EMPLOYMENT TRIBUNALS

Claimant:	Mrs A Phillips
Respondent:	Chief Constable of Durham Police
Heard at:	via CVP at Newcastle Employment Tribunal
On:	23, 24, 25 and 27 November 2020
Before:	Employment Judge Jeram sitting with Ms L Jackson and Ms E Wiles
Representatives:	
Claimant	Mr Feeney of Counsel
Respondent	Mr Rathmell of Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1. The Claimant's claims of discrimination arising in consequence of disability, failure to make reasonable adjustments and harassment are not well founded and are dismissed.

REASONS

1. By a claim presented on 4 December 2019, the Claimant complains of disability discrimination specifically discrimination arising in consequence of her disability, a failure to make reasonable adjustments and harassment.

Issues

2. The issues, after some refinement during the hearing by the parties, were identified as follows:

Disability

a. It is agreed that:
    i. the Claimant was a disabled person within the meaning of s.6 Equality Act 2010 in that she had Generalised Anxiety Disorder at all material times;
    ii. that the Respondent knew or ought to reasonably have been expected to know that the Claimant was disabled at the relevant time/s.

Discrimination Arising from Disability

a. It is agreed that the following amounts to unfavourable conduct and that it was because of something arising in consequence of the Claimant's disability: paying the Claimant half pay from 1 February 2019 – 15 July 2019.
b. Did the following amount to unfavourable treatment:
    i. Refusing to return the Claimant to full pay and/or reimburse the Claimant for the period during which she was paid half pay following representations by her Police Federation representative on 5 July 2019;
    ii. Refusing to return the Claimant to full pay and/or reimburse the Claimant for the period during which she received half pay:
        1. At any point during the ill-health retirement process (on the Claimant's case, December 2018 – 12 August 2019 including but not limited to those occasions on which the Respondent has pleaded the Claimant's pay was reviewed);
        2. On or around 15 July 2019 (when the Respondent made the decision to ill health retire the Claimant).
c. It is agreed that any treatment above was because of something arising from the Claimant's disability, since the treatment arose from the Claimant's absence and that there was 'no timeline' for her return.
d. Can the Respondent show that the treatment is a proportionate means of achieving the following aims, which the Claimant accepts are legitimate:

i. Operating a sick pay scheme designed to encourage and incentivise officers to return to work where possible;
ii. Encouraging and rewarding good attendance;
iii. Delivering the most effective policing service possible during a time of austerity;
iv. Responsible expenditure of scare public funds.

Failure to make reasonable adjustments

a. Do the following amount to PCPs operated by the Respondent:
    i. Drop officers to half pay after six months on sick leave;
    ii. Drop officers to half pay after a particular period of time on sick leave (with the relevant period of time determined by the Respondent).
b. Do the PCPs put the Claimant to a substantial disadvantage in relation to a relevant matter compared to persons who are not disabled, where the substantial disadvantages relied upon by the Claimant are:
    i. The fact and length of her sickness absence was because of her disability;
    ii. Individuals with disabilities are more likely to be on a sickness absence compared to persons who are not disabled;
    iii. Individuals with disabilities are more likely to have longer periods of sickness absence and/or more frequent periods of sickness absence compared to persons who are not disabled;
    iv. Individuals with disabilities are more likely to have sickness absence of such length and/or such a frequency as to mean that the Respondent puts them onto half pay when compared to persons who are not disabled.
    b. The adjustments that the Claimant contended would be reasonable to make so as to avoid the disadvantage were as follows:
        i. Maintaining the Claimant on full pay from December 2018 (when, on her case, the ill health retirement process commenced) until the termination of her employment on 12 August 2019;
        ii. Returning the Claimant to full-pay at some specified point between 1 February 2019 and 15 July 2019;
        iii. Reimbursing the Claimant for any periods of sickness absence for which she received half pay.

