EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms K Hibbert	v	The Chief Constable of Thames Valley Police

Heard at: Reading

On: 13, 14, 15 and 17 June 2022 and in private on 11 July 2022, 1 and 8 September 2022

Before: Employment Judge Hawksworth
Mrs F Potter
Mrs C Tufts

Appearances
For the Claimant: Mr C Banham (counsel)
For the Respondent: Mr J Arnold (counsel)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. The claimant's complaint of discrimination arising from disability in relation to the withdrawal of permission for a business interest succeeds.

2. The claimant's complaint of failure to make reasonable adjustments in relation to the application of the business interests policy succeeds.

3. The claimant's complaint of constructive discriminatory dismissal succeeds.

4. The claimant's other complaints of disability discrimination fail and are dismissed.

5. A remedy hearing will be arranged to decide remedy.

REASONS

Claim, hearing and evidence

1. The claimant was an officer in the respondent's force from 9 May 2004 until her resignation which took effect on 27 March 2020. From April 2017 until

she left the force she was a safeguarding sergeant, working with young people who were subject to child sexual exploitation and child drug exploitation.

2. In a claim form presented on 20 August 2020 after a period of Acas early conciliation from 24 June 2020 to 24 July 2020, the claimant made complaints of disability discrimination and constructive dismissal. The respondent presented its response on 17 December 2020 and defended the claim.

3. The full merits hearing was listed for five days starting on 13 June 2022. For judicial resourcing reasons, the time allocation had to be reduced to four days.

4. The hearing took place in person at Reading employment tribunal.

5. At the start of the hearing the employment judge told the parties that, before being appointed as a salaried judge in 2019, she was a solicitor and latterly a partner and principal lawyer at Slater and Gordon. She worked there for around 23 years. The firm and the judge acted for the Police Federation of England and Wales and Thames Valley Police Federation and their members. In that role, the employment judge had instructed the claimant's counsel Mr Banham. In response to a question from Mr Arnold, she said she could not remember when she last instructed him, but it would have been before May 2019. The judge had no knowledge of the current case or the people involved. Mr Arnold took instructions over a break. Neither party made any application for recusal or raised any objection to the judge continuing to hear the case.

6. There was an agreed hearing bundle. Pages were numbered from 1 to 1,521. Some additional pages had been interleaved so there were 1,616 pages in total. A policy document was added by the claimant, this was given page numbers 1,522 to 1,531. Page references in these reasons are to the agreed bundle using the hard copy pagination.

7. The parties had agreed a helpful cast list and chronology.

8. We heard evidence from the following witnesses for the claimant:

    8.1 The claimant;
    8.2 David Hibbert, the claimant's husband;
    8.3 Emma Garside, a superintendent, commander of the Cherwell and West Oxfordshire Local Policing Area;
    8.4 Jacqueline Kelly, a police officer and a friend and former colleague of the claimant.

9. We heard evidence from the following witnesses for the respondent (in this order):

    9.1 Tony Lees, an investigating officer in the Professional Standards Department;

9.2 Colin Paine, a detective chief superintendent and head of the Professional Standards Department;
9.3 Fiona Courtney, a support manager in the Professional Standards Department;
9.4 Wendy Percival, a detective chief inspector in criminal justice;
9.5 Hollie Roberts, the Force Security Advisor in the Professional Standards Department;
9.6 Craig Entwistle, Cherwell Neighbourhood Inspector and the claimant's line manager;
9.7 Mark Weston, a support manager in the Professional Standards Department;
9.8 Rebecca Myburgh, an Employment Relations Specialist in the Human Resources Department;

10. There was insufficient time in the reduced allocation to hear submissions, decide the claim and give judgment.

11. The parties agreed that they would provide written submissions, and written submissions in reply. We made case management orders for these steps. Both counsel provided detailed submissions, and Mr Arnold also provided a summary of the law. Both counsel provided submissions in reply. In all, we had 116 pages of submissions. We are grateful to the parties and their representatives for all of the submissions documents which were very carefully prepared and of considerable assistance to us.

12. Deliberation days took place in private on 11 July 2022, 1 and 8 September 2022. The employment judge apologises to the parties for the delay in the promulgation of this reserved judgment. It reflects delays arising from booked leave over the summer period, the particular complexity of the issues in this case and the current workload of the tribunal.

The Issues

13. The issues for us to decide were set out in a draft list of issues. The draft list had been agreed between the parties, other than two points in paragraphs 7 and 12, where there were competing versions put forward by the parties. We considered this with the parties at the start of the hearing. For reasons explained at the hearing, we decided that the respondent's versions of paragraphs 7 and 12 should stand. We set out next a brief summary of the two disputes and our reasons for our decisions.

14. Paragraph 7 of the list of issues set out the reasons why the claimant said she was at a substantial disadvantage in comparison with persons who did not have her disability, for her complaint of failure to make reasonable adjustments. The claimant wanted to include four ways in which she was disadvantaged. We decided that the respondent's shorter version reflected the way in which the claimant had explained disadvantage in her particulars of claim. We decided that a need for time off work for therapy sessions and sick leave was included in the wider 'need for time off work'. The need to undertake a business interest to benefit the claimant's well-being had not been pleaded as a disadvantage to the claimant, and seemed to us to be better seen as a suggested adjustment rather than a disadvantage.

15. In paragraph 12 the list of issues set out the 'something arising in consequence of disability' for the complaint of discrimination arising from disability. The claimant wanted to include 'the need for reasonable adjustments' in addition to two agreed points. We agreed with the respondent's counsel that this had not been pleaded. We decided that we should not consider 'the need for reasonable adjustments' as 'something arising in consequence of disability,' but we agreed with the parties that if there was a failure to make reasonable adjustments, this would be a factor for us to consider when considering whether any unfavourable treatment because of something arising in consequence of disability was a proportionate means of achieving a legitimate aim.

16. It was agreed that because of the reduced time allocation, issues relating to remedy would be left to another hearing, if needed. This includes any issues concerning contribution, any failure to follow the Acas Code of Practice and arguments based on Chaggar.

17. The issues for us to decide are therefore as follows (the numbering is retained from the draft list).

Time Limits

1. *Have the Claimant's claims been brought within the primary time limits, namely 25 March 2020?*

2. *If the Claimant's claims have not been brought within primary time limits, do the matters relied upon by the Claimant amount to conduct extending over a period so as to be treated as done at the end of that period, the end of that period being within the primary limitation period?*

3. *If any of the allegations are out of time, is it just and equitable for the time limit in respect of such allegations to be extended?*

Disability (s.6 EqA 2010)

4. *The Respondent accepts that the Claimant was disabled at all material times by reason of her mental impairment, diagnosed variously as:*
    a. *Depression;*
    b. *Anxiety;*
    c. *Complex PTSD.*

5. *[Did] the Respondent [have] the requisite knowledge of the Claimant's disability at all material times?*

Failure of Duty to Make Reasonable Adjustments (s.20 & s.21 EqA 2010)

6. *It is admitted that the Respondent applied the following provisions, criteria or practices ['PCPs'] to the Claimant:*
    a. *Application of its Business Interest Policy;*
    b. *The application of the Respondent's misconduct procedures under the Police (Conduct) Regulations (in this case, the 2012 Regulations) to matters of suspected Police Officer misconduct.*

7. *Did the PCP(s) place the Claimant at a substantial disadvantage in comparison with persons who did not have her disability, namely because the Claimant's disability meant that she had a need:*

    a. *for additional therapy sessions;*
    b. *time off work;*
    c. *An increase in her medication.*

8. *Did the Respondent know, or could it have reasonably been expected to know, of the comparative substantial disadvantage to the Claimant by applying any of the PCPs?*

9. *The Claimant contends that it would have been reasonable for the Respondent to have taken the following steps to alleviate the disadvantage:*
    a. *Allowing the Claimant to retain her business interest, whether in part or in full;*
    b. *Allowing the Claimant's appeal against the withdrawal of her business interest, whether in part or in full;*
    c. *Obtaining further medical advice in order to consider the impact of withdrawing the Claimant's business interest;*
    d. *Allowing more time to enable the Claimant to sign and respond to the Regulation 15 Notice of Investigation;*
    e. *Deciding not to pursue an investigation under the Police (Conduct) Regulations 2012;*
    f. *Deciding not to pursue gross misconduct proceedings under the Police (Conduct) Regulations 2012.*

10. *Did the Respondent fail to take such steps as were reasonable to avoid the disadvantage created by the PCP(s)? The Respondent contends that the following steps were taken and were reasonable to take or that the Claimant's contended step was not a reasonable step to take (paragraphs 38-40 and 43-45 GOR):*
    a. *The Respondent agreed to review his decision upon provision of appropriate medical evidence by the Claimant.*

11. *Did the Respondent fail in its duty to make reasonable adjustments?*

<u>Discrimination Arising from Disability (s.15 EqA 2010)</u>

12. *Did the following constitute "something arising in consequence of" the Claimant's disability?*
    a. *Suffering from low self-esteem and paranoia, making it difficult for her to work alongside her colleagues;*
    b. *Long-term sick leave (i.e. more than 28 days). In doing so, the Claimant is more likely to have had her business interest removed than an officer who does not share her condition;*

13. *Did the Respondent treat the Claimant unfavourably because of any of the matters mentioned above? The Claimant relies upon the following alleged acts as instances of unfavourable treatment:*
    a. *Suspension, withdrawal and/or revocation of her business interest;*
    b. *Service of the Regulation 15 Notice of Investigation under the Police (Conduct) Regulations 2012;*
    c. *Investigation under the Police (Conduct) Regulations 2012;*
    d. *Bringing gross misconduct proceedings against the Claimant under the Police (Conduct) Regulations 2012.*

14. *Insofar as there was such treatment because of the Claimant's sickness absence, was this treatment a proportionate means of achieving a legitimate aim? The Respondent relies upon the following legitimate aims:*

    <u>Application of the Business Interest Policy</u>
    a. *Compliance with the purpose of the statutory regime found under the Police Regulations 2003;*
    b. *Enable appropriate decisions to be taken to ensure the reputation of the police service;*
    c. *Enable appropriate decisions to be taken to ensure the health, safety and wellbeing of police staff and officer; and*
    d. *Ensure police officers and staff continue to meet the Force Commitment of working together to make our communities safer.*

    <u>Application of the Misconduct Process</u>
    e. *Maintain a well-regulated and/or disciplined police service;*
    f. *Complying with the statutory Police (Conduct) Regulations 2012;*
    g. *Maintaining the public's confidence in the police service;*
    h. *Maintaining the reputation of the police service;*
    i. *Uploading high standards in policing and/or deterring misconduct; and/or*
    j. *Protecting the public*

15. *The Respondent contends these aims were proportionally achieved in that the aims:*

    <u>Application of Business Interest Policy</u>

a. *Corresponded with a real need of the Respondent's police force to properly manage those police officers with such business interests, and in particular with reference to the purpose of the relevant regulations under the Police Regulations 2003;*
b. *Were appropriate with a view to achieving the objectives pursued;*
c. *Reasonably necessary to that end; and/or*
d. *Achieved proportionally in that the Respondent was prepared to re-visit any such decision (including the decision concerning the Claimant) upon the provision of medical evidence.*

Application of misconduct process

e. *Corresponded with a real need of the Respondent's police force to properly manage, investigate and (where necessary) discipline those police officers suspected of misconduct;*
f. *Were appropriate with a view to achieving the objectives pursued;*
g. *Were reasonably necessary to that end; and/or*
h. *Achieved proportionally in that the Respondent would adopt any reasonable accommodations requested of him by the Claimant in relation to the misconduct process.*

Indirect Disability Discrimination (s.19 EqA 2010)

16. *It is admitted that the Respondent operates the following Provisions, Criteria or Practices ['PCPs']:*
    a. *The application of the Respondent's Business Interest Policy (PCP1);*
    b. *The application of the Respondent's misconduct procedures under the Police (Conduct) Regulations (in this case the 2012 Regulations) to matters of suspected Police Officer misconduct (PCP2)*

17. *Did the Respondent apply, or would it have applied, the PCP(s) to persons who did not share the Claimant's disability?*

18. *Did the PCP(s) put the persons who share the Claimant's disability at a particular disadvantage when compared with persons who did not share that disability?*

19. *If so, did the PCP(s) put the Claimant at that disadvantage by reason of her disability?*

20. *Has the Respondent shown that the operation of the PCP(s) was objectively justified, i.e. a proportionate means of achieving a legitimate aim? The Respondent relies upon the following legitimate aims:*

PCP1

a. *Paras 14-15 above are repeated.*

PCP2

a. *Paras 14-15 above are repeated.*

Constructive Dismissal (s.39, EqA 2010)

21. Do the above acts of disability discrimination amount to repudiatory breaches of contract by the Respondent on the basis that the Respondent has breached the implied term of trust and confidence, such breach constituting a further discriminatory act? The Respondent contends that, as pleaded, the Claimant has no claim of constructive dismissal, s.39 not being a cause of action under the Equality Act 2010.

