EMPLOYMENT TRIBUNALS

Claimant: **Mr Edward Brudzinski**

Respondent: **The Chief Constable of Nottinghamshire Police**

Heard at: **Nottingham** **On:** **12th to 19th October 2018**
Before: **Employment Judge P Britton**
MEMBERS: **Mr J M Bonser**
Mr C Goldson

Representatives

Claimant: **Mr S Mallet of Counsel**
Respondent: **Mr J Allsop of Counsel**

JUDGMENT

The claim based as it is upon disability discrimination, is dismissed in its entirety.

REASONS

Issues and overview

1. The claim (ET1) in this matter was presented to the Tribunal on 22 February 2017. Essentially what the claim is about is that Sergeant Eddie Brudzinski, a longstanding member of the Respondent police force, was retired by reason of ill health, effective 23 November 2016. His claim was essentially based upon that him being a disabled person, the Respondent in thereby dismissing him had failed to make reasonable adjustments prior thereto for his disability pursuant to Section 20 – 22 of the Equality Act 2010 (the EQA), and that also in the context he had been unfavourably treated because of something arising in consequence of that disability pursuant to Section 15.

2. Stopping there, disability is not in dispute. Suffice it to say that from childhood, the Claimant has had problems with his right arm and that he had, in the context of his police career, needed a period off work due to problems with the arm, when he was a beat Sergeant at Mansfield, between circa October 2013 and a return on restrictive duties on 8 April 2014. This is covered by Occupational Health Reports in the bundle before us.

3. As at September 2014 he successfully passed the competitive interviews to become a cover Sergeant, still employed by the Respondent, in a regional intelligence unit known as EMSOU. Putting it simplest, his job as one of a team of cover Sergeants, was to look after a deep Undercover Police Officer. We have no doubt whatsoever from the collective evidence in this case, and the Claimant does not disagree with the evidence from Officer's 1 and 2 who were high level officers in EMSOU, that the job had the potentiality to require him to extract the undercover officer who he was responsible for in what could be an urgent circumstance with the possibility of having to use force, ie physical restraint.

4. On 24 August 2015 the Claimant suffered an injury in context of his cover Sergeant role; that is to say whilst posing as a mate of the undercover officer he was responsible for, he was moving boxes presumably into the accommodation of that undercover officer. In the process he exacerbated the existing weakness of his right arm and had to go off work. There was further Occupational Health involvement. Also in the welfare discussions that he had inter alia with Officer 1, he explained how he was at that stage unable to drive and inter alia because of the pain, sleep despite being on painkillers. By now the prognosis, and in particular the report of Mr Gooding, his Consultant Orthopaedic Surgeon dated 25 February 2016, was pessimistic as to long term improvement. His opinion mirrored that of a very experienced Occupational Health Physician, Dr Booth. The collective opinion at that stage, as to which see Bp96[1] was that the likelihood of his return to operational capability in the future was extremely low. He was only likely to be able to carry out sedentary work, and that was in the compass of what was then envisaged to be his state following a successful postoperative recovery. He was of course off work throughout this period covered by sicknotes. We use the phrase sicknote, although the modern parlance is "fit note" because within the fit note document there has for some years now been a provision whereby the doctor, if he considers it is an option, can either confirm his patient is unfit for work per se, or observe with in the document that he could be fit to return to work, ie with such as reasonable adjustments phased return etc: that is something that we shall come back to.

5. In this context on 2 February 2016 not in dispute is that he had a welfare discussion with Officer 1.[2] Both agreed that he could not return to his role in EMSOU. That brings in Detective Superintendent Mark Pollock[3] who performed an overarching role in the Respondents intelligence team including EMSOU. So, Officers 1 and 2 being very loyal to the Claimant with all his years of long service, essentially asked Superintendent Pollock if there was anything that he could give the Claimant to do in the short term and because, as the Claimant himself put it, he was going mad sitting at home staring at the television. Superintendent Pollock found him a supernumerary seat in his team: it was no more than that. At that stage he thought, and that is about it, that possibly there might be some role for the Claimant in the future as he had a need for a Document Retrieval Officer. This was in the context that by now the force, along with the other 4 forces which combined regionally in EMSOU were engaged in the requirements of the highly publicised Brooks Inquiry tasked with examining serious shortcomings in undercover policing. And so from the highest level in the Government and thence via this Judicial Inquiry, police forces including the Respondent and its partners in EMSOU were being ordered to investigate back in to the history of

[1] Bp = bundle page.