Harassment

a. It is accepted by the Respondent that the following treatment occurred and that it was related to the Claimant's disability:
    i. On or after 24 June 2019, the Claimant received a letter from the Respondent indicating that it was seeking further clarification from the Selected Medical Practitioner ('SMP') about which roles she could perform;
    ii. The decision by the Respondent to consider the Claimant / ask the SMP to consider the Claimant for two roles namely (a) counter clerk and (b) clerical officer.
b. Did this constitute unwanted conduct?
c. Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating hostile, degrading, humiliating or offensive environment?

Evidence

3. The Tribunal had before it an agreed bundle comprising of 536 pages;

4. The Tribunal heard from the following witnesses who gave evidence on oath:
    a. The Claimant;
    b. Andrew Craig Philips: the Claimant's husband and a serving Detective Sergeant with the Respondent;
    c. David Andrew Jackson; the Claimant's Police Federation representative;
    d. Sarah Davies, Human Resource Manager;
    e. Michael Kirtley, Detective Chief Inspector;
    f. Gary Ridley, Assistant Chief Officer.

5. In addition, the Tribunal read the statement of Julie Reilly, Occupational Health Advisor for Optima Health.

Background

Sick Pay – Regulations, Circular and Policies

6. Since a significant aspect of the claims we are required to determine relate to the Claimant's pay, we outline at this early juncture the relevant sick pay provisions and practices.

Police Regulations 2003

7. Regulation 28 of the Police Regulations 2003 ('the Regulations) and Annex K to the Home Secretary's determinations grants a public office-holder full sick pay for 6 months, and a further six months on half pay – both of which a chief officer may, from time to time, determine to extend at their discretion.

PNB Circular 05/01

8. The Police Negotiating Board Circular 05/01 is dated January 2005 and is entitled *'Guidance to Chief Officers on the use of discretion to resume / maintain paid sick leave'*. It sets out an agreement reached by the Board on *'additional guidance to chief officers on the use of discretion to resume / maintain paid sick leave in support of the Secretary of State's determination of sick pay under regulation 28 of the Police Regulations 2003'.*

9. The Circular contains, at paragraph 2 confirmation that a chief officer of police 'may' in a particular case determine that for a specific period a member who is entitled to half pay is to receive full pay, or that a member who is not entitled to any pay while on sick leave is to receive either full pay or half pay.

10. Paragraph 3 of the Circular contains a reminder of an earlier PNB agreement of 9 May 2002 that: *"the PNB will consider guidance to situations where it would be reasonable for chief constables to exercise their discretion favourable to resume / maintain paid sick leave".*

11. Paragraph 5 emphasises the need to exercise discretion based on the individual facts of a case, and the inappropriateness of a fixed policy.

12. Paragraph 6 sets out the recommendation to have a written policy on the exercise of a discretion.

13. Paragraph 7 states that whilst each case must be considered individually, "*the PNB considers it would be generally appropriate for chief officers to exercise the discretion favourably where:*

    a. *The chief officer is satisfied that the officer's incapacity is directly attributable to an injury or illness that was sustained or contracted in the exercise of his/her duty; or*
    b. *The case is being considered in accordance with the PNB Joint Guidance on Improving Management of Ill Health and the police authority has referred the*

issue of whether the officer is permanently disabled to a selected medical practitioner"

. . .

Absence Management Policy

14. The Respondent has an attendance management policy. The 13th version of that policy which remained in force until 30 January 2019, when it was superseded by the 14th version. Save in one respect, the relevant parts of those policies are identical.

15. The policies require a Sick Pay Panel ('SPP') comprising of the Head of HR, and a representative from the Police Federation (amongst others) to meet monthly to collate information about an officer's individual circumstances for the Panel to consider before making a recommendation to the Chief Constable to assist him or her when making a decision about an individual's salary whilst on sick leave.

16. In practice, the Chief Constable delegates the decision to his or her executive team; at the relevant time the executive comprised of 4 individuals, including Deputy Chief Constable Dave Orford and ACO Gary Ridley.