22. By her resignation on 14 January 2020, did the Claimant accept the breach and accordingly the termination of her employment amounts to a discriminatory dismissal within the meaning of section 39(2)(c) and (7)(b) of the EqA 2010?

Findings of fact

18. We make the following findings of fact based on the evidence we heard and read. We do not attempt to include everything that we heard about during the hearing. We set out here the facts which we have found of most assistance in deciding the issues we have to decide.

Introduction

19. Police officers are office holders, not employees (although they are deemed employees for the purposes of the Equality Act 2010, we return to this in our conclusions below). Police officers act under the direction and control of the chief constable. There is a ranking system and command structure in place from the rank of constable to the rank of chief constable.

20. The terms under which police officers serve are set out in statutory instruments, including the Police Regulations 2003. Officers are bound by Standards of Professional Behaviour contained within statutory conduct regulations. The Police (Conduct) Regulations 2012 are the relevant conduct regulations in this case. The respondent has its own policies which set out the procedure in Thames Valley Police in respect of some of these regulatory aspects, however the statutory provisions always take precedence.

21. The claimant's service as a police officer with the respondent began in May 2004. She had five years previous service as a police officer with Devon and Cornwall Constabulary.

22. The claimant was promoted to sergeant on 18 October 2004. She worked as an acting patrol inspector for 18 months in 2014/15. In late 2015, struggling with burnout, depression and anxiety, she relinquished acting inspector duties, and returned to a role as a neighbourhood sergeant. She was certified unfit for work because of depression, and took an extended period of sick leave. She returned to work in April 2016 on a phased return and with counselling support provided by the force. The respondent's

occupational health unit provided support to the claimant over a period of around 18 months from November 2015 to April 2017.

23. The claimant had exemplary service. She had never been subject to a complaint before the matters in this case.

The claimant's safeguarding role

24. In early 2017 the claimant began preparing to move to a new role as a safeguarding sergeant for Cherwell and West Oxfordshire Local Policing Area. The working pattern was Monday to Friday.

25. The role involved working with young people who were subject to child sexual exploitation and child drug exploitation. In April 2017 the claimant's fitness to do the role was assessed by occupational health. The occupational health nurse confirmed that the claimant could fulfill the safeguarding role, but raised the question of whether annual psychological screening would be beneficial for her (page 588). The claimant began the new role on 1 June 2017.

26. The safeguarding role was an important and challenging role. It required the claimant to work closely with young people and families who were going through the most difficult circumstances. It was clear to us from the evidence we heard and read that the claimant was a dedicated and highly regarded officer and that she performed this very challenging role in a highly effective and professional way. The claimant was highly empathetic in her dealings with young people and their families; she had a way of helping people to see things from the victim's perspective. She was regularly commended for excellent work. In November 2017 she was awarded a commendation from the commander of the Local Policing Area for her hard work on an operation safeguarding vulnerable people. In November 2018 she received an Operation Champion award for performing her role to a consistently high standard (page 1306).

27. The work associated with the role was emotionally intense, and at times the workload and competing priorities became overwhelming for the claimant (page 794). In 2018 her mental health began to deteriorate, and she began experiencing panic attacks.

28. In May 2018 the claimant began experiencing PTSD symptoms which were related to trauma she had experienced in her past. She made a report to another force as a victim of serious historic offences. The other force began an investigation.

The claimant's application to have a business interest

29. The claimant had been advised by the occupational health nurse that having other interests and hobbies could help her to manage the intensity of her work as a police officer, and could benefit her mental health and wellbeing. To put this advice into practice, the claimant took steps to be proactive in managing her mental well-being. This included doing creative hobbies and activities which she found helped her to relax and took her mind off things. In summer 2018 the claimant began thinking about setting up a small

party/events business alongside her role as a police officer. She thought that the business could be a positive outlet to help her cope with her difficult role as a police officer.

30. Carrying on a secondary business is a type of 'business interest' within regulation 7(2) of the Police Regulations 2003. Police officers who want to have a business interest have to apply for permission from their force, in accordance with a process set out in regulations 6 to 9A of the Police Regulations 2003 (page 120).

31. In summary, the first step of that process is for the officer to notify the force of the proposed interest. The force then considers whether the business is compatible with the officer remaining a member of the police force. The officer has the right to appeal if the force's decision is that the business is not compatible with remaining a police officer.

32. Thames Valley Police has a written policy on business interests. The policy which was in force at the relevant time was dated February 2018 (page 176). The policy recognised that the business interests provisions in the Police Regulations 2003 impose restrictions on the private lives of police officers, and explained that:

> "The main principle of this policy is that, unless there is good reason not to, business and external interests will be approved.

33. At the time the events in this claim took place, Detective Chief Superintendent Paine was the head of the respondent's Professional Standards Department, the department whose responsibilities include considering the business interests of police officers. Detective Chief Superintendent Paine described this policy principle as a rebuttable presumption in favour of a business interest being approved. His approach was that this principle should apply when a previously granted business interest permission is being reviewed, as well as when permission to conduct a business interest is initially requested.

34. On 16 September 2018 the claimant completed the application form to ask for permission to set up a business (page 831). She described the nature of the work as being to 'provide decorated themed indoor and outdoor tents for hire'. She estimated that she would spend 8 hours a week on the business. She gave her reason for wishing to set up the business as follows:

> "Having had a difficult few years I wanted to be involved in something that provides happiness to people and where I can use my creativity. I feel that this will benefit my mental wellbeing."

35. The claimant's application was supported by her line manager, Inspector Wendy Percival (page 830, 834). It was sent to the respondent's Professional Standards Department (PSD) on 28 September 2018.

36. On 1 October 2018 the claimant was notified that her application was authorised (page 835). Her business was considered to be compatible with her remaining a member of the force. The decision was taken by Hollie Roberts, the Force Security Advisor. The record of the decision noted that

business interest authorisations are reviewed on a regular basis and that continued authorisation would be influenced by good performance and sickness records (page 836).

37. Once authorised, the claimant, began working on the business. Her husband helped with the business in his time outside his job.

38. The claimant found working on the events business was highly beneficial to her mental health. In particular, it gave her the opportunity to work with families at happy times, such as parties or weddings, in contrast to her police role where she was working with families going through the most difficult times. The claimant found that making people happy made her happy, and that the positive and uplifting nature of the work she did for her events business balanced out the difficult and darker side of life that she saw though her police work. The claimant's involvement with her events business led to an improvement in the claimant's mental health, and she was able to reduce the dosage of her medication by half. The improvement in the claimant's mental health also enabled her to better carry out her very challenging police role.

The claimant's sickness absence

39. In February 2019 the claimant was told that the investigation by the other force into the historic offences she had reported was to be closed. The claimant was devastated by this outcome. She felt the investigation had been poorly handled and she made a formal complaint against the other force.

40. In April 2019, while she was on holiday, the claimant learned that a vulnerable young person she had been working with had died. The claimant was very badly affected by this. On her return from holiday she could not face returning to work, and she took more annual leave. She was then signed off work by her GP from 9 May to 23 May 2019.

41. The GP certificate recorded 'stress at work' (page 851). The trigger for this episode of sickness absence was the death of the young person the claimant had been working with. The claimant's medical history of depression, anxiety and PTSD meant that she was vulnerable to episodes of depression and anxiety being triggered by stress at work. This episode led to her being unfit for her police work. She was however still able to work on her events business because that work did not trigger her mental health issues. In fact, it was therapeutic and helpful for her recovery. We reach these findings based on the claimant's therapy reports which highlight the complex interaction between the claimant's mental health and her professional role (page 1346 to 1349) and on the claimant's evidence, including her evidence of the advice she received from occupational health about the benefit of hobbies and interests.

42. The claimant was referred to occupational health on 15 May 2019 (pages 852, 1342).

43. At about this time, the claimant's line manager changed. Her new line manager was Inspector Craig Entwistle. He was told that she was signed off sick until 23 May 2019 but was intending to return after that (page 852). He made initial contact with the claimant by email on 15 May 2019 (page 855). His email was reassuring and supportive. In terms of next steps, he suggested the claimant should, 'Maybe drop me a line sometime soon or give me a call on my mobile below. Hopefully we can have a chat soon'. He said that he would be going on annual leave shortly, until 28 May 2019.

44. On 16 May 2019 Inspector Entwistle emailed the claimant again to say that if they did not get the chance to catch up before his leave, he looked forward to seeing her when she was back. He said that she should contact Chief Inspector John Batty if she needed anything in his absence (page 854).

45. On 24 May 2019, the day after her sick note expired, the claimant was not at work. Chief Inspector Batty called her. She confirmed that she had booked annual leave for 24 to 27 May 2019 some months before. She said she would be back at work on 28 May 2019, after her annual leave. As it turned out, the claimant was not well enough to return on 28 May 2019 (page 857).

46. On 5 June 2019 Inspector Entwistle emailed the claimant again (page 859). He asked her to text or email him to touch base. The claimant replied by email late that evening. She had been signed off sick by her GP until 10 June 2019. She said she had managed to miss her occupational health appointment as she was confused about the date, but would rearrange it.

47. Inspector Entwistle replied to the claimant's email the following day (page 858). He said it would, 'Be good to catch up with you please'. He gave a number of options: if she was back at work on 10 June they could catch up then, or they could meet for a cup of tea, or they could meet on 11 June when he would be in Banbury. He said he was, 'a bit worried about providing a consistent line of contact for you whilst [you're] off work'.

48. This last comment was a concern about the contact the respondent was providing to the claimant (not vice versa). This concern was understandable in the context of Inspector Entwistle having been on annual leave very shortly after taking over as the client's line manager. Inspector Entwistle did not tell the claimant in his email that he was worried that the claimant had not established a consistent line of contact with him.

49. The claimant did not return to work on 10 June 2019 as she was signed off sick again by her GP.

<u>The review of the claimant's business interest</u>

50. At around this time, the permission which the claimant had been given to carry out a business interest was reviewed. Paragraph 4.2.1 of the respondent's policy on business interests provided that all approved business and external interests are subject to review (page 180). The purpose of a review is to assess whether a business and external interest

which has previously been authorised has become incompatible with working for Thames Valley Police.

51. In the claimant's case, the review was triggered by her absence on sick leave. Paragraph 4.4.6 of the policy said:

> "PSD will review business and external interests when a member of staff has been absent through sickness for over 28 days or is on restricted and recuperative duties."

52. Ms Roberts had responsibility for business interest reviews as well as initial applications. On 4 June 2019 Ms Roberts sent an email to Inspector Entwistle in his capacity as the claimant's line manager (page 860). She explained that the claimant's business interest had come up for review and she asked him some questions about it. Ms Roberts followed up by sending a copy of the file to Inspector Entwistle on 6 June 2019 (page 860).

53. Inspector Entwistle emailed Ms Roberts later on 6 June 2019 to reply to her questions (page 862). Even though the claimant had emailed Inspector Entwistle the evening before, and he had replied to her earlier that morning, Inspector Entwistle did not tell the claimant that there was a review of her business interest being carried out. He did not ask her about any of Ms Roberts questions before replying to Ms Roberts.

54. In his email to Ms Roberts, Inspector Entwistle said he had carried out a quick search on Facebook which showed that the claimant's business interest remained active while she was absent from work with stress and anxiety. He gave a list of the activities over a period from 2 May to 26 May and said there were others, the most recent being about four hours previously.

55. His email continued:

> "Sickness review unable to be conducted at this time as limited contact with [the claimant] at this time
>
> 2. I am surprised to see that for someone unable to attend work due to what I assume is work related stress [the claimant] has missed an OHU appointment, yet managed to make two posts on [Facebook] regarding her business on this day. My opinion about this is made on an ethical level rather than medical opinion. I feel it is unsuitable to be running an active business whilst unable to fulfil your obligations to your employer.
>
> 3. I have not been able to establish consistent contact with [the claimant] at this time (I have received my 1st brief email from [the claimant]). I am unable to comment on any detrimental effect this may have on her wellbeing.
>
> Could I seek some advice/severity assessment on the temporary withdrawal of this business interest based on the activity of the business and [the claimant's] current situation. The [Facebook] messages are upbeat and happy, which one would expect from this

> line of work. However my understanding is that Kat is suffering with stress or anxiety and my concern is the detrimental effect this withdrawal may have on Kat's wellbeing and contribute additional stress."

