS Trust v Foster [2010] UKEAT/0552/10.**

70. Thus, it is not for the claimant to prove that the suggested adjustment will remove the substantial disadvantage, it is sufficient if the adjustment might give the claimant a chance that the disadvantage would be removed and not that it would have been completely effective or that it would have removed the disadvantage in its entirety: see **Griffiths and South Staffordshire and Shropshire Healthcare NH Foundation Trust v Billingsley UKEAT/0341/15 in which it is stated as follows:**

"Thus the current state of the law, which seems to me to accord with the statutory language, is that it is not necessary for an employee to show the reasonable adjustment which she proposes would be effective to avoid the disadvantage to which she was subjected. It is sufficient to raise the issue for there to be a chance that it would avoid that disadvantage or unfavourable treatment. If she does so it does not necessarily follow that the adjustment which she proposes is to be treated as reasonable under Section 15(1) of the 2010 Act."

71. Notwithstanding the above, in **Romec Ltd v Rudham [2007] UKEAT 0069/07/1307** it was held that the essential question for an employment tribunal is whether the adjustment would have removed the disadvantage experienced by the claimant. In that case, in remitting the issue to the same tribunal, the EAT directed that if the tribunal concluded that there was no prospect of the suggested adjustment succeeding, it would not be a reasonable adjustment: if, however, the tribunal found a real prospect of the adjustment succeeding it might be reasonable to expect the employer to take that course of action.

72. Thus, an employer can lawfully avoid making a proposed adjustment if it would not be a reasonable step to take **Royal Bank of Scotland v Ashton [2011] ICR 632.** Similarly, the Code, at paragraph 6.28, provides that one of the factors that might be taken into account when deciding what is a reasonable step for an employer to take is, "whether taking any particular

steps would be effective in preventing the substantial disadvantage".

73. Once a potential reasonable adjustment is identified, the onus is cast on the respondent to show that it would not have been reasonable in the circumstances to have had to take the step: **Latif.**

74. The question of whether it was reasonable for the respondent to have to take the step depends on all relevant circumstances, which will include the following:

    i. the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

    ii. the extent to which it is practicable to take the step;

    iii. the financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of the respondent's activities;

    iv. the extent of the respondent's financial and other resources;

    v. the availability to it of financial or other assistance with respect to taking the step;

    vi. the nature of its activities and the size of its undertaking.

75. If a Tribunal finds that there has been a breach of the duty, it should identify clearly the PCP, the disadvantage suffered as a consequence of the PCP and the step that the respondent should have taken.

Failure to make reasonable adjustments- auxiliary aids.

76. The duty to make reasonable adjustments also arises where, but for the provision of an auxiliary aid, a disabled person would be put at a substantial disadvantage. This is found in s.20(5) of the Equality Act 2010.

77. In its ordinary meaning, an auxiliary aid is a piece of technology or equipment that is intended to assist a disabled person. However, in the context of the Equality Act, the term 'auxiliary aid' is drawn more widely. As well as encompassing technological aids such as those mentioned above, the term also includes an 'auxiliary service' such as personal support or an assistant.

78. The EHRC Employment Code of Practice at para 6.13 gives the examples of the provision of a specialist piece of equipment such as an adapted keyboard or text-to-speech software, and the provision of a sign language interpreter or a support worker for a disabled worker.

Knowledge

79. For a failure to make reasonable adjustments the employer must have actual or constructive knowledge of the disability.
80. It is clear from s.20(1) of the Equality Act that the employer will only come under the duty to make reasonable adjustments if it knows not just that the relevant person is disabled but also that the relevant person's disability is

likely to put him or her at a substantial disadvantage in comparison with non-disabled persons.

81. In *Secretary of State for Work and Pensions v Alam 2010 ICR 665, EAT*, the EAT stated that tribunals should ask two questions when considering knowledge-

    a. did the employer know both that the employee was disabled and that the disability was liable to disadvantage the employee substantially?
    b. if not, ought the employer to have known both that the employee was disabled and that the disability was liable to disadvantage the employee substantially?

82. If the answer is no to the questions, then the duty to does not arise.

83. The words 'could not reasonably be expected to know' in para 20 of Schedule 8 clearly leave scope for a tribunal to find that the employer had 'imputed' or 'constructive' knowledge of the disability. It may be possible to determine that the employer had, or that a reasonable employer would have had, knowledge based on piecing together disparate pieces of information it had before it.