[2] Officers 1 and 2 are anonymised because of the highly sensitive nature of their roles. Both gave evidence before us.

[3] Also gave evidence before us. In the case of all witnesses that we heard from evidence in chief was by written statement, all of which were before us in a combined page numbered witness statement bundle.

covert surveillance including viz activists: an example being the undercover operation centring on events at Radcliffe-on-Soar power station which is of course in the Nottingham region. So a discrete investigation was being undertaken by a specially selected team tasked with inter alia retrieving source date and analysing the same. But the team was in embryo at this stage. We gather that later on it was to become formally established as the National Police Enquiry Team (NPET). Superintendent Pollock already had officers in his team gathering and collating the data, but he was hoping that he could make a business case for the role being whole time performed by one designated person which he foresaw as being the Claimant. There would however be problems because Eddie (the Claimant) could not at present drive and if he could following further recovery, it would be restricted. And he would not be able to lift such as boxes of documents that might be retrieved from police stations or covert places used for undercover operations. As it is the possibility of the role never went any further. The Claimant sat in the team for about 5 days having a look at what was going on. He himself at that stage saw it as nothing more than supernumerary. Then on 5th March 2016 he again ceased working because he underwent exploratory pre-planned surgery on the right arm. The outcome unfortunately only reinforced the previous gloomy prognosis.

6. The only possible solution would be to perform artificial elbow surgery, but such a replacement would last at most 5 years and the current state of the art meant this was a one time only procedure. As the Claimant was only 57 years old and otherwise in good health, the medical opinion was that he was too young. Thus he remained signed off sick by his General Practitioner. The sicknotes from then on, all the way through to the end of the employment, the last of which ran up to December 2016, were never "Fit Notes". Nothing in them indicated that the Claimant could come back in some sort of reasonably adjusted/phased return. Thus back into the picture came OH via Dr Booth: as to which see in particular his observations in his referral to Dr Barbara Kneale dated 26 April 2016 in particular (Bp374).

7. By then on 3 February 2016 the Police Federation had applied for Ill Health Retirement (IHR) on behalf of the Claimant. The application (Bp106) was clear: as per the IHR policy the Claimant met the definition of permanent incapacity. If therefore, the matter then went down the IHR route into play would come the Police Pension Regulations 1987 ("the Regs") (commencing at Bp273). Suffice it to say, that if the collective medical opinion already obtained was that the Claimant was unfit for an operational role, and of course it was and nothing had changed for the better, then the next stage would be to refer him for a medical opinion to a Selected Medical Practitioner (SMP) to determine whether he met the permanent incapacity criteria. This is what happened: hence the appointment of Dr Barbara Kneale and the detailed letter of referral for assessment written to her by Dr Booth on the 26 April 2016. The SMP is an independent senior medical expert. If the SMP confirms the officer referred is permanently operationally unfit as per the definition, then the case moves forward for a formal report to be made, in this case by a senior HR person in the Respondent; and in the context the person referred for IHR, in this case the Claimant, then gets an opportunity to consider the said report and make representations within 28 days. If none are made then the matter goes forward to what is known as the ACO; that is a senior member of the Respondent Police Force with delegated powers from the Chief Constable to confirm whether Ill Health Retirement should be granted. If it is, then the referred police officer retires on an Ill Health Pension and depending on length of service a substantial lump sum. All of this occurred in this case.

8. To take it at its simplest, the Claimant did not appeal Dr Kneale's opinion that he was permanently unfit for operational duties "as a result of the severe degenerative changes in his right elbow" (Bp 370).

9. As a consequence the preparation of the report for the ACO as per the next stage of the process was commenced circa 11 July 2016 (Bp137) by Angela Killeavy (AK). She was new to the task in a hard pressed Human Resources team. She was working on an agency basis it seems with no previous experience in the Police Force and certainly of doing an Ill Health Retirement process. She clearly understood that proceeding down the IHR path was at *"Your request is therefore being to be retired on medical grounds"*. But on 19 July 2016 a senior Police Federation Representative, Malcolm Spencer, now informed the Respondent that the Claimant no longer wished to be considered for IHR.