17. The 13th edition of the policy requires the SPP to consider a number of matters, which include:

"Has the individual been referred to the Selected Medical Practitioner. . .;

If the SMP recommends the individual is permanently disabled from performing a role within the Respondent, and is subsequently medically retired they will be reinstated to full pay (if necessary) from the date of recommendation to the SMP. [sic]

Is the absence due to an injury sustained whilst performing actual duties associated with their role which is not the fault of the individual and is the individual making active attempts to return to work?

. . .

The panel will then make recommendations to the Chief Constable who will consider each case on its merit and exercise discretion to salary [sic] as follows:

No extension of salary
Remain on full pay, to be reviewed again by the panel after a stated duration
From half pay to full pay for a stated duration as seemed by the panel [sic]

From no pay to half pay as deemed appropriate by the panel."

18. In the 14th edition, the words underscored above were replaced with the words: *the individual will remain on their current pay status at the time of referral which may be full, half or nil pay and will only be reinstated to full pay (if necessary) when the notice period commences if medical retirement is progressed"*

Findings of Fact

19. The Claimant joined the Respondent as a police constable in January 1997; she was an Inspector by the time her service came to an end on 12 August 2019.

20. During her service with the Respondent, the Claimant was exposed to pressures accompanying her role and the Respondent recognised that the Claimant as someone holding a 'operational vulnerability role'. In 1998 the Claimant attended a fatal road traffic accident involving a colleague and in 2012, a minor with whom she had worked in her safeguarding role, committed suicide. The Claimant had access to welfare officers and other support services which at the time she did not access; she had no prior history of mental health problems until the events leading to her claim.

21. Between mid-November 2017 and 6 February 2018, the Claimant took a period of extended leave, by combining her annual leave entitlement with rest days and time off in lieu.

22. On 7 February 2018 the Claimant, at her return to work meeting, asked Detective Chief Inspector Paul Gray to refer her to Occupational Health. She said she had not realised how much stress she was under and that she could recognise in herself the signs of an impending "burnout". She said that her anxiety was exacerbated by the ongoing misconduct investigation concerning one of her officers. She intended to visit her GP to discuss her concerns. She raised the possibility of spending some time away from her role and perhaps doing something else for a short while. DCI Paul Gray supported the referral to Occupational Health and arrangements were made for the Claimant to be transferred to the intelligence department; by reason of the Claimant's subsequent and continuing absence, that transfer was never effected.

23. The Claimant was seen on 15 February 2018 by the Force Medical Adviser ('FMA') Dr Khan. Dr Khan advised that the Claimant was fit to continue to work without restrictions but noted that she suffered substantial stress symptoms. It was anticipated by Dr Khan

the Claimant would make a reasonable level of recovery but if she were subjected to continuing overwhelming levels of pressure at work this recovery would be delayed or prevented. A review was arranged in two months' time.

24. On 20 April 2018 the Claimant was absent from work by reason of ill health. She did not return to work before being retired by reason of ill health in August 2019.

25. The Claimant's statutory entitlement was for a minimum of 6 months' sick pay at the full pay rate i.e. until 19 October 2018.

26. On 23 April the Claimant submitted a fit note completed by her GP confirming that she was suffering work-related stress was not fit to return to work for two weeks. The fit notes submitted by the Claimant between April 2018 and August 2019 all confirmed the Claimant's condition as being 'work-related stress'. The length of the notes ranged from two weeks to 6 weeks at a time, save on one occasion when it covered a period of 2 months.

27. On 25 April 2018 the Claimant had the first of a several – approximately monthly - absence support meetings with DCI Mick Kirtley ('MK'). This was the first absence that he had been required to support. The meetings largely took place at the Claimant's home, with the Claimant's husband Andy Phillips ('AP') often present for support. MK took a note of their discussions.