84. Even where an employer knows that an employee has a disability, it will not be liable for a failure to make adjustments if it 'does not know, and could not reasonably be expected to know' that a PCP, physical feature of the workplace or failure to provide an auxiliary aid would be likely to place that employee at a substantial disadvantage — see para 20(1)(b), Sch 8 EqA.

Victimisation

85. Victimisation is set out in section 27 of the Equality Act 2010

(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.

(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 Act;

(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.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

86. In a victimisation claim there is no need for a comparator. The Act requires the tribunal to determine whether the claimant had been

subject to a detriment because of doing a protected act. As Lord Nicholls said in **Chief Constable of the West Yorkshire Police v Khan [2001] IRLR 830**:-

"The primary objective of the victimisation provisions...is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory right or are intending to do so".

87. The Tribunal has to consider (1) the protected act being relied on; (2) the detriment suffered; (3) the reason for the detriment; (4) any defence; and (5) the burden of proof.

88. To get protection under the section the claimant must have done or intended to or be suspected of doing or intending to do one of the four kinds of protected acts set out in the section. The allegation relied on by the claimant must be made in good faith. It is not necessary for the claimant to show that he or she has a particular protected characteristic but the claimant must show that he or she has done a protected act. The question to be asked by the Tribunal is whether the claimant has been subjected to a detriment. There is no definition of detriment except to a very limited extent in Section 212 of the Act which says "Detriment does not ... include conduct which amounts to harassment". The judgment in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** is applicable.

89. The protected act must be the reason for the treatment which the claimant complains of, and the detriment must be because of the protected act. There must be a causative link between the protected act and the victimisation and accordingly the claimant must show that the respondent knew or suspected that the protected act had been carried out by the claimant, see **South London Healthcare NHS Trust v Al-Rubeyi EAT0269/09**. Once the Tribunal has been able to identify the existence of the protected act and the detriment the Tribunal has to examine the reason for the treatment of the claimant. This requires an examination of the respondent's state of mind. Guidance can be obtained from the cases of **Nagarajan v London Regional Transport** [1999] IRLR 572, **Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830**, and **St Helen's Metropolitan Borough Council v Derbyshire [2007] IRLR 540**. In this latter case the House of Lords said there must be a link in the mind of the respondent between the doing of the acts and the less favourable treatment. It is not necessary to examine the motive of the respondent see **R (on the application of E) v Governing Body of JFS and Others [2010] IRLR 136**. In **Martin v Devonshires Solicitors EAT0086/10** the EAT said that:

"There would in principle be cases where an employer had dismissed an employee in response to a protected act but could say that the reason for dismissal was not the act but some feature of it which could properly be treated as separable."

90. In establishing the causative link between the protected act and the less favourable treatment the Tribunal must understand the

motivation behind the act of the employer which is said to amount to the victimisation. It is not necessary for the claimant to show that the respondent was wholly motivated to act as he did because of the protected acts, **Nagarajan**. In **Owen and Briggs v James [1982] IRLR 502** Knox J said:-

"Where an employment tribunal finds that there are mixed motives for the doing of an act, one or some but not all of which constitute unlawful discrimination, it is highly desirable for there to be an assessment of the importance from the causative point of view of the unlawful motive or motives. If the employment tribunal finds that the unlawful motive or motives were of sufficient weight in the decision making process to be treated as a cause, not the sole cause but as a cause, of the act thus motivated, there will be unlawful discrimination."

91. In **O' Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615** the Court of Appeal said that, if there was more than one motive, it is sufficient that there is a motive that is a discriminatory reason, as long as this has sufficient weight. Conscious motivation is not a prerequisite for a finding of discrimination. It is therefore immaterial whether a discriminator did not consciously realise they were prejudiced against the complainant because the latter had done a protected act. An employer can be liable for discrimination or victimisation even if its motives for the detrimental treatment are benign.