10. At this juncture we observe, and it is in contrast to the factual scenario in the case of ***Secretary of State for Work and Pensions v Heggie*** [UK EAT 0482/07/JOJ], which judgment was handed down on the 6th June 2008, that if the Police Federation had not requested IHR back in February we have no doubt that the Claimant would have been taken down the management for attendance/ capability route, and in our experience as an industrial jury there would inevitably have come a time given the library of medical opinion when the Claimant would have been dismissed on capability grounds. If that had occurred, then he might never have got an ill health retirement pension. Be that as it may, post 19 July the Respondent continued down the IHR route and in due course via AK presented a report signed off by a senior HR manager, Stephen Mitchell[4], supporting IHR to the ACO. This of course was because the medical opinion, and in particular that of the SMP, made plain that the Claimant was unfit as per the definition and thus met the criteria for IHR subject to the determination as per the policy by the ACO. In that sense albeit the Claimant may have changed his mind as at the 19 July 2016, he cannot dictate the process and of course by now his initial application via the Police Federation having set the ball rolling, there had been the medical report of the SMP and in respect of which the Claimant had nor raised any opposition/ dissent with her medical opinion.

11. That brings in the reasonable adjustment issue. Engaged is s20 of the EqA, and in particular s20(3):

> *"The first requirement is a requirement where a provision criterion or practice of A's put 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.* "

12. It is an objective test. But is the duty to consider reasonable adjustments actually engaged in the context of this case? Thus engages the dicta of His Honour Judge Peter Clarke in ***Heggie*** and in particular paragraphs 35 and 36. Thus if the Claimant was never certified fit to return at all during the period of the material events, particularly from March 2016 onwards, how can the duty engage? Mr Mallet in his submissions[5] on this issue submits that the "Fit" notes are not definitive because the medical opinion, was that the Claimant was in fact fit within the restrictions set out by Dr Kneale at Bp370 and echoed about that time by Dr Booth at Bp374. But that of course ignores the conclusions of both of

[4] Who gave evidence before us.

[5] Both he and Mr Allsop provided helpful written submissions.

them that the Claimant was not fit as defined for the purposes of being a police officer. However**, a**nd we factor in the Costa Coffee Meeting on 13 September 2016 when he met AK and Officer 1, all accepted that albeit there was no "likelihood of ever returning to full fitness" there was still a hope something might be found for him to do albeit if that search was fruitless then he would "be pensioned off": in other words IHR. So there is a distinction between the criteria for IHR which he clearly met, and nevertheless possibly being found something other than a front line policing role. Finally it is clear from the IHR guidance before us that the Respondent is obliged, if reasonably possible, to retain a disabled office rather than use IHR albeit usually it is the norm to grant a Police Federation driven IHR application where the applicant meets the IHR criteria[6]. In that sense this of course is an unusual scenario given the Claimant's change of heart via the Police Federation on the 19 July 2016. Nevertheless it means that we conclude that the the duty to consider making a reasonable adjustment was engaged.

First law engaged

13. This brings in the approach to determining the issue as to whether the respondent failed to make reasonable adjustment as per **Environment Agency v Rowan (2008) ICR 218** and as helpfully set out in Mr Allsop's closing written submissions commencing at paragraph 13. Thus first what was the PCP which placed the claimant at a substantial disadvantage as a disabled person? It has been set out for us in the list of issues which was prepared by **Mr Mallett.** Thus at 1) as follows:

> *1.1): A PCP that, " required that an officer will be retired if the officer is disabled from performing the ordinary duties of a member of the police force, it is a permanent disability and no alternative post is available for him" (R does not dispute that it had such as PCP).*
>
> *1.2) A PCP " requiring the Cover sergeant to be available for emergency extraction and to be able to move heavy items."*
>
> *1.3) A PCP that required C " to write and use a computer keyboard for prolonged period of time."*

14. Then at his paragraph 2) he sets out how these PCPs placed the Claimant as a disabled person at a substantial disadvantage.

> 2.1) *"Be more likely to be retired given the more limited employment options available to him than an officer who is disabled".(this is disputed by the R).*
>
> 2.2) *"The disadvantage of being unable to engage in physical confrontation to move heavy items"* ie the operational core requirements in EMSOU and
>
> 2.3 *The disadvantage of having "difficulties in writing and using a computer keyboard for prolonged periods"*.