28. At that first meeting, the Claimant told MK that her GP had diagnosed her with clinical depression and work-related stress. We were taken to no evidence to support the assertion that she had been diagnosed with depression by her GP. The Claimant's GP had, however, referred her to a community psychiatric nurse ('CPN').

29. MK recommended that whilst the Claimant seemed to be 'some way' from being fit to resume duty, there appeared to be little merit in developing a return to work plan; his recommendations in that regard remained largely unchanged during the period of time he acted as her welfare officer.

30. On 31 May 2018 the Claimant saw Dr Khan for a review appointment. He recommended that the Claimant received Eye Movement Desensitisation and Reprogramming ('EMDR') treatment. The Respondent agreed to fund the treatment. For reasons that we were not taken to by either party, and in respect of which the Claimant makes no complaint, that treatment did not commence until September 2018.

31. We accept the Respondent's contention that by August 2018, the Claimant had arrived at a settled conclusion that she did not wish to return to work. Her CPN records, which note that the Claimant was suffering from anxiety and changing mood, demonstrate that between June and August 2018, the Claimant was questioning whether to return to her role, followed by her communicating to her CPN that she had made the decision to leave her role and describing it as 'a huge decision' and she had 'no option', and in August 2018, the Claimant telling her CPN that she was more relaxed than she had been in some time and was capable of reflecting on how her work affected her quality of life, and impacted on her health. We do not consider it necessary to the disposal of the issues before us to determine whether, and if so to what extent, that conclusion was influenced by external, lifestyle, choices on the part of the Claimant.

32. On 26 July 2018 the Claimant completed a referral form for the recommended EMDR treatment. On that part of the form bearing the heading 'Background Information', she asserted that she had been advised '*by my GP and force medical doctor that I had severe clinical depression, stress and anxiety'.* For reasons already stated, we are not satisfied that the Claimant was diagnosed with depression by her GP; Dr Khan had not reported a diagnosis of depression, severe or otherwise; during cross examination, she distanced herself from her own use of the word '*severe'.*

33. On 10 August 2018 Dr Khan, in a report released the Respondent on 29 August 2018, confirmed his view that the Claimant was not fit to return to work.

34. On 30 August 2018 the Claimant told MK at an absence support meeting that she was aware that her pay would be reviewed by the Sick Pay Panel in the near future. She may have not known the precise date of the review, but she had people she could ask, not least her Police Federation representative, Dave Jackson ('DJ'). She told MK that her CPN had told her that there was no clinical need for a psychiatric report as requested by Dr Khan, and the nurse had advised her that if the Respondent required one it would have to make its own arrangements.

35. On 5 September 2018, the Head of HR, Judith Clewlow ('JC') Head of HR, sent to the Claimant a letter notifying her that her pay was liable to be reduced from full pay to half pay on 19 October 2018. JC provided the circumstances in which the Chief Constable can exercise his or her discretion favourably and, as set out *'in the policy and is in line with national guidance'*, one such circumstance was *"if the absence due to an injury sustained whilst performing actual duties associated with their role and is the individual*

making active attempts to return to work?". JC informed the Claimant she could make written representations for the consideration of discretion to be exercised in her case and that her application should include relevant evidence, and *'specific supporting medical opinion if available'*. The letter defined injury on duty as those injuries that are sustained during the execution of duty was exercising police powers.

36. The letter directed the Claimant to the two named welfare officers, as well as the confidential care line, the occupational health unit, her management as well as her staff association as sources of advice and support during her absence. JC ended the letter by inviting direct contact in the event that the Claimant required further assistance.

37. In late September 2018 the Respondent agreed to fund four additional sessions of EMDR, as had been requested of it.

38. In early October 2018 the Claimant submitted written representations to the SPP for consideration of discretion to be exercised in her favour. In that document, which was unaccompanied by any medical evidence, the Claimant stated that she was *"now suffering from clinical depression, work-related stress anxiety and stress, and PTSD, which is purely an entirely related to my job."* The Claimant also stated that she hoped and wished to be able to return to full duties as soon as possible but had been advised by her GP, CPN and Dr Khan that this would be currently detrimental to her health.