56. We note two things about this email. First, the references to limited contact and inability to establish consistent contact suggested that Inspector Entwistle had had difficulty getting in touch with the claimant. This was not the impression we had from the email correspondence between Inspector Entwistle and the claimant. At the time of his email to Ms Roberts, Inspector Entwistle had emailed the claimant three times. His first two emails did not suggest that the claimant needed to reply with any urgency, which was understandable as she was on sick leave and he was about to go on annual leave. In the third email Inspector Entwistle asked the claimant to contact him, and the claimant had replied the same day. This was the evening before Inspector Entwistle sent his email to Ms Roberts. Although Inspector Entwistle had raised concerns about 'consistent contact' in his email to the claimant, this was a concern about the contact the force was providing to the claimant, not the contact the claimant was providing to the force.

57. Secondly, it was clear from Inspector Entwistle's email that there may be medical issues arising from the review of the claimant's business interest, and that Inspector Entwistle was saying that he was not in a position to assist with those issues. He said he did not know the reason for the claimant's sickness absence and could only assume that it was due to work related stress. He said he could only offer an ethical rather than a medical opinion: this was a general comment about the suitability of having an active business while unfit for police work. (Inspector Entwistle knew nothing about the claimant's complex mental health issues or the reasons for her setting up her business, including the advice she had had about balancing her police role with something positive to support her mental well-being, so he could not and did not comment on her individual circumstances.) Importantly though, he said that he was concerned about any detrimental effect which the withdrawal of the business interest could have on the claimant's wellbeing, but that he was unable to comment on this. In this context, Inspector Entwistle requested some advice or a severity assessment of the temporary withdrawal of the business interest.

58. On the same day that he sent this email, Inspector Entwistle updated Chief Inspector Batty to say that Ms Roberts was inclined to remove the claimant's business interest permission because she was engaged on her activity whilst absent from work with stress/anxiety, had missed an occupational health appointment, and there was a lack of meaningful contact (page 865).

59. On 8 June 2019 the claimant contacted Inspector Entwistle to let him know that she had a GP appointment for 10 June 2019 and that she would update him after the appointment.

60. On 10 June 2019 Ms Roberts emailed Inspector Entwistle (page 867). She said:

> 'In terms of withdrawing the business interest, I really need to know first if [the claimant] has returned to work today. If she hasn't I am …happy to send the withdrawal…'

61. Inspector Entwistle replied to say the claimant had not returned to work and he was unsure when she would be returning. It was thought that the 'most likely outcome' was that she would be signed off sick again (page 866).

62. Ms Roberts went ahead with the review decision and decided that the claimant's permission should be withdrawn with immediate effect. Ms Roberts emailed Inspector Entwistle with a copy of the letter which was to be posted to the claimant to notify her of the withdrawal of her business interest (page 870 and 871). The letter gave the following reasons for the withdrawal:

> "It is important to us that your health and wellbeing is the number one priority and we do not want any added additional stress delaying your return to work.
>
> I conducted some checks and can see that you have been actively carrying out your business interest whilst off sick, which could be impacting on your return.
>
> We are a public facing organisation and the public would expect our staff to be able to carry out their contracted role ahead of any business interest.
>
> I have liaised with your line manager Inspector Craig Entwistle who has informed me there has been a lack of communication and you did not attend your occupational health appointment. It is important that your line manager is aware of your circumstances … to help you with an appropriate return to work plan."

63. The letter explained that the claimant had a right of appeal.

64. The reasons given by Ms Roberts include reasons which would apply in general to any police officer conducting a business interest while off sick (that is, the claimant had been actively carrying out a business interest whilst off sick, and there is an expectation to carry out the contracted (police) role ahead of a business interest).

65. Ms Roberts' comments in the letter about additional stress arising from the business interest, and about the possibility of the business interest delaying or impacting on the return to work are not based on any specific evidence about the claimant. At the time the withdrawal decision was made and the letter was sent to the claimant, Ms Roberts herself had no knowledge of the claimant's history of depression and anxiety. She had not made any enquiries with occupational health. She had not obtained advice or conducted a severity assessment of the possible impact of the withdrawal on the claimant's wellbeing, as suggested by Inspector Entwistle. Ms Roberts had decided that, as she had no information to work off as to whether withdrawal of the business interest permission would be detrimental or beneficial to the claimant's well-being, she should assess the review on

the information she had to hand. She decided that she was not left with any alternative but to withdraw permission with immediate effect.

66. The only reasons relied on in the letter which are specific to the claimant are to do with the lack of communication with her line manager and failure to attend an occupational health appointment. However, Ms Roberts did not have a full understanding of the position on this, as Inspector Entwistle's email did not fully reflect the email correspondence between him and the claimant.

67. At the time of her decision, Ms Roberts had not spoken to the claimant or given her any opportunity to comment on the withdrawal of permission or the grounds on which it was based. Ms Roberts told us in her evidence that when she was considering an application for permission for a business interest, if she had questions or concerns, she would try to arrange a meeting with the applicant and their line manager, to ensure full understanding of the proposed business interest. However, she adopted a different process when considering whether permission which had already been granted should be withdrawn. She would not normally have a meeting at that stage.

68. Also on 10 June 2019, Ms Roberts informed the respondent's Counter Corruption Unit, part of PSD, about the claimant's case. An investigation was opened and allocated to a member of the Counter Corruption Unit. An enquiry log was set up (page 1232).

69. At her appointment with her GP on 10 June 2019 the claimant was signed off work again until 24 July 2019.

70. The claimant received the letter notifying her of the withdrawal of her business interest on 12 June 2019.

71. On 13 June 2019 the claimant emailed Inspector Entwistle. She said that she was not trying to be awkward by not being in regular contact but that she would prefer to have contact with an inspector that she knew, such as Detective Inspector Capps or her previous line manager Inspector Percival (page 879). In relation to the withdrawal of the permission to carry out her business, she said:

> "I see you have withdrawn my business interest - this was my happy and creative distraction that has now been taken away. I'm not sure this will promote a faster return to work but rather a spiral into deeper depression. That said, I do understand some would consider I am taking the mick."

72. In the claimant's circumstances and given the history and nature of her health issues, the withdrawal of the claimant's business interest permission detrimentally affected her health and well-being and was likely to delay her return to police work rather than to speed it up.

<u>The appeal against the withdrawal of the business interest permission</u>

73. The claimant appealed against the withdrawal of the permission to have a business interest. On 17 June 2019 at 9.25am she sent an email to Ms Roberts and to Detective Chief Superintendent Colin Paine who is the respondent's Head of Professional Standards (page 880). In her appeal she explained some of the difficulties she was experiencing including depression, anxiety and PTSD. She mentioned the investigation into the historic offences she had raised as a victim of crime. She said that her current role for the respondent was very pressurised and emotive. She said:

> "As you can imagine, I have a lot of traumatic experiences that I am dealing with at the moment. My way to manage on a day to day basis is to distract myself with other things and the business helps me to do this - by creating beautifully decorated tents for happy events it helps me to focus on positive things rather than the difficult situations faced by many of the families I work with."

74. She ended by saying:

> "It is not the case that I am off sick busy with my business interest and just ignoring everyone. I feel this is most unfair and ask that Thames Valley Police support me rather than punish me."

75. Ms Roberts acknowledged receipt of the appeal at 14.24 on the same day (page 882). At 15.08 Ms Roberts sent the claimant another email which attached a letter from Detective Chief Superintendent Paine with the business interest appeal outcome (page 883). The appeal was not upheld. The reasons given by Detective Chief Superintendent Paine for this decision were:

> "You are currently off work with sickness, but continue to be paid by Thames Valley Police. It is my view that the public would expect police officers who are off sick to also cease any secondary business interest; if an officer is not well enough to continue police work then they are not well enough to continue their own business. To do otherwise could lead to a perception that you are furthering your own business interest at the expense of your paid role as a police officer."

76. Detective Chief Superintendent Paine made his decision without having any meeting or conversation with the claimant. He followed the respondent's business interest policy when conducting the appeal. However, the respondent's policy and Detective Chief Superintendent Paine's approach in this case did not properly reflect the statutory procedure set out in regulation 9 of the Police Regulations 2003.That regulation requires the force to give the officer 'the opportunity to make representations in writing, at a meeting, or both, at the discretion of' the officer.

77. The respondent's policy also explained that policy reviews would take into account changes to Association of Chief Police Officers' (ACPO) Guidance (page 185). ACPO guidance on business interests remains in place (although ACPO has since been replaced by the National Police Chiefs' Council). The ACPO Guidelines refer to the officer's right to make oral representations on appeal, reflecting the statutory procedure in regulation 9

of the Police Regulations 2003 (page 159). The ACPO guidelines also explain the relevance of an officer's sickness absence, saying:

> "When a member is absent from work on sick leave or returns to work on restricted or recuperative duties, consideration should be given to suspending approval for the business interest, providing the medical issue is related to the business interest or additional occupation so as to make it relevant."

78. When making his decision, Detective Chief Superintendent Paine did not think about whether the claimant's medical issue was related to her events business so as to make it relevant. He did not consider whether it would be possible to allow the permission to remain in place, subject to conditions.

79. The claimant had 24 bookings for her business at the time the respondent withdrew permission. Because of the short notice, Detective Chief Superintendent Paine allowed her to honour the first of these which was due to take place a few days later on 22 June. The claimant was told that the other commitments would have to be rescinded or undertaken by someone else. The claimant's husband, David Hibbert, resigned from his job so that he could take on more work for the events business.

Steps taken after the withdrawal of permission for the business interest

80. On 18 June 2019 Mr Hibbert emailed Ms Roberts to ask for the withdrawal of the business interest to be reconsidered (page 885a). He said:

> "I understand the view given in relation to perception of the public of an officer working while off sick, and receiving wages but not actually carrying out their role. However in this case I believe her business interest will actually benefit TVP as it provides her with an outlet for the stress she feels over her role and with the Police service as a whole, and will ultimately help her return to work a more balanced and happy individual."

81. Mr Hibbert explained to Ms Roberts that the events business benefitted the claimant's mental health. He suggested that:

> "The business we have started provides [her] with a diversion away from the troubles in the police and her own private life. She gets an enormous amount of self worth and feels valued by the compliments given over the product we provide and the people we deal with, it makes her happy and gives her a real boost. To take that away completely I believe will harm her recovery and will ultimately lengthen the time she is off sick."

82. He suggested that the claimant could be allowed to carry out the admin for the business and on occasion help at weekends as this would be outside her working hours with the respondent. He also said that he would be asking the claimant's GP for a medical perspective.

83. On 19 June 2019 Ms Roberts replied to Mr Hibbert (page 887). She said that if the claimant could provide medical evidence from her GP or

occupational health that undertaking the business interest would assist with the claimant's mental health, then Detective Chief Superintendent Paine would review his decision. Detective Chief Superintendent Paine was anticipating that if medical evidence could be obtained by the claimant, he could have a discussion with the claimant and try and find a way to allow the business to continue, with conditions such as withdrawing from Facebook and not conducting any activity in the public eye. However, he did not think it was possible to consider this without the claimant providing medical evidence.

84. Mr Hibbert suggested that a temporary hold be placed on the withdrawal of the authorisation until medical reports were received (page 886). He said this would relieve the anxiety the claimant was feeling. Ms Roberts said the appeal outcome would only be reviewed once medical reports were received (page 886).

85. Ms Roberts provided an update to occupational health on 19 June 2019 (page 897). She said this was for information only. The client manager of the occupational health unit replied to Ms Roberts the following week (page 896). She said that occupational health would not be in a position to provide a clinical opinion in relation to a business interest. They would only be able to advise in relation to the health of the individual and their police role The advisor added:

> "Although it is evidenced that spending time on activities and hobbies can help sustain or improve mental health and well-being, the activity related to the business interest mentioned is not something the nurse is in position to measure in respect of the clinical condition and how that relates to remaining in or returning to work."

86. This comment appears likely to have been made without input from the occupational nurse who was supporting the claimant, and who had specifically advised the claimant that spending time on other activities would help her to manage her police role.

87. Mr Hibbert spoke to the claimant's GP to ask if he could provide evidence about the therapeutic benefit to her of the events business. The GP said he was not qualified to give that opinion.

88. On 23 June 2019 the claimant terminated her appointment as a director of the events business (page 893).

89. At about this time, Inspector Percival started acting as a point of contact for the claimant. She had a welfare meeting with the claimant on 10 July 2019 and they discussed the withdrawal of the business interest permission. Inspector Percival followed this up with emails to Inspector Entwistle on 12 and 15 July 2019 (pages 903 and 908). She said the claimant accepted that 'she should not be out on the ground mixing with the public', but:

> "She would like permission to continue with creating and theming party tents (I understood this to be a remote position as opposed to public

facing) as part of her mental health recovery. [She] plans on discussing it with the doctor for their opinion."

90. Inspector Percival's emails and suggestions were not acted on. The complete withdrawal of permission remained in place.