15. Stopping there, as to the third, the Claimant could not use his right arm, thus he could not type or make handwritten notes. By the time of the welfare visits that we have referred to, encapsulated circa October 2015 and still present

[6] Evidence of Mr Mitchell.

at the Costa Coffee meeting on 13 September 2016, he could not really use his left hand for these tasks. He is right handed. He had tried but had begun to suffer repetitive stress injury in the left hand; and as he told us, and which we totally understand, he could not risk his left arm going the same way as his right. So, when we look at this issue as we are going to now, there is an obvious restriction in terms of the clerical side, so to speak, of his duties in the police force, in terms of those restrictions. So, the issue becomes, could a reasonable adjustment be made for them, what we might call the Dragon Speak/Olympus/Livescribe issue. As to PCP disadvantage number 2 the Claimant himself accepted, very honestly, that when it came to his cover sergeant role in EMSOU, in terms of the role he had been doing, he could not do it and that the potentiality for extraction was a core part of the role. Thus is can be ruled out as being capable of reasonable adjustment.

Steps taken to ameliorate the substantial disadvantage, alternative roles, and in that context was there a failure to make reasonable adjustments

16. The Foundation Cover Role and the Undercover Online Role. As to the first this is a lower level of undercover policing. An example might be using an undercover officer usually temporarily acting in that role as a opposed to the longer term covert infiltration, to make a test drugs purchase and from which a raid or a wider street search can be organised. The Claimant says to us *"Well, as regards the Foundation Cover Role, I could do that from the office, I would not need to go out with undercover teams and I would not therefore need to extract anybody".* As to the second role this involves essentially entrapping paedophiles via the Internet. And so the Claimant says that he could have done this as it is office based.

17. We have the evidence of two extremely experienced, high level police officers in Officer 1 and 2. We found them very convincing. It follows that we are persuaded by them that there is no possibility that Foundation Cover means the Sergeant is thus not obliged if necessary to be on the street. Suffice it to say, that given the nature of the work that is undertaken ie street raids in the smaller end of the drug market, test purchases having been made undercover by a single officer and then a team assembled, it is part of the role. Thus physical involvement such as coming to the rescue of an officer is an essential part of the role.

18. As to Undercover Online, the very nature of the role means that it is one which officers find very difficult to stomach for any length of time. It is why all the cover Sergeants interchange, depending on their level of training. That is to say the Foundation Cover and the Undercover Online roles interchange. It follows that for operational reasons we are entirely unconvinced by the Claimant that those roles could be done by him simply remaining in the office.

Other alternatives to IHR

19. We need to bring into the equation the wider context of modern policing. We are well aware that the police forces of this country have undergone extensive cuts. This has placed huge pressure on their operational abilities which was so obvious from the evidence we heard during this case, an example being ACO Naylor who we found an impressive witness. What it means is that although senior officers might have a wish list, and which requires additional expenditure, these are not going to be granted when there is not a justifiable operational need and in particular when that desired for role can be covered by

the existing team. That was so clear from the evidence of Officers 1, 2, Superintendent Pollock and ACO Alison Naylor backed up by Mr Mitchell the then Senior Human Resources Officer, who signed off the report for her consideration as part of stage 2 of IHR process.

20. In any event Angela Killeavy, as part of the requirement to ensure apropos the IHR guidance there was no alternative to retirement, began to explore possible retention of the Claimant, albeit with his restrictions[7]. Her job was to circulate colleagues to see if there was anything that he could do. She of course would need to be open about his restrictions. Thus, we can see her doing that on 9 and 10 August 2016 (Bp 154). She circulated to nine individuals who look to be HR in the various divisions. One of those was Tracy Meakin based at Leicestershire Police but the HR for **EMSOU** which as we say covers 5 forces. Suffice it to say that we can take it that there was nothing that the HR teams could come up with because we are of the view that had there been, they would have replied. So, what it means is this: we accept that albeit new to the role, that in a perfect world AK should perhaps have followed up matters with these colleagues post 9 August 2016 to belt and braces that there was nothing they could offer, we do not consider that actually ends up as a failure to make a reasonable adjustment: as there is no evidence that they had anything to offer which could accommodate the restrictions of the Claimant.