Time limits

92. The time limit for submitting a complaint of discrimination to an employment tribunal is within 3 months, from the date of the act complained of. (s.123 of the Equality Act 2010)

93. Where the acts form a continuing sequence of events, the time limit can be taken to run from the date of the last act in the sequence. S.123(3) states that conduct extending over a period is to be treated as done at the end of that period

94. In relation to a failure to act, s.123(3)(b) states a failure to do something is to be treated as occurring when the person in question decided on it. In the absence of evidence to the contrary, a person is taken to decide on a failure to do something either when that person does an act inconsistent with doing something, or, if the person does no inconsistent act, on the expiry of the period within which he or she might reasonably have been expected to do it — S.123(4).

95. The tribunal has discretion to extend the time limit for a discrimination claim if it deems it is "just and equitable" to do so.

Findings

Discrimination Arising From Disability

96. The Tribunal heard from both the Claimant and Inspector McManus about this incident. Both gave conflicting versions of the events.

97. Whilst the Claimant's was in line with the allegations, Inspector McManus instead denied that she every shouted at the Claimant or called him a liar.

98. Her evidence was that she was new to the unit and had not previously been at this place of work. She said that it was an open plan office and for all those reasons she would be acutely aware of how she presented herself. She did not want to make a bad first impression on her colleagues by shouting at someone in earshot of everyone else.

99. She also denied calling the Claimant a liar.

100. In relation to the disciplinary referral, Inspector McManus stated that she had referred the Claimant for "Reflective Practice". This was evidenced by the documents. Inspector McManus stated that this was not a form of a disciplinary, but instead much earlier than a disciplinary and more informal.

101. The tribunal found Inspector McManus to be a very frank and direct witness. It was also clear that she was unhappy that the Claimant had not turned up for a duty she had ordered him to do and not given any notification that he was not going to attend, but the tribunal felt that on balance, it was unlikely she would have shouted at the Claimant in the circumstances that she describes.

102. The tribunal decided that Inspector McManus almost certainly told the Claimant off, but taking into account all the circumstances, decided that it was unlikely that she had raised her voice, which would have been required for her to have been shouting at the Claimant.

103. The claim in relation to that failed.

104. In relation to whether she called him a liar, the tribunal felt that this claim also failed. It was for the Claimant to prove that this comment had been made and he had failed to do so. Inspector McManus was a credible witness.

105. In relation to the latter two allegations regarding disciplinary action, these hinged on the tribunal's understanding as to whether Reflective Practice was a form of disciplinary action or not.

106. It was the tribunal's decision that it did not. It did not form part of the disciplinary procedure in either of the two documents in the bundle that were relevant to this- the College of Policing- Code of Ethics and the Standard Operating Procedure.

107. Both policies allowed for informal action to take place before disciplinary action to begin, as an opportunity for the individual to correct their behaviour. It was clear that this was what Reflective Practice was. It would not initiate any formal process. The Respondent's policy document regarding this states that it meant to focus on learning and reflection and not blame and punishment.

108. On that basis, the latter two allegations also failed. The Claimant was not threatened with disciplinary action by Inspector McManus and, although she did speak to his supervisor (Mr Reid) this was in relation to reflective practice and not an instruction to discipline the Claimant.

109. As none of the acts of unfavourable treatment were proven, the claim for discrimination arising from fell at the first hurdle.

110. Nonetheless, the tribunal went on to consider whether any conduct had been because of something arising in consequence of his disability. The tribunal found that it did not. The something arising that the Claimant relied upon was that he was working from home on 11th November 2021 because of his back injury.

111. The Claimant claimed he was working from home because of his back but there was some uncertainty here. The Respondent's argument was that the Claimant was actually unwell due to Covid symptoms and that was why he had not come into work. The distinction was important as Covid was not a disability that the Claimant was relying upon for his claim.

112. The Respondent pointed to the messages on the day where the Claimant asks to work from home. These started at page 1381. The Claimant asks Sgt Reid on the 3rd November 2021 if he could work from home for the next few days. When asked to describe his symptoms he states he has an itchy throat, cough, headache and nose bleeds. He does not mention a bad back or back pain. Sgt Reid replies "are we calling it self-isolation".

113. The Claimant asks to extend the time for working from home on the 8th November 2021. He does not describe new symptoms or mention his back. He simply says he is still unwell. It is a reasonable assumption to anyone reading these that he was still suffering the same problems he identified on the 3rd November 2021 message.

114. The next message on the 15th November 2021 also describes similar symptoms. Importantly it does not mention his back.