91. Ms Roberts kept the claimant's case under regular review, including contacting Inspector Entwistle for updates and checking the events business's social media posts (pages 906 and 916, 902e).

The claimant's health at this time

92. On 15 July 2019 the claimant was signed off sick again by her GP until 26 August 2019 (page 910). She gave a copy of her sick note to Inspector Entwistle.

93. On 7 August 2019 the claimant heard the outcome of her formal complaint concerning the investigation by the other force of the historic offences she had reported. The claimant's complaint was upheld and the investigation was reopened. She was required to give a video interview about the case. This added to the stress and pressure the claimant was under.

94. On 14 August 2019 the claimant attended an appointment with the force's chartered psychologist, Noreen Tehrani. It was a long and intense consultation. The focus was on the claimant's mental health, getting back to work, and how she could manage her mental health issues in her role dealing with child exploitation. The nature of the discussion and the way the consultation evolved meant that the claimant did not ask Dr Tehrani for her opinion about the therapeutic benefit of the events business.

95. After the consultation Dr Tehrani produced an assessment report (page 593). The claimant was diagnosed with Complex Traumatic Stress Syndrome. She had 'very high levels of anxiety, moderate depression, burnout and high levels of primary, secondary and complex trauma'. She was referred for a course of trauma therapy which was funded by the respondent and Dr Tehrani said she would need welfare support until her case was resolved. The claimant's therapy sessions took place between 28 August 2019 and 9 January 2020. She had additional sessions on a privately funded basis. The claimant found the therapy helpful and her therapist reported mid-treatment that she was doing well (page 1346). At the end of the programme, the therapist said that the claimant's had been a complex and demanding case which had involved a lot of case supervision (page 1349).

96. The claimant remained on sick leave having been signed off sick again by her GP on 21 August 2019 until 30 September 2019 (page 924). The claimant hoped that she would be able to return to work on 1 October 2019.

97. On 1 September 2019 Inspector Entwistle moved roles and Inspector Percival took over as the claimant's line manager (page 925).

98. On 9 September 2019 Inspector Percival spoke to Ms Roberts to let her know that the claimant was intending to return to work on 1 October and to

ask if the claimant could carry out the arts and crafts side of the events business as therapy, but not be involved in the public facing parts of the role. Ms Roberts discussed this with Detective Chief Superintendent Paine. He wrote to the claimant on 10 September 2019 (page 930). He had considered Inspector Percival's suggestion. He said that the force's position remained the same, and that her business interest was still unauthorised. He said he would review this if medical evidence of therapeutic benefit was provided.

Conduct investigation

99. In the meantime, the Counter Corruption Unit had been continuing the enquiry into the claimant's activities which it had started on 10 June 2019.

100. The enquiry found (and the claimant later admitted) that on 10 occasions during the period from 19 July 2019 to 28 September 2019, the claimant carried out some activities for the events business, mainly helping to set up and take down tents. She did so knowing that the respondent had withdrawn its permission for her to carry out this activity.

101. On 18 September 2019 the claimant's case was referred to Mark Weston. He is a support manager for PSD. His role includes carrying out assessments of alleged misconduct by police officers to decide whether the conduct, if proven, would amount to misconduct, gross misconduct, or neither of these. The outcome of the assessment determines whether there should be an investigation or other steps in relation to the alleged conduct, and if so, which is the relevant procedure to follow.

102. At the time the case was referred to him, Mr Weston did not know the claimant and had not worked with her. Mr Weston was provided with copies of relevant documents including the claimant's business interest application, approval, review, appeal and information supporting the allegation that the claimant had continued to work on events after the permission to do so had been withdrawn (pages 933 and 934).

103. Mr Weston assessed the claimant's case. He analysed the chronology of events and the information available to him and summarised this in an assessment report dated 18 September 2019 (page 956 to 958). He considered there to be potential breaches of the standards of conduct, specifically i) acting with honesty and integrity and ii) abiding by lawful orders and instructions. In his view, the conduct of the claimant in continuing to run a business after permission was withdrawn would, if proven, amount to gross misconduct and breach of the statutory Standards of Professional Behaviour to which police officers are subject.

104. After Mr Weston's assessment, on 22 September 2019, the respondent's PSD received an email from a member of the public (the wife of a police officer colleague of the claimant) (page 935). The member of the public said she wanted to report what she believed to be 'fraud and moonlighting' by the claimant, namely the continuation of her events business while she was on sick leave from her police role. The member of the public was not aware of the history or detail of the claimant's complex medical condition, or of the

importance of the claimant's events business for maintaining good mental health and helping her perform her police role. She was unaware that the claimant's current episode of mental ill health had been triggered by the claimant's police work. She wrongly thought that the claimant might be lying about being unfit for police duties, or that the claimant's work on the events business might have caused or contributed to her unfitness for duty.

105. In light of Mr Weston's assessment, the respondent started a formal investigation in respect of the claimant's conduct. The first step in this procedure is for the force to notify the officer that they are the subject of an investigation into an alleged breach of the Standards of Professional Behaviour, and to provide them with other information about the investigation and the procedure. The notification of these matters is done by giving the officer a written notice containing the relevant information. This step is required by regulation 15 of the Police (Conduct) Regulations 2012 and the written notice itself is usually called a regulation 15 notice.

106. On 1 October 2019 the claimant returned to work on a phased return and with the support of a temporary sergeant to help manage her workload.

107. The investigation into the alleged misconduct by the claimant was allocated to Tony Lees, an Investigating Officer in the respondent's PSD. On 4 October 2019, Mr Lees attended the claimant's place of work to serve her with the regulation 15 notice. The claimant was away from her office.

108. Mr Lees returned on 7 October 2019 and found the claimant alone in her office. He sat down and after a short discussion handed the claimant the regulation 15 notice. He said the claimant was under investigation for gross misconduct. The claimant was extremely upset. She began to experience a panic attack. She could not see or hear properly, her heart was pounding and she began to hyperventilate. She felt she had to remove herself from the situation and began throwing her belongings into her handbag. As she did so her emotions took over and she began crying, shouting and swearing.

109. The claimant left the office and went home without signing the regulation 15 notice. Her half hour drive home took two and half hours because she was so shocked and upset that she had to stop several times when it was not safe to continue. She went to see her GP and was signed off sick again until 31 October 2019 (page 1310). The trigger for this period of sickness absence was the service of the notice of the conduct investigation. It caused a relapse of the claimant's mental health issues.

110. On 10 October 2019 Mr Lees contacted the claimant's Police Federation representative. He said he would like to carry out a formal interview with the claimant on 21 October (page 983). The claimant's Police Federation representative replied to say that the claimant would submit a written response (page 990). He also sent Mr Lees a copy of the Regulation 15 notice signed by the claimant (page 992a).

111. On 23 October 2019 the respondent's occupational health department updated Mr Lees after a consultation with the claimant on 22 October 2019

(pages 1370 and 1371). A copy of a letter from the claimant's trauma therapist was attached (page 596). The therapist explained the claimant's diagnosis of Complex Post Traumatic Stress Disorder and said the claimant's therapy was continuing. She said the claimant could find it difficult to regulate her emotions, and was vulnerable to panic attacks, especially under stressful situations. She asked for this to be taken into account in the conduct investigation, so that the claimant could engage fully with the process.

112. On 25 October 2019 Thames Valley Police Federation contacted Detective Chief Superintendent Paine to raise the discrepancy between the appeal procedure as set out in the respondent's business interests policy, and the procedure required by the statutory Police Regulations 2003 (page 1001). The policy said that the officer 'may' be offered an appeal meeting, while the statutory regulations required that an officer 'shall' be offered an appeal meeting if they chose. The Police Federation suggested that Detective Chief Superintendent Paine restart the business interest review process, and send a new letter to the claimant rescinding her business interest permission, then offer an appeal in accordance with the procedure set out in the Police Regulations 2003. Detective Chief Inspector Zahid Aziz considered this and told the Police Federation that the conduct process would be continuing (page 999).

113. A new date of 6 November 2019 was set for the claimant's conduct interview and on 31 October 2019 she was given a formal order by Detective Chief Inspector Aziz to attend the interview (page 1002).

114. The claimant returned to work on a phased basis on 1 November 2019. She replied to Detective Chief Inspector Aziz to confirm that she would attend the interview. She said that she had challenged the legality of the withdrawal of her business interest permission, and the subsequent misconduct process. Detective Chief Inspector Aziz said that Detective Chief Superintendent Paine was aware of the issue about the business interest appeal process and that Detective Chief Superintendent Paine had directed that the conduct investigation should proceed nonetheless.

115. The claimant was interviewed under caution on 6 November 2019 (page 1008). The claimant provided a prepared statement in which she said that she had sought legal advice and that the failure of Detective Chief Superintendent Paine to follow Police Regulations in respect of the business interest appeal procedure made his appeal outcome letter of 17 June 2019 an unlawful instruction or order.

116. After the claimant's interview, the respondent's Counter Corruption Unit prepared an investigation report for consideration by the Appropriate Authority. The role of the Appropriate Authority is to decide whether there is a case to answer following a conduct investigation, such that the case should proceed to a conduct hearing.

117. Detective Chief Superintendent Paine would normally act as Appropriate Authority. Because of his earlier involvement in the claimant's case, it was decided that Fiona Courtney, support manager for PSD and job share

partner of Mr Weston, would act as Appropriate Authority. Ms Courtney had never met the claimant or had any previous involvement with her (other than being copied in to the request for the initial assessment which had been dealt with by Mr Weston, and the complaint email from the member of the public).

118. Ms Courtney was provided with the investigation report and appendices (pages 1077-1082). She reviewed the report and decided on 11 December 2019 that there was a case to answer in respect of breaches of the Standards of Professional Behaviour relating to i) honesty and integrity and ii) orders and instructions (page 1083). The claimant had continued to be actively involved in the business after permission to do so had been withdrawn by Detective Chief Superintendent Paine. Ms Courtney decided that the case should proceed to a hearing to consider whether there had been gross misconduct.

119. When the claimant was notified of the decision of the Appropriate Authority, she was mistakenly told that Detective Chief Superintendent Paine had acted as Appropriate Authority (pages 1085 and 1086). On 18 December and 19 December 2019 the respondent confirmed to the claimant's Police Federation representative and solicitor that Ms Courtney had acted as Appropriate Authority in the case (pages 1088 and 1100).

The claimant's resignation

120. On 14 January 2020 the claimant gave notice of her resignation from the force (page 1102). She said:

> "The Professional Standard department's investigation into my business interest, coupled with the police services' lack of interest in investigating a serious crime against me or making improvements for other victims, has had a deeply detrimental effect upon my mental health and my faith in the police service. My experience over the last year leaves me feeling that my voice will not be heard, and frankly I am not mentally strong enough to battle through a gross misconduct hearing. Thus for my own self-preservation I have decided to leave a job that I enjoyed and felt extremely passionate about."

121. The conduct investigation and the investigation of the serious crime reported by the claimant were two reasons for the claimant's resignation.

122. The claimant's experience of the previous year was another reason for her resignation. The claimant said, and we accept, that when referring in this letter to her 'experience over the last year' and her feeling that her voice would not be heard, the treatment she was referring to included the respondent's withdrawal of permission for her to have a business interest, the outcome of her appeal against that decision, and the respondent's failure to reconsider the decision despite requests to do so.

123. The claimant's last day of service with the respondent was 27 March 2020 (page 1102).

Conduct hearing

124. The conduct process continued after the claimant's resignation. Her conduct hearing was held on 22 June 2020 (page 1176). The case was to be heard by a misconduct panel with a legally qualified chair. It was dismissed by the chair of the panel before any evidence was heard. It was found not proven because of the failure to follow the Police Regulations 2003 in respect of the business interest appeal procedure (page 1252).

125. In his reasons, the panel chair explained the business interests approval and appeal procedures required by the Police Regulations 2033 (pages 1166 and 1167). He said that in this case he had found 'a catalogue of errors started by adopting the incorrect policy'. He saw the force in the respondent's submission that the panel should proceed with the case in any event, but decided in relation to the allegation of breach of the standard relating to orders and instructions that:

> "It cannot be said that it is fair to proceed against the former officer where the regulations have been substantially breached in a number of ways so as to make the decision unlawful. ... Had an appeal been heard in the manner described within the regulations and thus a hearing in person been adopted with assistance from the police Federation, then it is likely that medical evidence we now have before us could have been made available. We cannot know what decision would then have been taken. We can conclude that by not following the correct procedure the former officer was disadvantaged. It would be unconscionable for us to continue with this in mind."

126. In relation to the allegation of breach of the standards of honesty and integrity, the panel chair heard further submissions. He decided that there was no allegation of dishonesty specifically pleaded, and the allegations of breach of integrity and the breach of orders and instructions had been conflated and not separately averred. He concluded:

> "The findings we made regarding the unlawfulness of the order regarding the former officer's business interests means that to expect the former officer to now answer allegations not specifically pleaded would compound the unfairness she faces."