CRIM

21. CRIM is a control and command centre operated by the Respondent. Sergeants are the front line first response/triaging supervisors. It is a noisy environment, hectic and pressurised. The Sergeants do not have the luxury of being able to go outside the control room if for instance they want to tag, which means type, controls on the 57digit keyboards that they use; all of which link into what is a somewhat creaking but nevertheless sophisticated IT system.

22. The possibility of whether or not the Claimant could be inserted into such a role was canvassed by AK's immediate predecessor David Lawley with inter alia Jim Donaghie, who is the Telephony and Desktop Services Manager, starting circa 19th July 2016 and crystallising on 9th August 2016. This in turn deals with utilisation of voice activated software such as Dragon or Olympus as a reasonable adjustment to enable the Claimant to perform a role in in CRIM (see Bp158-162).Putting it at its simplest the CRIM IT system is incompatible.

23. Otherwise could he have performed the role? The Tribunal had the benefit of the clear and helpful evidence of Joanne Miller and Julie Mansfield. The former is a Business Systems Development Manager for Contact Management with the Respondent. The latter is the Infrastructure & Service Delivery Manager for Nottinghamshire Police Information Services ("IS"). Both are very experienced. The evidence that they provided was to the effect that 90% of the work that would have been carried out by the Claimant in CRIM (at sergeant rank) would involve keyboard work. Furthermore the supervision and oversight provided by the Claimant would have primarily been a manual process. Thus it could not have been effectively achieved in a different location, such as a side room to the personnel he supervised if such a location was available in 2016 (which was not the case.

24. Thus it follows that deployment in CRIM was not reasonably practicable. Thus it can be eliminated as a reasonable adjustment.

[7] The Claimant was by now 2½ years from retirement.

Other avenues

25. AK was circa this time also canvassing senior police officers across the Respondent to see if they could help ie see Bp153. An example is Supt Paul Winter at Headquarters Corporate Development (CRIM systems). Looking at the email exchange with him (Bp 165), she said:

> *"When we met you said you were looking to recruit a Supervisor to your team in the near future. This is a bit of longshot but would you consider an officer who has recently been assessed for H1 medical retirement but is keen to be retained and redeployed. Obviously, I can give you more details if you are open to this in theory".*

The answer she got was:

> *"Happy to discuss but now up to strength on the team".*

26. There is no obligation as such to create a post specifically for a disabled person which is otherwise not needed[8]. It is different from assisting proactively a disabled person into a vacant role that is there, ie the **Archibald v Fife Council [9]** scenario. It is self-evident that Superintendent Winter no longer had a vacancy.

27. That brings us to Detective Inspector Lee Young who gave evidence before us [10]. He was also asked by AK (at Bp163 on 9/8/16) if he had got anything in the department he was then responsible before. This was the Counter Corruption Unit (CCU) within Professional Standards (PSD). He came up with that he had got what we would describe as really a wish list. He had been thinking that he would like to create a new role within his team for a Digital Media Investigator. This would be primarily office based. It would however involve writing such as reports. Self-evidently, it would also mean a need to use the IT system and of course a keyboard. Also it was not a Sergeant role. It would only be at Constable rank or equivalent were it to be established. Even so, prima facie at first blush this looks like a prospect that AK should have followed up, instead she replied:

> *"I will see what other responses I get in and I will come back to you if that is ok".*

28. Mr Mallick's arguments are on this one at first blush attractive; however, we bring back in the evidence of Alison Naylor and our original observations about the restrictions on the Respondent. It echoes the Superintendent Pollock point. There is no money. The Respondent is not going to indulge wish lists and create unnecessary supernumerary type roles. So, what have we got? Lee Young would have liked to have this role provided for. He had actually got his police officer team (not Sergeants) boxing and coxing to do the role he wanted done as part of their duties. He never got the funding. The role was never created for the reasons we have given. It is back to our deployment of ***Tarbuck***. Thus it can be dismissed as a failure to make reasonable adjustment.

[8] **Tarbuck v Sainsburys Supermarket Limited** (2006) IRLR 644 EAT**.**
[9] 2004 IRLR 651 HL.
[10] Statement at witness bundle commencing P66.