115. On that basis the tribunal found that the Claimant was not working from home because of his back and therefore this absence could not be something arising from his disability.

116. Further, the reason that Inspector McManus was unhappy with the Claimant was nothing to do with the reason the Claimant was not at work. Her evidence explained that she was upset that he had not reported for the duty she had tasked him at all. The fact that he had not told her that he was not going to come in (for whatever reason) was the thing that caused her to respond as she did. This too was not something arising from the Claimant's disability. The Claimant's lack of explanation for his absence to Inspector McManus was not caused by his back. Further, there was no evidence that Inspector McManus knew about the Claimant's back condition.

117. The Claim therefore would have failed on those grounds also.

<u>Failure to Make Reasonable adjustments.</u>

- *The Charing Cross Incident*

118. The Claimant alleged that Sgt Baker-Doyles instructions on the 2nd June 2020 amounted to a PCP.

119. The wording of the allegation was vitally important. The Claimant confirmed at the start of the hearing that the wording set out in the EJ Khan's case management order was correct.

120. That stated that the PCP was that Sgt Baker-Doyle

"Instructed the Claimant to clear one of the bunkers at Charing Cross Police Station, which he did on 12, 13, and 14 June 2020, without the promised assistance being provided."

121. Those last 6 words were crucial. The tribunal confirmed with the Claimant that being required to carry out work without promised assistance was part of the instruction from Inspector Baker-Doyle. His complaint was that this placed him at a substantial disadvantage.

122. The tribunal's finding in relation to this was that the instructions from Inspector Baker-Doyle was only to clear the bunker at Charing Cross. It did not make any reference to whether there would be any assistance from anyone and what the Claimant needed to do if no such assistance was provided.

123. The offer of assistance came from someone else, PS Reid. Mr Reid offered to come and help the Claimant with some other officers. However, he was unable to provide that due to being called away on other duties.

124. The tribunal therefore found that there had been no PCP to clear the bunker without promised assistance being provided. Inspector Baker-Doyle could not have made any reference to this in his order as he did not know any help was being offered.

125. The claim for a failure to make reasonable adjustments in relation to this therefore failed.

126. We also however went on to find that even if this had been a PCP, it did not place the Claimant at a substantial disadvantage. The Claimant said that this task exacerbated his back condition. The Claimant claimed that the task required lots of lifting and carrying which caused him to harm his back.

127. The tribunal did not agree with this. The instructions from Inspector Baker-Doyle were in the bundle in an email at page 999. This confirmed that the task involved shredding some documents and collecting some uniforms.

128. The Claimant's evidence was that the task involved much more than cleaning up some documents and uniforms. He had sent some pictures after the task had been completed showing the extent of the work he had done over the 3 days.

129. The tribunal heard evidence from Inspector Lovatt who explained that when any officer approaches a task they need to carry out a "dynamic risk assessment". Other witnesses also confirmed that this should be done in any duty and that officers are given training on this. Essentially it means that you should weigh up the situation and only do what is safe for you, within your means.

130. It was clear to the tribunal that there was no requirement on the Claimant to work beyond his capacity. Inspector Baker-Doyle's instruction only referred to papers and uniforms. There was no argument from the Claimant that even doing this would have exacerbated his back.

131. The Claimant's position was that the task was more than just papers and uniforms and it was that which had caused his back condition to be worsened. However, the tribunal found that if he had done so, he had gone beyond the instructions of Inspector Baker-Doyle and that he had ignored the requirement to carry out a dynamic risk assessment and work within his capacity.

132. The Claimant had been in contact with his superiors during the 3 days. There was no suggestion that he was unable to check what he should be doing or that he had received other instructions which told him to do more strenuous work.

133. It was the tribunal's finding therefore that the instructions of Inspector Baker-Doyle did not place the Claimant at a substantial disadvantage compared to a person without his disability. All officers needed to act within their own capacity and after carrying out a dynamic risk assessment. This may lead to officers doing different levels of work and there was no evidence that this would be unacceptable to the Respondent. Any injury to the Claimant was therefore as a result of his own actions and behaviours and not because of any PCP.

134. As stated, this claim therefore failed.

- *Being instructed by Chief Inspector Jackson to remove uniforms and documents at Belgravia Station*

135. This incident took place in February 2022.

136. There was no dispute that the Claimant had been tasked to do this.

137. Inspectors Jackson said that before carrying out the task, he had met with the Claimant to discuss the job. The Claimant denied any such meeting had taken place.