127. The respondent has since changed its policy on business interests so that it now reflects the procedure set out in the Police Regulations 2003 (page 1252).

Employment tribunal proceedings

128. The claimant notified Acas for early conciliation on 24 June 2020. The early conciliation certificate was issued on 24 July 2020.

129. The claimant's employment tribunal claim form was presented on 20 August 2020.

The Law

Police officers

130. Police officers are office holders, not employees. However, section 42 of the Equality Act 2010 provides that for the purpose of part 5 of the Equality Act (work), they are treated as employees of the chief constable, in respect of any act done by the chief constable. This includes acts done by delegates of the chief constable.

Disability

131. Disability is a protected characteristic under sections 4 and 6 of the Equality Act 2010.

Discrimination arising from disability

132. Section 15(1) of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if:

> *"(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."*

133. Section 15(2) says that:

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

134. In Pnaiser v NHS England and anor 2016 IRLR 170, EAT, Simler J summarised the approach to be taken under section 15. In relation to the the cause of the unfavourable treatment, she said (paragraph 31):

> *"The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*
>
> *(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant."*

Indirect discrimination

135. Section 19 of the Equality Act 2010 says:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

Failure to make reasonable adjustments

136. The duty to make reasonable adjustments comprises three requirements. In this case, the first requirement is relevant. This is set out in sub-section 20(3). In relation to an employer, A:

> *"(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

137. Under section 21, a failure to comply with the duty to make reasonable adjustments amounts to unlawful discrimination.

138. Under paragraph 20 of schedule 8 of the Equality Act, an employer is not subject to the duty to make reasonable adjustments for someone in their employment if they do not know and could not reasonably be expected to know:

> "*that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first…requirement."*

139. Paragraph 6.2 of the Equality and Human Rights Commission Code of Practice on Employment says:

> *'The duty to make reasonable adjustments is a cornerstone of the Act and requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers ... unfavourably and means taking additional steps to which non-disabled workers ... are not entitled.'*

Constructive discriminatory dismissal

140. Section 39 of the Equality Act prohibits discrimination in employment. Section 39(2) lists the ways in which an employer must not discriminate against an employee, and these include, at section 39(2)(c), 'by dismissing' the employee.

141. Section 39(7)(b) says that the reference at section 39(2)(c) to dismissal includes a reference to the termination of B's employment:

> *'by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice'*

142. This means that constructive dismissal is included in the type of dismissal which is prohibited. *Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27* set out the elements which must be established by the employee in constructive dismissal cases. The employee must show:

    142.1 that there was a fundamental breach of contract on the part of the employer;
    142.2 that the employer's breach caused the employee to resign; and
    142.3 that the employee did not affirm the contract, for example by delaying too long before resigning.

143. The claimant in this case relies on breaches of the implied term of trust and confidence. The implied term was explained by the House of Lords in *Malik v Bank of Credit and Commerce International SA 1997 ICR 606, HL* as a term to the effect that neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

144. Where there is more than one reason why an employee leaves a job, the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause. The issue is whether the repudiatory breach has played a part in the resignation (*Wright v North Ayrshire Council* UKEATS/0017/13/BI per Langstaff P).

145. In *Meikle v Nottinghamshire County Council* [2005] ICR 1, a case under the Disability Discrimination Act 1995, the Court of Appeal considered whether, in cases of constructive discriminatory dismissal, 'the act complained of' by the claimant is only the repudiatory conduct by the employer, or whether the acceptance by the employee of that conduct (ie the termination of the employment) is also an act of discrimination by the employer. The Court of Appeal concluded in paragraphs 52 and 53 that:

> *"the act complained of is the constructive dismissal which takes place when she accepts the repudiation by her employer. …*
>
> *an interpretation which acknowledges that not merely has the employer acted in a discriminatory way but also that this has led to the employee's loss of his or her job is appropriate. For all these reasons I*

conclude that the EAT was right to regard the constructive dismissal of [the claimant] as being in itself a discriminatory act under the DDA."

146. In *Redcar and Cleveland Primary Care Trust v Lonsdale* UKEAT/0090/12/RN, the EAT considered a case where a failure to make adjustments to a redundancy procedure led to the claimant's dismissal. The EAT accepted a submission that:

"having found a breach of the duty under s.20 the ET was bound to go on to conclude that the dismissal was inextricably linked with the failure to make that adjustment and was therefore an act of discrimination contrary to s.39(2)(c)."

147. HHJ Clark said (in paragraph 23) that, as a discriminatory element amounted to a significant factor in the dismissal, that was 'sufficient to amount to a discriminatory dismissal under s20(3) read with s39(2)(c).'

148. In *De Lacey v Wechseln Limited t/a The Andrew Hill Salon* [2021] IRLR 547, the EAT considered a case in which two acts of alleged discrimination were part of a course of conduct which led to a constructive dismissal. The EAT held that the ET had failed to consider whether the constructive dismissal itself was discriminatory. Cavanagh J explained the correct approach to this:

"In order to deal with this question, the Tribunal had to ask itself two subsidiary questions:

(1) Were any of the [events which gave rise to the constructive dismissal] themselves tainted by sex discrimination; and

(2) In light of the answer to (1), did the discriminatory matters sufficiently influence the overall repudiatory breach so as to render the constructive dismissal discriminatory? "

<u>Burden of proof in complaints under the Equality Act 2010</u>

149. Sections 136(2) and (3) provide for a shifting burden of proof in proceedings under the act:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) This does not apply if A shows that A did not contravene the provision."

150. This means that if there are facts from which the tribunal could properly and fairly conclude that there has been unlawful discrimination, the burden of proof shifts to the respondent.

151. In a complaint of failure to make reasonable adjustments, the burden shifts to the employer if the claimant demonstrates that there is a PCP causing a substantial disadvantage and there is evidence of some apparently reasonable adjustment that could have been made (*Project Management Institute v Latif* 2007 IRLR 579, EAT).

152. If the burden shifts to the respondent, the respondent must then provide an "adequate" explanation, which proves on the balance of probabilities that the respondent did not fail to make reasonable adjustments.

153. Where the burden shifts to the respondent the respondent can defend the claim by showing that it did not know the claimant was disabled, that the reason for the unfavourable treatment was not the 'something' alleged by the claimant, or that the treatment was a proportionate means of achieving a legitimate aim.

154. The respondent would normally be expected to produce "cogent evidence" to discharge the burden of proof. If there is a prima facie case and the explanation for that treatment is unsatisfactory or inadequate, then it is mandatory for the tribunal to make a finding of discrimination.

Time limits

155. The time limit for complaints of discrimination is set out in section 123 of the Equality Act. It says:

> *"(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a)the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b)such other period as the employment tribunal thinks just and equitable….*
>
> *(3) For the purposes of this section—*
>
> *(a)conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b)failure to do something is to be treated as occurring when the person in question decided on it."*

156. Each decision which results from a reconsideration can amount to a separate act of discrimination. A series of such decisions can amount to a discriminatory policy constituting conduct extending over a period in respect of a particular employee (*Cast v Croydon College* [1998] IRLR 318).

157. Section 140B allows for extensions of time to facilitate early conciliation. It says:

> *"(1) This section applies where a time limit is set by section 123(1)(a) or 129(3) or (4).*
>
> *(2) In this section—*
>
> *(a)Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement*

to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b)Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section."

Conclusions

158. We have applied these legal principles to our findings of fact to reach our conclusions in respect of the issues we had to decide. We have started by setting out our conclusions on the complaints of discrimination arising from disability and failure to make reasonable adjustments (in respect of the business interest policy first, then the misconduct procedures). We have next considered the complaints of indirect discrimination and constructive discriminatory dismissal. Finally, we consider the time limit.

159. As a police officer, the claimant was deemed to be an employee of the respondent for the purposes of the Equality Act by virtue of section 42.

Disability

160. The respondent accepts that the claimant was disabled at all material times by reason of her mental impairment, diagnosed variously as depression, anxiety and Complex PTSD.

Discrimination arising from disability in respect of the business interest policy

161. We have started with the section 15 complaint because we consider that the claimant's complaint about the withdrawal of her business interest permission is best understood as a complaint of discrimination arising from disability.

Something arising in consequence of disability

162. The claimant relied on her long-term sick leave as something arising in consequence of disability. The respondent accepts that long term sick leave, and therefore a greater likelihood of having permission for her

secondary business interest removed, was something arising in consequence of the claimant's disability.

163. (The claimant also said that "suffering from low self-esteem and paranoia, making it difficult for her to work alongside her colleagues" was something arising in consequence of her disability. We do not understand the claimant's case on this issue. We have not found that the claimant had low self-esteem and paranoia which made it difficult for her to work alongside her colleagues. Also, we have not found that the respondent took steps under its business interest and misconduct procedures because the claimant had low self-esteem or paranoia, or because she found it difficult to work alongside her colleagues. The complaint based on this 'something arising' in consequence of disability fails.)

Unfavourable treatment

164. We have next considered whether, in relation to the respondent's business interests policy, the claimant was subjected to unfavourable treatment. The unfavourable treatment relied on by the claimant is the suspension, withdrawal and/or revocation of her business interest. We understand each of these terms to be referring to the same thing. Nothing turns on the difference in terms. 'Withdrawal' probably best describes the treatment complained of, because it was the word used by Ms Roberts and Detective Chief Superintendent Paine when conveying their decisions to the claimant.

165. In our findings of fact, we found that the permission which the respondent gave the claimant to conduct a secondary business interest was withdrawn by the respondent on 10 June 2020. An appeal against the decision was refused on 17 June 2020. The decision was reconsidered and refused again on 10 September 2020. We regard the withdrawal as including each of these decisions.

166. The respondent suggested that the withdrawal of the claimant's business interest permission was favourable treatment, because it was to protect the claimant's health and wellbeing or (indirectly) to protect her reputation as a police officer. Although it is possible that withdrawal of permission to conduct a business interest might be protective of an officer in some circumstances, in this case it was not. There was no evidence of any risks to the claimant's health or wellbeing from her business. The claimant did not want to stop her involvement in the business. She found it therapeutic. She had asked for permission in the first place as she felt the business would help her mental well-being. We do not consider that the fact that reputational issues affected the claimant as an individual officer as well as the respondent's force more widely made the respondent's treatment of the claimant favourable treatment. Those reputational issues are more relevant to the question of whether the treatment was a proportionate means of achieving a legitimate aim. The withdrawal of permission for the claimant to carry out a business interest was unfavourable treatment by the respondent.

Treatment 'because of' something arising

167. The respondent accepts that this treatment was because of something that arose from the claimant's disability, namely her long-term sick leave. It is entirely clear from the facts as we have found them that the reason for the review of the claimant's business interest, and the reason for the withdrawal of permission to conduct it, was the claimant's long-term sick leave.

Proportionate means of achieving a legitimate aim

168. As we have concluded that the withdrawal of the business interest permission was unfavourable treatment of the claimant because of something arising in consequence of her disability, we need to decide whether the respondent can show that the treatment, namely the withdrawal of permission for the claimant's business interest, was a proportionate means of achieving a legitimate aim. This is the key question in relation to this complaint.

169. The respondent relies on the following as legitimate aims:

    169.1 compliance with the purpose of the statutory regime found under the Police Regulations 2003;
    169.2 to enable appropriate decisions to be taken to ensure the reputation of the police service;
    169.3 to enable appropriate decisions to be taken to ensure the health, safety and wellbeing of police staff and officers; and
    169.4 to ensure police officers and staff continue to meet the Force Commitment of working together to make our communities safer.

170. Those are clearly legitimate aims. However, we have concluded that the withdrawal of the claimant's business interest permission was a not proportionate means of achieving those aims. We reach this conclusion for three main reasons. Firstly, the procedure the respondent adopted was not proportionate, for the following reasons:

    170.1 Ms Roberts made the decision to withdraw permission without giving the claimant the opportunity to comment on the withdrawal or the grounds on which it was based. The claimant was unaware the permission was being reviewed until she was notified of the withdrawal. Despite having questions and concerns (for example she was unclear about the impact withdrawal would have on the claimant's well-being), Ms Roberts did not arrange a meeting with the claimant or try to speak to her. In choosing not to meet with or speak to the claimant, Ms Roberts took a different approach to the approach she would normally take at the application stage if she had questions or concerns. It would have been proportionate to have given the claimant the opportunity to comment on the proposed withdrawal before making the decision.
    170.2 When considering the claimant's case on appeal, Detective Chief Superintendent Paine failed to comply with the requirements of the statutory regime under the Police Regulations 2003 in that the claimant was not given an opportunity to make representations at a meeting. It was not proportionate to make the appeal decision

without giving the claimant the opportunity to make representations, especially as this was required by the statutory procedure for business interest appeals.