Final possible port of call

29. Circa this period a vacancy was advertised[11] by the Leicestershire Constabulary for a Regional Strategic Advisor in **EMSOU.** We have no doubt from the evidence of Officers 1 and 2 in particular that it would have been on the Intranet of all five police forces. Thus either directly or via the Police Federation the Claimant should have known about it. The Claimant or on his behalf the Police federation did not express an interest that he be considered. Even so should AK have informed him and urged him to apply? If so does it make any difference? The issue is resolved by the evidence of Officer 2. The Claimant would never have been considered for this role because inter alia a core requirement was "must have attended and successfully passed the National Undercover Cover Officers Course". The Claimant had been put on this course within weeks of joining **EMSOU** as a Cover Sergeant, ie before he injured himself lifting the boxes. He tells us, and we have no reason to disbelieve him, that it was plain from everybody else on the course that he was years behind them in terms of the kind of experience they were displaying in the sessions. He could complete successfully the written tests, indeed he got 95%, but he shared the view of the course organisers at the end of the first week that he was "out of his depth": Therefore he left the course.Thus he lacked this crucial qualificatory requirement.

30. We bring in another factor. The Police Federation has considerable influence within the Police Force nationally and thus within the Respondent. Its representatives sit on MJC's. There is an office for them at HQ. Alison Naylor sees them on a daily basis. Furthermore, during this time the Police Federation had come a calling with an expanded list of its members wanting Ill Health Retirement, the reason being as follows. The Windsor review was it seems about cutting down the benefits to police officers of remaining on their full allowanced pay who were unfit to perform their full duties. So the Windsor review was about that their pay would be reduced if they were unable so to do. From the evidence we have, and it comes in particular from the Claimant, who we observe at this stage has called no one from the Police Federation, the advice he was getting, ie from Malcolm at the Police Fed, was that if his worst fears were confirmed, then the Claimant might be facing a £9,000pa loss of pay given the restrictions, thus, he would be better going down the IHR route. Second this would also mean if his application for IHR was accepted, that he would not be going down the Capability Management route.

31. And reverting to the regional |Strategic Advisor role, we learnt that this role could be filled by a civilian, albeit obviously one who had previously performed and undercover cover support police or security agency role. So there would be nothing to stop the Claimant taking IHR and simultaneously applying for such as this role. As it is he did not apply. The observation we make is first that it was a role funded by the budget of Leicestershire Police Force: so not the Respondent. Second he lacked the crucial qualification to which we have referred.

32. Finally on the alternatives to IHR, if the Police Federation, during the relevant period had had any concerns about the way that matters were being handled they would have made it abundantly clear. This brings in a senior Police Federation Representative, Mark Davies, otherwise known as Spike. Later down the line on 15 November 2016 (Bp258A) he sent a critical e-mail to AK along the lines of there had been a failure to consider and then make reasonable adjustments principally focusing on CRIM and making plain that the Police Fed

[11] Job and role descriptions start at at Bp124.

was considering the Employment Tribunal route. His next email is telling (Bp 265:

"Thanks for getting back to me (The office) so promptly it is appreciated. Having been updated by Mick with your reply it would appear that all avenues have been looked at by the employer and I may initially have been given a selective version by way of an update…"

Conclusion on the claim of failure to make reasonable adjustments claim

33. It is clear from our findings that the Respondent did consider making reasonable adjustments, For the reasons we have now given it did not fail in its duty. There were no adjustments that it could reasonably make. Accordingly this head of claim fails.

Unfavourable treatment

34. This of course concerns the decision to dismiss the claimant by way of ill health retirement.

35. Section 15 of the EqA is engaged:

> *(1) A person (A) discriminates against a disabled person (B) if –*
>
> > *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
> >
> > *(b) (B) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

36. The correct approach to the operation of this section was set out at paragraph 31 by Simler P in the case of **Pnaiser v NHS England** (2016) IRLR 170. It is fully recited at paragraph 5 of Mr Allsop's submissions and thus does not need to rehearsed by us.