138. It was difficult for the tribunal to determine if it had. The Claimant relied heavily on the timings of the emails which he said showed that he left for Belgravia shortly after the first email and therefore there would not have been time for him to meet with Inspector Jackson.

139. However, there was no evidence to prove exactly what time he arrived at Belgravia.

140. Inspector Jackson had met with the other 2 officers tasked with this duty

and so it seemed out of place for him to have not met with the Claimant too.

141. However, in the end, the tribunal decided that nothing turned on this and therefore they didn't need to make a conclusive finding either way.

142. The key for the tribunal was the wording of the instruction and the information we had already gleaned from the witnesses about dynamic risk assessments.

143. The instructions from inspector Jackson were to clear some uniforms and documents, that was accepted. The Claimant however said that when he arrived on site, some of the uniforms there contained "level 2 kit". This would be heavier than standard uniforms as it contained safety equipment and similar protection.

144. The Claimant also said that he was required to lift up heavy bags and move large boxes.

145. The problem for the tribunal panel was that none of this formed part of Inspector Jackson's instructions. It was clear that Inspector Jackson had given the Claimant limited things to do. He had not told the Claimant to go to the site and clear everything. He had not told the Claimant that he had to go beyond what was in his email. There was no evidence of that.

146. The email from Inspector Jackson at page 1204 of the bundle makes it clear that the Claimant should work within his own capacity.

147. Therefore, if the Claimant had done more than clear papers and standard uniforms, he had done so of his own volition and in defiance of the requirement to work within his own capacity and to carry out a dynamic risk assessment.

148. It was the tribunal's finding thus that the Instructions by Chief Inspector Jackson did not place the Claimant at a substantial disadvantage compared to those without a disability. The instruction was limited to basic work which we did not consider would have affected his back. The Claimant did not argue that this basic work is what affected him. Further, the instruction was qualified by the need to work within his own capacity and following the dynamic risk assessment. All staff would have been under this duty and therefore no one, including the Claimant would have been at a disadvantage.

149. This claim therefore failed.

- *Being asked to search motorcycles for weapons and drugs.*

150. The Claimant also alleged that whilst at Belgravia Station, he was called by Inspector Jackson and told to carry out an additional task- that was to search some abandoned motorcycles for drugs and weapons. The motorcycles were abandoned and strewn about the carpark area where the Claimant was working, according to the photographs the Claimant provided.

151. Searching these motorcycles required lifting them up and moving them, which the Claimant say placed him at a substantial disadvantage. The Claimant says that this exacerbated his depression and anxiety. He did not

say that it exacerbated his back injury.

152. The wording of the Claimant's complaint was that he told Inspector Jackson that he could not complete this task because it involved heavy lifting but Inspector Jackson insisted that the Claimant undertook the task.

153. Again, the facts did not seem to support the Claimant's version of what happened.

154. Firstly, there was no evidence that the Claimant had been asked to search the motorcycles for drugs and weapons. This was a verbal instruction given on the day so we could not know for certain exactly what was said on the telephone to the Claimant. However, the supporting evidence we did have, the emails that were sent after the event, showed it was not likely that the Claimant was asked to search for drugs and weapons.

155. The email from the Inspector Jackson on the 4th February 2022, at page 1210 of the bundle states that the Claimant should complete a vehicle removal pound form for the vehicles.

156. A further email from Inspector Jackson to Dan Reid on the same day at page 1209, states that he had asked the Claimant to obtain details of the vehicles and makes reference to a recovery form.

157. There was an email from the Claimant dated the 3rd February 2022, at page 1212, where he says that he was unable to conduct a search for drugs. However, Inspector Jackson forwards that email on the 16th February 2022 to Dan Reid (also page 1212). In that email, he states that vehicles need to be collected to go to the car pound and that none are involved in criminal investigations; they have just been dumped by officers over the years. There is no mention of carrying out a search for drugs or weapons.

158. This is in line with the oral evidence we heard from Inspector Jackson. He stated that the instruction was only to collate the details of the bikes so that they could be sent to the pound. It did not make sense that they would need to be searched for drugs and weapons, given that they had been discarded for many years at Belgravia. It seemed unlikely that the police would leave drugs and weapons lying around in the bikes for such a long period of time.