170.3 The speed in which the appeal decision was taken (within one working day) suggests that the appeal was not given careful consideration. As the reason for the decision was long term sickness absence, that would have flagged up the potential for disability discrimination. It would have been proportionate to have taken more time to make sure that the decision was not discriminatory.

171. Secondly, the reasons relied on by the respondent do not support a conclusion that withdrawal of the permission was necessary to meet the respondent's aims:

171.1 Ms Roberts' relied on generic reasons for withdrawing permission in a way which was not consistent with the respondent's policy. The policy provided for review of permission in cases of sick leave, not automatic withdrawal of permission. Ms Roberts relied on reasons which would apply to every officer continuing a business interest while on sick leave (the officer being actively involved with the business while on sick leave, and the public's expectation that an officer would carry out their police role ahead of any business interest). In providing for a review rather than automatic withdrawal, the policy clearly did not consider these to be necessary reasons for withdrawal of permission.

171.2 Ms Roberts also relied on the lack of communication between Inspector Entwistle and the claimant, however the email correspondence did not suggest a lack of communication on the claimant's side. It would have been proportionate for Ms Roberts to have tried to contact the claimant, either directly or via Inspector Entwistle, before relying on lack of communication as a reason for withdrawing her business interest.

171.3 Ms Roberts relied on health reasons without any medical basis for doing so. She said that withdrawal of permission would avoid additional stress delaying the claimant's return to work. Ms Roberts formed the view that withdrawal would have this effect without any evidence to support this, and without any knowledge of the claimant's history of mental ill-health. She took no steps to investigate the medical position despite Inspector Entwistle having made her aware of the possibility that withdrawal could have the opposite effect (that is, it could have a detrimental effect and contribute additional stress). In fact, withdrawal of permission did not achieve the respondent's third legitimate aim (of ensuring the health, safety and wellbeing of police officers). Instead, it had a detrimental effect on the claimant's health and well-being.

171.4 Ms Roberts' decision that, in the absence of information about the likely impact on the claimant's well-being she would have to withdraw permission, was not consistent with the main principle of the respondent's policy. The policy said that, unless there was good reason not to, business interests would be approved. That

presumption applied equally to reviews of business interests, as to initial applications (and perhaps more, given that the impact of withdrawal of permission is likely to be even greater for an existing business than for a proposed business).

171.5 Further, Ms Roberts gave no consideration to whether the medical reason for the claimant being on sick leave was connected to her business interest, as suggested by the ACPO guidance which was referred to in the respondent's policy. This was a relevant consideration to whether withdrawal of permission would help meet the respondent's fourth aim (working together to make communities safer) by assisting the claimant to get back to work. In the claimant's case, her sickness absence was not connected to her business interest, it was related to her police work. In those circumstances, withdrawal of permission to conduct the business interest was not necessary to assist the claimant to get back to work and the respondent to meet its fourth aim.

171.6 In the appeal, Detective Chief Superintendent Paine took a similar approach. He also relied only on general reasons for withdrawing permission which would apply in all cases where officers had business interests while on long term sick leave (that is, the officer being paid while on sick leave, and the public's expectation that an officer who is not well enough to do their police role would also cease any secondary business interest). Again, these are reasons which would explain the need for automatic withdrawal of permission in every case, but this was not what the respondent's policy said. The same reasons were relied on in the 10 September 2019 decision.

171.7 Like Ms Roberts, Detective Chief Superintendent Paine gave no consideration to whether the medical reason for the claimant being on sick leave was connected in any way to her business interest. That was important information to enable proper consideration of whether withdrawal of permission would meet the respondent's third and fourth legitimate aims.

171.8 Detective Chief Superintendent Paine declined to accept that the events business was of therapeutic benefit for the claimant without the claimant providing specific medical evidence, although he had information from the claimant herself and from her husband about this, and this was supported by the comment from occupational health on the general benefit of activities and hobbies for mental health and well-being.

172. The respondent could have still achieved its legitimate aims by adopting a more proportionate approach, by taking the following steps:

172.1 The respondent could have offered the claimant the opportunity to comment or respond to questions at withdrawal and appeal stage;

172.2 The respondent could have sought medical evidence to understand the medical issues, before taking the decision to withdraw permission. This would have provided information to assist the respondent to assess the likely impact of withdrawal on the claimant's well-being, as Inspector Entwistle suggested was

required. It would have enabled the respondent to assess whether withdrawal would achieve its third and fourth aims (or whether it would be detrimental to them);

172.3 The respondent could have taken steps to contact the claimant either directly or via Inspector Entwistle, if relying on lack of communication from the claimant as a ground for withdrawal of permission.

172.4 The respondent could have considered, and sought advice if necessary on whether there was a connection between the claimant's business interest and the medical reason for her being on sick leave, as suggested by the ACPO guidance.

172.5 Detective Chief Superintendent Paine could have offered the claimant the opportunity to discuss her appeal at a meeting, as required by the statutory procedure.

172.6 The respondent could have applied the respondent's policy presumption, by continuing permission unless there was good reason not to. Both applied a reversed presumption: Ms Roberts decided that as she had no evidence, she should withdraw permission, and Detective Chief Superintendent Paine required the claimant to provide evidence before permission could be continued.

173. Allowing the claimant the opportunity to comment before deciding to withdraw the permission would have been less discriminatory. There was no good reason why Ms Roberts could not have afforded the claimant a chance to respond before the withdrawal decision was made. Providing an opportunity to appeal against a decision that has already been made is not the same as allowing input at the decision-making stage. Similarly, failing to allow the claimant to make representations in person to Detective Chief Superintendent Paine as part of the appeal process was not just a technical or procedural slip. It is very likely that a different decision would have been reached if the claimant had had the opportunity to explain in person the therapeutic benefit of her events business. We found hearing the claimant's oral evidence about this benefit was far clearer than reading about it in the documents, and even than reading about it in her witness statement. In a similar way, the respondent's officers who had spoken to the claimant about the effect of her events business on her well-being, including Superintendent Garside and Inspector Percival, had a much clearer understanding why the events business was beneficial to her than those who considered it on the basis of the paperwork alone.

174. The offer made after the appeal to revisit the decision upon the provision of medical evidence did not in itself achieve proportionality. Again, an offer to revisit a decision which has already been made is not the same as providing a proper opportunity to comment at the point the decision is being considered. Further, the offer reversed the force's policy presumption and put the onus on the claimant to obtain medical evidence. She was expected to show a good reason why permission should be granted.

175. Because of the complex nature of the claimant's mental health conditions, it was difficult for the claimant to obtain the evidence required. Her GP did not

have the specialist skills. The claimant could not have been expected to seek advice on this from Dr Tehrani, given the scope of the other issues which the claimant had to deal with at that appointment. Bearing in mind the resources available to the respondent and the medical issues which had been expressly raised by Inspector Entwistle, it would have been proportionate for the respondent to have sought medical advice, rather than putting the onus on the claimant to obtain it. The respondent could have obtained medical advice from the occupational health nurse who was supporting the claimant and whose advice the claimant had followed when she decided to set up her business. Or, specific advice about this could have been sought from Dr Tehrani. Such advice would have been highly likely to have explained the therapeutic effect the events business had for the claimant.

176. If the claimant had been given the opportunity to make representations before the withdrawal of her business interest permission, and if medical evidence had been obtained, the respondent would have had a better understanding of the medical issues relating to the claimant's business and in particular the therapeutic benefit she derived from it, and the corresponding benefit to her police role. It would have been in a better position to assess the medical impact of withdrawal on the claimant, and to weigh this up against the other relevant factors.

177. This leads on to the third reason why we have concluded that the respondent's treatment of the claimant was not a proportionate means of achieving its aims: the respondent failed to consider whether there were alternatives to withdrawal of the business interest permission, which would have met its aims but which were less discriminatory for the claimant.

178. There was a less discriminatory approach which the respondent could have taken, which was for the respondent to have allowed the business interest permission to have continued subject to restrictions, rather than completely withdrawing permission. Neither Ms Roberts nor Detective Chief Superintendent Paine properly considered this as an option.

179. The respondent could have granted continued permission subject to the claimant restricting involvement with the public facing side of her business. Conditions could have been imposed that the business would not post on Facebook while the claimant was on sick leave, and that the claimant would not carry out any activity in the public eye. These were conditions that Detective Chief Superintendent Paine had in mind but, in the absence of medical evidence, he had not considered them. Imposing conditions without withdrawing permission in full would have addressed in large part the respondent's concerns about public perception. Although they would not have entirely removed the risk of negative publicity, there would have been a significantly reduced risk. That reduced risk would have been set against a corresponding improvement in the claimant's mental health, and a likely earlier return to police work, which would have met the respondent's third and fourth aims.

180. Neither the respondent's policy nor the ACPO guidance said that withdrawal of permission while on long term sick leave is always required. The respondent failed to properly recognise this, and failed to consider the proportionality of its decision, bearing in mind the discriminatory impact on the claimant. We have concluded that allowing continued permission subject to conditions, rather than withdrawing permission completely, would have been a proportionate means of achieving the respondent's aims.

181. For these reasons, we have concluded that the withdrawal of the claimant's business interest permission was not a proportionate means of achieving a legitimate aim.

182. The respondent does not suggest that it can rely on section 15(2), that is that it did not know and could not reasonably be expected to know that the claimant had the disability. We agree that this defence is not available to the respondent. We have found that the respondent had known about the claimant's disability for some years, as the occupational health unit had supported her through an episode of depression from November 2015 to April 2017, and were aware of her current period of ill health from 15 May 2019.

183. The claim of discrimination arising from disability in respect of the withdrawal of the claimant's permission to conduct a business interest succeeds.

Failure to make reasonable adjustments to the business interest policy

PCP

184. The respondent admitted that in applying its Business Interest Policy it applied a provision, criterion or practice ('PCP') to the claimant.

Substantial disadvantage

185. The business interest policy said at paragraph 4.4.6 that a review of permission to conduct a business interest would be conducted when a member of staff was absent through sickness for over 28 days. In other words, the policy used sickness absence as a trigger for a review.

186. In this respect, the policy put the claimant at a substantial disadvantage compared with people who do not have her disability. This is because, as a person with depression, anxiety and complex PTSD, the claimant was more likely to need to take time off work on sick leave than a person who does not have her disability. This is reflected in our findings that because of her disability, the claimant had a need for time off work on sick leave for a period of well over 28 days in 2015/2016 as well as in 2019. The need to take time off work on sick leave meant that the claimant was more likely to have her business interest reviewed, and was at greater risk of having the permission withdrawn, than a person who does not have her disability.

187. (We do not find that the business interest policy put the claimant at a substantial disadvantage in comparison with people who do not have her

disability because of a need for additional therapy sessions and an increase in medication. We do not understand how these two factors relate to the application of the business interest policy.)

Knowledge of disability and disadvantage

188. The respondent knew about the claimant's disability; it knew about the claimant's mental ill health, and about the substantial adverse effect on her, and that it was long term. In particular, the respondent's occupational health unit had supported the claimant through an episode of depression from November 2015 to April 2017, and were aware of her current period of ill health from 15 May 2019.

189. Because of its knowledge of her sickness absence record, the respondent also knew that the claimant was likely to be placed at a disadvantage by a policy with a review triggered by 28 days sickness absence.

190. From around 17 June 2019 Ms Roberts and Detective Chief Superintendent Paine themselves knew the claimant was disabled. They knew about her depression and anxiety. They knew that it had a substantial adverse effect on the claimant and they knew that it was long term.

191. Ms Roberts and Detective Chief Superintendent Paine could reasonably have been expected to know that the claimant had a disability before 17 June 2019. They should have been alerted to the possibility that she had a mental health condition by her business interest application form, which referenced issues with wellbeing, and by Inspector Entwistle's email which highlighted his understanding that the claimant was suffering with stress or anxiety, his concern about the detrimental effect the withdrawal of permission may have on her wellbeing, and the possibility that withdrawal could contribute additional stress. With those concerns having been raised, Ms Roberts and Detective Chief Superintendent Paine should have investigated the claimant's medical position, either directly with the claimant or by seeking her consent to liaise with the respondent's occupational health department.

192. If Ms Roberts and Detective Chief Superintendent Paine had, prior to 17 June 2019, investigated the claimant's medical position with the claimant or sought her consent to liaise with occupational health, they would have very easily found out that the claimant has a disability.

193. If they had taken this step, Ms Roberts and Detective Chief Superintendent Paine would also have found out about the disadvantage the claimant was under because of her disability. The claimant's occupational health records would have shown that the claimant had a previous lengthy period of sickness absence, from which Ms Roberts and Detective Chief Superintendent Paine could reasonably have been expected to know that the attendance-related trigger for business interest reviews would be likely to place the claimant at a disadvantage because of her need to take sick leave.