37. First has the Claimant been treated unfavourably? He is in a situation, from our findings, where there has not been a failure to make reasonable adjustment. The alternative to therefore continuing down the IHR route would have been the Capability route. He could have appealed the IHR route first at the stage of getting Dr Kneale's report, and second when he got the Mitchell report on 22 September and by which the recommendation to the ACO for the reasons fully set out therein, commencing at Bp 198, was that the Claimant be retired be retired on ill health grounds. Had he appealed, as was his right at the time he got the Mitchel report, then as Alison Naylor made plain to us, it would have stopped the process for the time being.

38. Despite what Mr Mallick valiantly says to us, namely that the Claimant had been misled in terms of failures on the reasonable adjustment front and as to which there is no evidence, we are driven to the conclusion that the following must apply here. On 5 October 2016 (Bp229) he in effect accepted the conclusions of the Miller report. He wrote as follows:

"Angela

I have read the report and the comments which have been made in relation to my disability and options available to me.

As you are aware I cannot dispute the doctor reports as I am fully aware that my condition will only deteriorate over time.

Although I have stated constantly that I prefer not to retire if at all possible I have to accept that it is unlikely at this time that an alternate position is available.

I have seen the recommendations of both yourself and Steve Mitchell and I will have to accept whatever decision is reached."

39. It might have been a reluctant decision but it was not as is obvious in a situation of duress; there was no improper pressure placed on him by the Respondent.

40. Accordingly on 10 November ACO Alison Naylor made the decision to ill health retire the Claimant effective midnight 23 November. A letter to that effect was sent to the claimant that day (Bp246). He received details of his entitlements. A further copy of this is in the bundle at Bp 261 dated 18th November 2016 from the Keir Pensions Unit which obviously provided an outsourced service to the Respondent. Set out was his pension and substantial lump sum entitlements

41. But then circa 15 November 2016 he contacted David Lawley who in turn e-mailed AK (Bp 258A):

" Ed called he wants advice/update on the following;

- *Will he be paid his annual leave on leaving service via medical retirement*
- *Can he appeal to the Home Secretary because he has no internal right of appeal?*

Ed states that he feels the Federation gave him bad advice about the pension on medical retirement – in short he has not received full pension as suggested by Fed

Can you call Ed back on the points above…"

42. Then as already stated "Spike" Davies came over the parapet but then retracted his criticism having got the full picture from AK. And of course as per the policy, for the reasons we have gone to given the two stages at which an appeal could have been raised and wasn't as per the Pension Regs the decision of ACO Naylor was final, there is no further right of appeal.

43. So, what was the Claimant doing during this period? He was talking to the Police Federation, albeit it might have been by now to Dave Keen as Malcolm Spencer had retired. Prior thereto, from what he told us, via Malcolm the Police Federation had advised him to take IHR and incepted his application. Doubtless part of the factors in their minds for the reasons we have now gone to would be

the possible impact of the Windsor review and the potential otherwise for say, Capability Management intervention. In that context isn't IHR that to his benefit how can it be unfavourable treatment? And although he decided not to proceed, we know that he didn't subsequently appeal SMP Kneale or the Mitchel report, and thus did not oppose the continuance down the IHR path for the reasons which are obvious at Bp229. Then as it is, having been informed of his last day of service, it seems that around that time having now got his pension details he realised that he was not going to get the full pension as he thought because as he was in the last 5 years of service pre retirement as per the policy IHR would not be at 100 per cent pension: so there was a shortfall on what he expected.

44. But the fault lies in the advice he got from the Police Federation. And this was in respect of a IHR policy agreed with it and with which it is clear from the weight of the evidence before us as a body it would have been fully conversant. And the Claimant had not otherwise done anything to find out what his IHR entitlement would be in the run up to his in effect acceptance of IHR at Bp229[12].

45. Given these findings how can the employer be acting unfavourably when it is the Police Federation who has given the bad advice if indeed it did? The Respondent has scrupulously followed the agreed IHR policy. The Claimant clearly met the criteria. Thus it is not unfavourable to grant him the benefits of IHR as opposed to proceeding down such as the Capability/ performance route.

Conclusion

46. There was no unfavourable treatment thus s15 need be no further explored.

Overall conclusion

47. It accordingly follows that the claim is dismissed in its entirety.

Employment Judge P Britton

Date: 15 January 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

[12] On this issue in passing the highly experienced lay members find it astonishing that the Claimant did not so inquire. What it also shows however is the extent of his reliance upon the Police Federation.