159. The tribunal therefore decided that the Claimant hadn't been asked to search for drugs and weapons. Further, we determined that the Claimant hadn't been told to continue doing this when he said he had injured his back.

160. The second phone call between Inspector Jackson and the Claimant had occurred when the Claimant had hurt himself. During that call Inspector Jackson told the Claimant that he should go to the hospital. We believed Inspector Jackson's evidence in relation to that. He came across as a credible witness and none of the evidence supported the Claimant's assertion that he had instead been told to continue working. In fact, the Claimant accepted that this phone call had been about getting medical treatment for his back injury. The Claimant says that Inspector Jackson told the Claimant to go to a private clinic about it. We do not accept this and believe that this was the Claimant's misinterpretation of Inspector Jackson suggestion to seek medical treatment. However, the key finding is that that call was about the Claimant seeking

medical help and not an instruction by Inspector Jackson to continue working.

161. In light of the finding that the Claimant was never instructed to search for drugs and weapons and was never instructed to continue doing this when he reported his back being injured, this claim also fails.

- *Provision of a larger tablet/laptop*

162. The Claimant alleged that he was given a small tablet to use by the Respondent but continuous use of this whilst working from home caused him to aggravate his back injury.

163. The Claimant also said that it exacerbated his depression as he was unable to perform his duties satisfactorily.

164. Finally, he also claimed that using the small table caused him stress, anxiety and depression because of the concern he had that there would be a risk of a data security breach as he was forced to use his own laptop instead.

165. The Claimant said that he had requested a larger tablet or laptop from March 2021. There were six further requests between then and 11th January 2023.

166. The law surrounding auxiliary aids states that the duty arises "where the disabled person would, but for the provision of an auxiliary aid, be placed at a substantial disadvantage….".

167. The tribunal therefore needed to find whether or not the Claimant would be placed at a substantial disadvantage in the absence of a larger tablet or laptop.

168. The Respondent's process for obtaining a larger tablet or laptop was that a request needed to be made through their IT portal. The Respondent's witnesses confirmed that alternative devices could be granted for different reasons such as operational requirements or a promotion. One of the reasons was because it was required for medical reasons. For that request to be successful, there needed to be evidence such as an OH report which supported the request. If the report did not support the need for an alternative device, the request would be rejected.

169. The Claimant relied upon a number of medical reports that had been prepared by the Respondent's OH. He stated that the Respondent had ignored these reports.

170. However, going through the reports, it was clear that they did not actually support the need for a larger tablet or laptop.

171. There was a report from a consultant spinal surgeon, John O'Dowd at page 565, dated July 2017. However this made no reference to using a tablet or laptop.

172. The report from OH practitioner, Jacqueline Turner, at page 662 of the bundle, dated April 2021, recommended breaks from the computer and stretching exercises. This reflected the fact that the Claimant had been given

an adapted workstation in the office to use. It did not make reference to a larger laptop or tablet.

173. A further OH report by Jacqueline Sanu from June 2022 was in the Claimant's supplementary bundle at page 2154. This did not make specific reference to using a laptop or tablet but recommended a DSE (Display Screen Equipment) assessment. Such an assessment is normally carried out to ensure that an individual is using their office equipment correctly- i.e. positioning themselves the right distance from their screen, sitting in the correct way etc. It can sometimes recommend different equipment if it is more ergonomic.

174. There was a DSE report from June 2022, at page 1266 of the bundle. This was carried out by a DSE assessor. It was not clear whether this person had any medical background or qualifications. Therefore, the weight of this report was questioned.

175. Further, in relation to using the tablet he had, the report stated that the Claimant reported eye strain and neck pain. It did not refer to any medical assessment being carried out. The content of the report was based on what the Claimant had said.

176. The report did state that "a laptop may be better for him". It goes on to say however that "this is a Line Manger/Operational discretion rather than an ergonomic decision.".

177. In the tribunal's opinion, this was not an instruction that the Claimant required a laptop because of a medical reason, or that he would suffer a substantial disadvantage to his back, his depression, his stress or anxiety, if one was not provided.