194. We have concluded that well before 10 June 2019 the respondent knew of the claimant's disability, and of the comparative substantial disadvantage that the claimant was likely to be placed at by the application of the business interest policy. We have also concluded that from the time they began considering the claimant's business interest review, Ms Roberts and Detective Chief Superintendent Paine could reasonably have been expected to know of the claimant's disability and the substantial disadvantage she was placed at, as the issues raised in the claimant's business interest application and Inspector Entwistle's email should have alerted them to the need to make enquiries, and enquiries about her medical position with the claimant herself or with the occupational health department would have quickly informed them of her disability and the disadvantage she was under.

Steps to avoid the disadvantage

195. We next consider whether the respondent took such steps as it was reasonable to have to take to avoid the disadvantage. The claimant says that it would have been reasonable for the respondent to have:

    195.1 obtained further medical advice in order to consider the impact of withdrawing the claimant's business interest;
    195.2 allowed her to retain her business interest, whether in part or in full;
    195.3 allowed her appeal against the withdrawal of her business interest, whether in part or in full.

196. We do not consider that the step of obtaining further medical evidence would have been a reasonable adjustment because it would not in itself have alleviated the disadvantage to the claimant. Although it would have been helpful for the respondent to have had further medical evidence, other steps would have been required for the disadvantage to the claimant to have been alleviated.

197. We have considered the other adjustments suggested by the claimant in two parts, first allowing the claimant to retain her business interest permission in full (either at review stage or appeal stage), and, secondly, allowing the claimant to retain her business interest permission in part (again, either at review stage or appeal stage).

198. In relation to the first of these, we do not think it would have been a reasonable adjustment to have allowed the claimant to retain her business interest in full. This is because of the concerns the respondent had about the force's reputation and public perception. These were valid concerns, as the claimant recognised. One member of the public had made erroneous assumptions about the claimant's health and involvement with her business. Other members of the public might have done the same. The respondent reasonably wanted to limit the scope for that by not allowing the claimant's business interest permission to continue in full while she was on long term sick leave.

199. However, allowing the claimant to retain her business interest permission in part (in other words granting permission subject to conditions) would have

been a reasonable adjustment. The claimant could, for the reasons explained in our conclusions relating to discrimination arising from disability, have been given permission (either at the review stage or at appeal stage) to take part in the creative non-public facing part of the business. This would have alleviated the disadvantage to the claimant to a large extent as it would have enabled the claimant to continue with some activities of her business which she found of therapeutic benefit.

200. This would have been a reasonable step to take because:

    200.1 it would have been in line with the respondent's own policy, which was based on the presumption that permission to carry out a business interest would be approved unless there was good reason not to approve it;
    200.2 approval of the business interest subject to the condition that the claimant did not do any public-facing work and with social media restrictions would also have significantly reduced the reputational risks which the respondent was concerned about; and
    200.3 as advised by the respondent's occupational health department, spending time on activities and hobbies can help sustain or improve mental health and well-being. The claimant found the creative and positive sides of the business beneficial. Allowing the claimant to continue with parts of her business would have been more likely to assist with her recovery and return to her police role, rather than delay it.

Failure to comply with the duty

201. The respondent failed to take the step of allowing the claimant to retain her business interest in part (subject to conditions).

202. The decision that the withdrawal could be reconsidered on submission of medical evidence by the claimant did not go far enough to meet the respondent's duty, for the reasons set out in our conclusions on the section 15 complaint.

203. We have concluded therefore that the respondent failed to make reasonable adjustments in respect of its business interests policy by failing to allow the claimant to retain her business interest permission subject to conditions (either at the first review stage or at appeal stage).

204. The complaint of failure to make reasonable adjustments succeeds in this respect.

<u>Discrimination arising from disability in relation to the conduct procedures</u>

205. We have next considered the complaints in relation to the conduct procedure to which the claimant was subjected. We start with the complaint of discrimination arising from disability.

Something arising from disability

206. As with the complaint in relation to the business interests policy, the 'something arising from disability' is the claimant's sickness absence. (We do not find the case based on "suffering from low self-esteem and paranoia, making it difficult for her to work alongside her colleagues" to be established, for the same reasons as set out in relation to the complaint about the business interests policy.)

207. This means the question for us is whether, in relation to the conduct procedures, the claimant was subjected to unfavourable treatment because of her disability-related sick leave.

Unfavourable treatment

208. The unfavourable treatment relied on by the claimant is:

    208.1 The service of the regulation 15 notice of investigation under the Police (Conduct) Regulations 2012;
    208.2 Investigation under the Police (Conduct) Regulations 2012;
    208.3 Bringing gross misconduct proceedings against the claimant under the Police (Conduct) Regulations 2012.

209. There is no dispute as to whether any of this treatment took place. What is in dispute is whether the treatment amounted to unfavourable treatment, and if so whether it was done 'because of' the claimant's sick leave.

210. As to whether the treatment was unfavourable, we accept the submission of Mr Arnold that the service of the regulation 15 notice of investigation under the Police (Conduct) Regulations 2012 was not in itself unfavourable treatment of the claimant. The service of the document notified the claimant in accordance with the statutory provisions of the fact of the investigation and the allegations against her. It gave her the opportunity to know what was being alleged and to seek advice. To the extent that 'service of the regulation 15 notice of investigation' means 'deciding to carry out an investigation under the Police (Conduct) Regulations 2012', this is the same as the claimant's second allegation of unfavourable treatment. (We return to this second allegation below.)

211. In the course of the hearing, it was alleged that the scope of the unfavourable treatment alleged by the claimant in respect of the service of the regulation 15 notice was wider than this. The claimant said that as well as the decision to serve the notice, her complaint encompassed the manner in which the notice was served on her (that is, personal service by Mr Lees alone, rather than service by post or some other method). The respondent said the alleged unfavourable treatment only included the decision to serve the regulation 15 notice. We determined this dispute in favour of the respondent. We decided that the manner in which the regulation 15 notice was served was not part of the claimant's complaint. We reached this decision because there was no reference in the particulars of claim, the list of issues or the claimant's witness statement to any complaint about the choice of personal service by Mr Lees, or to other methods of serving the notice. We decided that the allegation about service of the notice did not

extend to the manner of the notice, and had not been understood in that way.

212. We have not therefore considered whether the manner of service of the regulation 15 notice amounted to unfavourable treatment because of something arising from disability. We record however our surprise that the notice was served on the claimant less than a week after she had returned to work on a phased return, after a five month period of sick leave related to work-related mental health issues, and that it was served on her without someone being present to support her. The service of the notice on the claimant in this way meant that the claimant undertook a journey home in circumstances which could have been unsafe. It would have been better if more consideration had been given to the manner of service of the notice in the claimant's particular circumstances, and to what support she might require during and after service of the notice.

213. The other two acts of unfavourable treatment relied on by the claimant are the investigation and bringing of gross misconduct proceedings under the Police (Conduct) Regulations 2012. These were acts which amounted to less favourable treatment of the claimant. They were part of a procedure which could eventually result in the claimant being subject to sanctions including the possibility of loss of office.

Treatment 'because of' something arising

214. We come to the question of whether the conduct investigation and the gross misconduct proceedings were 'because of' the claimant's long-term sick leave. 'Because of' requires there to be a causal link between the 'something arising' and the unfavourable treatment. One must cause the other.

215. We have given careful consideration to this, to make sure we apply the right test. In one sense, the investigation and misconduct proceedings happened 'because' the claimant had been on sick leave. There would have been no need for an investigation or misconduct proceedings if the claimant had not been on long term sick leave, because in that case there would have been no review or withdrawal of her business interest permission, and therefore no suggestion that she was carrying out business activities contrary to an order or instruction of the respondent.

216. That analysis reflects the application of a test known as the 'but for' test: 'but for' the sick leave there would have been no review, no withdrawal of the business interest permission, and no suggestion of misconduct, so no investigation and no gross misconduct proceedings.

217. However, the 'but for' test is not the correct test for us to apply. Rather, the statutory test in section 15 of the Equality Act requires us to address the question of whether the unfavourable treatment was 'because of' the claimant's long term sick leave. The sick leave need not be the main or only reason for the treatment, but it must have a significant (or more than trivial) influence on the unfavourable treatment. At this stage of the section 15 test,

we examine the conscious and unconscious thought processes of the person said to have discriminated against the claimant (keeping in mind that motive is irrelevant).

218. The decision maker in relation to the decision to investigate the claimant was Mark Weston. The decision maker in relation to the decision to bring gross misconduct proceedings against the claimant was Fiona Courtney. Both Mr Weston and Ms Courtney are support managers in the respondent's PSD.

219. Mr Weston's decision was that the conduct the claimant was accused of would, if proven, amount to breaches of the Standards of Professional Behaviour at the level of gross misconduct. His assessment was based on the information he was provided with, and his knowledge of the relevant standards set out in the Conduct regulations. He reached his decision because in his view continuing to run a business after permission to do so had been withdrawn would, if proven, amount to gross misconduct.

220. Similarly, Ms Courtney took the decision that the case should proceed to a gross misconduct hearing because of her view of the information gathered as part of the investigation and provided to her. She felt that the claimant had a case to answer in respect of her continued involvement in the events business after the withdrawal of the permission.

221. Neither Mr Weston nor Ms Courtney made their decision because of the claimant's sickness absence. Her absence was not a reason for the decisions to investigate and then to continue with gross misconduct proceedings. Her sickness absence provided the context in which the alleged misconduct had taken place, but it was not a reason for their treatment of her.

222. Our conclusion that neither the investigation nor the misconduct proceedings were 'because of' the claimant's long term sickness absence means that the respondent is not required to show that the investigation and conduct proceedings were a proportionate means of achieving a legitimate aim. This complaint fails.

<u>Failure to make reasonable adjustments – misconduct procedure</u>

PCP

223. The respondent admitted that in applying the misconduct procedures under the Police (Conduct) Regulations 2012 to matters of suspected misconduct by police officers, it applied a provision, criterion or practice ('PCP') to the claimant.

Substantial disadvantage

224. We need to consider whether the application of the misconduct procedure put the claimant at a substantial disadvantage compared with people who did not have her disability. The claimant said that it did, because her disability meant that she had a need:

224.1 For additional therapy sessions;
224.2 For time off work and
224.3 For an increase in her medication.

225. The misconduct procedure did not put the claimant at a disadvantage because of her need for additional therapy sessions or because of an increase in medication. We do not fully understand how the claimant's case is put on these points. Those factors were not relevant to the way the procedure was applied or the way the claimant experienced the procedure.

226. In relation to the claimant's need for time off work, the position is not the same as with the business interests policy. That policy contained a review provision triggered by absence of over 28 days. We have concluded that this disadvantaged the claimant in relation to the business interests policy, because she was more likely than someone without her disability to have to take sickness absence of over 28 days, and therefore at greater risk of having her business interest reviewed and withdrawn. It is not apparent that the need for time off work for sickness disadvantaged the claimant in relation to the misconduct procedure. There was no 'trigger' provision being applied under that procedure. She was not subject to any sanction because of any issues caused by absence. The claimant did not say that she was disadvantaged because her absence (or her disability more widely) meant that she coped less well with the procedure. We do not see how the need for time off work disadvantaged the claimant in the way in which the misconduct procedure was applied to her.

227. We have therefore concluded that the claimant has not shown that she was put at a substantial disadvantage by her disability in respect of the conduct procedure. Her claim for failure to make reasonable adjustments to the conduct procedure fails.

Indirect discrimination

228. The respondent accepts that its business interests policy and the misconduct procedures applied by the respondent (the Police (Conduct) Regulations 2012) are PCPs. It accepts that it applies or would have applied these PCPs to people who do not share the claimant's disability.

229. The question of whether the PCPs put people who share the claimant's disability at a particular disadvantage compared with people who do not is disputed. Group disadvantage is at the heart of a complaint of indirect discrimination. However, the claimant did not put her case on group disadvantage clearly, and we heard very little about it in the way of evidence and submissions.

230. We understand the claimant to be saying that the 28 day review trigger point in the business interest policy puts people who share her disability at a particular disadvantage, because they are more likely to take sick leave. However, without any evidence of this, we cannot simply make an assumption from the information we have about the claimant (from which we have concluded that she was at a disadvantage) that the trigger point will

also put people who share her disability at a particular disadvantage. We do not have enough evidence to reach this conclusion.

231. We do not understand how the claimant suggests that the misconduct procedure puts people who share her disability at a disadvantage. There is no evidence before us of group disadvantage arising from the respondent's application of the misconduct procedure.

232. It seems that the indirect discrimination complaint may have been included in the claim in a 'belt and braces' approach, without much consideration being given to the basis on which the complaint was being put. We do not find this complaint to have been made out.

Constructive discriminatory dismissal

Was there a constructive dismissal?

233. Constructive dismissal is a form of dismissal based on common law principles of the law of contract. In contractual terms, the employment contract is terminated by the employee's acceptance of a repudiatory breach of contract by the employer. The repudiatory breach means that the employee is entitled to terminate the contract without notice.

234. The contractual basis of the concept of constructive dismissal is reflected in the statutory definition in section 39(7)(b) of the Equality Act. The sub-section defines constructive dismissal by reference to the entitlement to terminate the contract without notice. That entitlement arises where there has been a repudiatory breach by the employer. It is the entitlement to terminate without notice which is important; a constructive dismissal may occur whether the employee actually gives notice or not.

235. It is not straightforward to apply these contract-based principles of constructive dismissal in the claimant's case, because the claimant did not work under a contract of employment. She was not an employee of the respondent. She was an officer holder whose service is treated as employment by the respondent by virtue of section 42 of the Equality Act 2010. We have to apply the principles of contract as best as we can in this non-contractual situation, in order to give effect to section 42.

236. The first question for us is whether there was a fundamental breach by the employer. We have found that the reasons for the claimant's resignation were:

    236.1 the conduct investigation to which the claimant was subjected;

    236.2 the investigation into the serious offence reported by the claimant by the other force; and

    236.3 her experience over the previous year, including the withdrawal of her business interest permission and the refusal to uphold her appeal against that withdrawal.

237. The claimant says that the respondent's conduct was a breach of the implied term of trust and confidence. The test is whether the respondent, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between them. Because of the importance of the implied term to the employment relationship, all breaches of it are repudiatory.

238. We found the respondent's withdrawal of the permission for the claimant to conduct a business interest to have been an act of unlawful discrimination arising from disability. We also found there to have been a failure to make reasonable adjustments to the application of the business interests policy to the claimant; the claimant should have been given permission to continue working on her business interest subject to conditions, either at review or appeal stage.

239. This unlawful discriminatory treatment was, objectively viewed, likely to seriously damage trust and confidence in the respondent. The conduct in itself was also (again, objectively viewed) likely to seriously damage trust and confidence, bearing in mind the following features:

    239.1 the claimant was given no opportunity to respond to the concerns which led to the withdrawal of permission;
    239.2 the claimant's appeal was determined without giving her the opportunity to make representations, contrary to regulation 9 of the Police Regulations 2003 (her statutory terms and conditions of service);
    239.3 the reasons relied on by the respondent for the withdrawal of her business interest permission and for the failure to uphold her appeal were non-specific, not evidence-based, and were contrary to the main principle of the respondent's business interests policy and to the ACPO guidance on sickness absence and business interest reviews.

240. The respondent did not have reasonable and proper cause for its conduct as it was unlawful discrimination, and it was conduct which failed to comply with the requirements of regulation 9 of the Police Regulations 2003, the respondent's own business interests policy and the ACPO guidance.

241. We have concluded that the respondent's conduct in relation to the withdrawal of the business interest permission and the refusal of the claimant's appeal against that withdrawal was a repudiatory breach which entitled the claimant to resign without notice. The treatment in itself was a breach of the implied term of trust and confidence, and the fact that it was unlawful discrimination also made it a repudiatory breach of that term.

242. The respondent's breach caused the claimant to resign. There were other reasons for the claimant's resignation, that is the misconduct procedure to which she was subject, which we have not found to have been unlawful discrimination, and the investigation into the claimant's historic complaints, which was not the responsibility of the respondent. However, we are not looking for 'the effective cause'. There can be more than one cause. In the claimant's case, one of the reasons for the claimant's resignation from her

role was that it was a response to the respondent's repudiatory breach in respect of the withdrawal of her business interest permission. The repudiatory breach played a part in her resignation.

243. The claimant did not affirm the contract between the repudiatory breach and her resignation on 14 January 2020. During that period she did not say or write anything which indicated that she did not regard the respondent's conduct as repudiatory or that she no longer regarded it as such. She did not suggest that she was prepared to put things behind her. On the contrary, in the context of the misconduct investigation, she continued to challenge the respondent's decisions regarding her business interest, and maintained that they were unlawful.

244. The claimant resigned with notice. Her last day of service was 27 March 2020. A constructive dismissal under section 39(7)(b) can include a resignation with notice.

245. We have concluded that the claimant was constructively dismissed.

Was the dismissal an act of discrimination?

246. We have gone on to consider whether the dismissal was an act of discrimination. We apply the test set out in *De Lacey v Wechseln Limited t/a The Andrew Hill Salon*. The events which gave rise to the constructive dismissal (the repudiatory breach) were acts of discrimination arising from disability and a failure to make reasonable adjustments. These discriminatory matters were a significant influence in the repudiation of the claimant's contract. This renders the constructive dismissal discriminatory.

247. The way in which this act of discrimination fits into the framework of the Equality Act is not straightforward. The respondent said that this complaint cannot succeed, as the claimant relied only on section 39 (within Part 5 of the Equality Act), without saying that the constructive dismissal was an act of prohibited conduct within Part 2 of the Equality Act. The respondent said that section 39 is not, on its own, a cause of action, as a type of prohibited conduct is also required.

248. We agree that section 39 is not a cause of action in itself. Section 39 prohibits discrimination in an employment context but it is not itself a type of prohibited conduct. Normally, the cause of action is the type of prohibited conduct read with section 39, and the type of prohibited conduct determines the test to be applied to determine whether unlawful discrimination is made out.

249. However, the authorities have established a different approach in the context of discriminatory dismissal, including constructive discriminatory dismissal. As the Court of Appeal explained in *Meikle v Nottinghamshire County Council*, a constructive dismissal which takes place when the claimant accepts discriminatory and repudiatory conduct by her employer, is itself a further act of discrimination. This interpretation, the Court of Appeal said, appropriately acknowledges that not only has the employer acted in a

discriminatory way, but also that the act of discrimination has led to the loss of the employee's job.

250. In *Meikle* the Court of Appeal accepted that the respondent's failure to make reasonable adjustments for the claimant was the repudiatory conduct which led to the claimant's constructive dismissal. It accepted that in those circumstances the claimant's dismissal was also an act of discrimination. It did not go on to consider which type of prohibited conduct the dismissal was. It did not undertake any analysis as to whether, for example, the required elements of sections 20 and 21 were met, such that the constructive dismissal was a further failure to make a reasonable adjustment. The constructive dismissal was discriminatory by virtue of the part played by a discriminatory act in the dismissal.

251. A similar approach was taken in *De Lacey v Wechseln Limited t/a The Andrew Hill Salon.* Having set out the test for whether a constructive dismissal is a discriminatory dismissal, Cavanagh J did not say that any of the tests for prohibited conduct from Part 2 of the Equality Act need to be applied as well. Discriminatory dismissal will be established where an act of discrimination sufficiently influences a repudiatory breach which leads to a constructive dismissal.

252. In *Redcar and Cleveland Primary Care Trust v Lonsdale* HHJ Peter Clark accepted that where a discriminatory element amounted to a significant factor in a dismissal, that was sufficient to render the dismissal discriminatory. In that case (where the discriminatory element which led to the dismissal was a failure to make reasonable adjustments under section 20(3)) he concluded that the dismissal was an act of discrimination 'under section 20(3) read with section 39(2(c)'. Like the Court of Appeal in *Meikle*, HHJ Peter Clark reached this conclusion without applying the various elements of the section 20 test to the dismissal itself.

253. The same analysis applies in the claimant's case. The constructive dismissal of the claimant was an act of discrimination because of the discriminatory nature of the repudiatory conduct which led to it, not because the dismissal itself had the elements of one of the types of conduct prohibited by Part 2 the Equality Act. The discriminatory elements of the constructive dismissal in the claimant's case were acts contrary to sections 15 and 20(3). The constructive dismissal of the claimant was therefore a dismissal under sections 15 and 20(3), read with sections 39(2)(c) and 39(7)(b). The claimant's case on this was put sufficiently clearly in the grounds of complaint and in the list of issues.

254. The claimant's complaint of constructive discriminatory dismissal succeeds.

<u>Time limit</u>

255. We have found that there were two acts of discrimination by the respondent:

    255.1 discrimination arising from disability in respect of the withdrawal of the permission to conduct a business interest (there was also a failure to make reasonable adjustments in this respect); and

255.2 the constructive discriminatory dismissal on 14 January 2020 which took effect on 27 March 2020.

256. The claimant notified Acas for early conciliation on 24 June 2020 ('day A') and received the early conciliation certificate on 24 July 2020 ('day B').

257. The claimant presented her claim form on 20 August 2020.

The dismissal

258. In relation to a dismissal, the act of discrimination takes place when the notice expires, not when it is given (*Lupetti v Wrens Old House Ltd* 1984 ICR 348 EAT). In the claimant's case, the act of discrimination in relation to the constructive dismissal took place on 27 March 2020 when the claimant's notice expired. The primary time limit for presenting a claim would have expired on 26 June 2020.

259. This time limit is extended by the provision in section 140B of the Equality Act (providing for extension of time limits for early conciliation). For the purposes of calculating the time limit, the period beginning with the day after day A and ending with day B is not counted. In the claimant's case, the one month period from 25 June 2020 to 24 July 2020 is not counted (section 140B(3)). That means the time for presenting a claim would have expired a month later, on 26 July 2020.

260. That later date was only two days after day B, that is within the period ending one month after day B. Sub-section 140B(4) therefore applies. That provides for an extended time limit which falls one month after day B. In the claimant's case, the time limit in respect of the dismissal as extended by section 140B(4) expired on 24 August 2020. The claim was presented on 20 August 2020, before the expiry of the extended time limit. In respect of the constructive dismissal, the claim was presented in time.

The withdrawal of the business interest permission

261. The respondent's decisions in respect of the withdrawal of the business interest permission were made on 10 June 2019 (the review decision) and 17 June 2019 (the appeal decision). On 10 September 2019 Detective Chief Superintendent Paine considered and refused a suggestion by Inspector Percival that the claimant be permitted to undertake the business interest to a limited degree.

262. The decisions by the respondent from 10 June 2019 to 10 September 2019 amounted to conduct extending over that period. The decisions taken constituted a discriminatory policy in relation to the withdrawal of the permission for the claimant to conduct a business interest (*Cast v Croydon College* (1998) IRLR 318).

263. The time limit in relation to the complaint about the withdrawal of the business interest permission would have expired on 9 December 2019. There is no extension in respect of Acas early conciliation, because the time limit had expired before day A, meaning there was no early conciliation period 'not to be counted' within the primary three month time limit.

264. In relation to this act of discrimination, the claim was not presented within the primary time limit. It was around 8 months late.

265. Was the withdrawal of the business interest permission conduct extending over a period within section 123(3)(a) when considered with the constructive dismissal? We have decided that it was. Both acts of discrimination were linked in that the withdrawal of the business interest permission was the repudiatory conduct which gave rise to the constructive dismissal. From the time it occurred until the dismissal, the respondent's repudiatory conduct was a continuing state of affairs, in the sense that (as long as she had not affirmed the contract) it remained open to the claimant to accept the repudiation and bring her service with the respondent to an end. When her employment came to an end by constructive dismissal, the dismissal was a further act of discrimination which brought that state of affairs to an end. Time for presenting the claim in respect of both the business interest issues and the constructive dismissal runs from the end of the period for which the state of affairs was continuing, that is from the date of on which the dismissal took effect. The complaint about the withdrawal of the business interest permission was therefore presented in time.

266. If we had not found there to have been conduct extending over a period, we would have decided that in respect of the withdrawal of the business interest permission, the claim was presented within a period we think just and equitable within section 123(1)(b). This is because:

    266.1 the claimant promptly made an internal appeal against the withdrawal and sought further reviews of the decision;
    266.2 the claimant was on sick leave for a significant part of the three month primary time limit for this complaint (10 September 2019 to 1 October 2019 and from 7 October 2019 to 1 November 2019);
    266.3 after 7 October 2019 the claimant was dealing with the related conduct investigation and procedure. She began the Acas early conciliation process to enable her to present her employment tribunal claim two days after that procedure finished. It is understandable that the claimant would have focused on the conduct process while it was going on;
    266.4 the respondent's decision makers on the business interest withdrawal issues were able to attend the tribunal and give evidence. There was no evidence of prejudice to the respondent in defending this complaint arising from the 8 month delay in presenting the claim.

267. The claimant's complaints relating to the withdrawal of her business interest permission were therefore brought in time within section 123(3)(a), and 123(2)(b).

Remedy

268. A remedy hearing will be arranged to decide what remedy the claimant should be awarded.

_____
Employment Judge Hawksworth

Date: 31 October 2022

Judgment and Reasons sent to the parties
On 1 November 2022

For the Tribunal Office

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