178. The final report from Dr Purves was dated July 2023, at page 2181 in the Claimant's supplementary bundle. Crucially, this is after the period in which the Claimant says that his requests were ignored. Further, after that report was submitted with the Claimant's request to IT for a laptop or larger tablet, one was provided. This took 15 days, which in our opinion is a insignificant period of time and reasonable.

179. Going back to the date of that report, the Claimant's claim was that no laptop or tablet was provided from March 2021. There was no end date to the period he was claiming but he made reference to the dates of the requests he made which went up to January 2023.

180. Potentially we could consider that a duty to make reasonable adjustments in relation to this auxiliary aid arose in July 2023. However, looking back at the history of the claims we could see that the current hearing dealt with 3 claims that had been consolidated together. Those claims were submitted in May 2022, January 2023 and May 2023. These all predated the report in July 2023 and therefore it could not have formed part of those claims.

181. The Claimant had been given permission to amend his claim at the hearing before EJ Khan but this was in June 2023 (again before the report) and the permission was only in relation to the allegation regarding the motorcycles. There was no mention of an additional failure to make

reasonable adjustments.

182. Given that there was no medical evidence that the Claimant would suffer a substantial disadvantage before July 2023 and that report fell outside the range of the claim, this claim for reasonable adjustments failed. Further, even if we did find that there was a duty to make reasonable adjustments in relation to that July 2023 report, the tribunal found that that duty was complied with as a laptop was provided within a reasonable period afterwards.

183. This claim therefore failed.

Victimisation

184. The Claimant claimed that after notifying the Respondent that he was going to submit an ET claim on the 12th May 2022, he was subjected to detrimental treatment. It was accepted by the Respondent that the Claimant had carried out the protected act.

185. The first detriment that the Claimant claimed was being told by Inspector Scott on 1st August 2022 to not talk to PS Reid. This would cause the Claimant some difficulty as PS Reid was his line manager at the time.

186. There was a conflict of evidence in relation to this. The Respondent denied that the Claimant was ever told this. They accepted there was a meeting with Inspector Scott and the Claimant on the 1st August 2022, but their position was that in that meeting when the topic of a Welfare Officer to discuss the Claimant had been raised, the Claimant had suggested PS Reid take that position. Inspector Scott stated that he had said that wouldn't be a good idea as there might be a potential conflict due to the claim and the fact PS Reid was the Claimant's line manager.

187. There was an email from Inspector Scott to the Claimant, dated 2nd August 2022, at page 1317, which set out a summary of the discussion of the meeting. This made it clear that they had discussed PS Reid in relation to the Welfare Officer role.

188. This, the tribunal felt, was sufficient to convince them that the Claimant had not been told to not speak to PS Reid.

189. We were further persuaded by the fact that the Claimant had continued to speak to PS Reid. This was evidenced by email communication as well as the witness evidence of both PS Reid and the Claimant.

190. This claim therefore failed as we did not find that the detriment had occurred.

191. The second detriment was that the Claimant was without a line manager between August 2022 and March 2023. The Claimant claimed that PS Morton had been appointed as a new line manager in the meeting on the 1st August 2022 but had declined the role shortly afterwards. The Claimant said that he had effectively been left in limbo and without any support or direction until March 2023.

192. The Respondent accepted that the situation with PS Morton was as

described. However, they stated that when he declined, PS Reid remained the Claimant's line manager. This was PS Reid and Inspector Scott's evidence and we found them to be credible witnesses.

193. PS Reid was very supportive of the Claimant throughout his evidence and we found no reason to believe he would turn on the Claimant on this point alone.

194. Further, PS Reid explained that it was clear from the email correspondence that the Claimant was treating PS Reid as his line manager. There were emails in the period August 2022 to March 2023 where the Claimant contacts PS Reid as he would do someone he considered to be his line manager.

195. Finally, the tribunal heard evidence from Augustine Anyaegbuna. Mr Anyaegbuna stated that he had been the Claimant's second line manager from August 2022. Mr Anyaegbuna's evidence had been relating to the Claimant's laptop request but it was clear that he was also providing line management to the Claimant, in addition to PS Reid.

196. Therefore this claim also failed on the basis that the alleged detriment had not occurred.

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Employment Judge **Singh**

_____24th April 2024_____
Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

15 May 2024
.....

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FOR THE TRIBUNAL OFFICE