39. The Claimant in her oral evidence was unable to identify any other occasion when she had indicated to the Respondent that she hoped to return to work.

40. The SPP meets monthly and, for the first time on 2 October 2018, it considered the Claimant's case. At this and subsequent review meetings before the SPP, the Claimant's interests were represented by a Police Federation representative (who was not David Jackson). The Tribunal received no evidence about what was said or discussed about the Claimant at this meeting or subsequent meetings.

41. The SPP completes a form in respect of each officer, setting out the basis for its recommendation; the form contains criteria similar to those in the PNB Circular at paragraph 13 above and the Absence Management Policy at paragraph 17 above including:
    a. whether an individual has been referred to the Selected Medical Practitioner; and

b. whether the absence is due to an injury sustained whilst performing actual duties associated with their role and which is not the fault of the individual and whether the individual making active attempts to return to work.

42. On 8 October 2018, the SPP recorded that the Claimant had not be referred to the Selected Medical Practitioner. As against the criterion *"is the absence due to an injury sustained whilst performing actual duties associated with their role which is not the fault of the individual and is the individual making active attempts return to work?"* the 'yes/no' response remained uncompleted and a manuscript note, we find on balance made by JC, stated as follows: *"Anna will state this is due to a series of high work load pressures".*

43. The Panel made a recommendation to the Chief Constable that the Claimant's pay remain at full rate, for a period of one month after which it would review the position. That recommendation was considered and accepted by or on behalf of the Chief Constable; JC wrote to the Claimant on 4 October 2018 confirming that she would remain on full pay for the present time and reviewed on 6 November 2018 and that the decision to pay full pay was 'without prejudice'.

44. By November 2018, on the Claimant's own evidence, she was discussing with her GP the possibility of medical retirement.

45. On 5 November 2018, the MK met with the Claimant and her husband for an absence support meeting. In contrast to previous meetings, for the first time, the Claimant indicated to MK that she considered herself to have been injured on duty.

46. The SPP met again on 7 November 2018 to discuss the Claimant's case. The response of the panel was the same as before, save that the manuscript note stated: *"this is likely to be the case – we are providing EMDR".* Another recommendation was made to maintain the pay at full rate, and it was again accepted by or on behalf of the Chief Constable.

47. ACO Gary Ridley (GR) has responsibility for finance and for ensuring the expenditure of public funds is justified. In this capacity, he occasionally attends SPP review meetings; he attended the SPP meeting on 5 December 2018, at which the Claimant's case was one of those that was reviewed.

48. As against the same criterion as the last occasion the 'yes/no' response remained uncompleted and this time JC noted *"currently having EMDR as authorised by force".*

49. The SPP made a recommendation of a further extension of the Claimant's salary to full pay for one month, after which her position would be reviewed. The Chief Constable decided to exercise his discretion in line with the recommendation of the SPP and written confirmation was sent to the Claimant in the same terms as before.

50. We accept the extent of the evidence that GR was able to give about the Claimant's case, namely that he took the view at some stage in either December or January, in exercising the delegated powers of the Chief Constable, that the discretion to pay full sick pay should not be extended further.

51. On 20 December 2018 the Claimant attended a review appointment with Dr Khan. The Claimant told him that she understood she had completed the course of EMDR, as well as 8 counselling sessions and that she was no longer seeing her CPN. She told Dr Khan that she was still on a high dose of mood stabilising medication. She described, and exhibited to Dr Khan, very high levels of anxiety. We reject the Claimant's contention that the idea of ill health retirement was posited by Dr Khan; as his notes plainly indicate, it was the Claimant who told him that she did not feel she would be able to come back and said that she *'wanted to be considered for permanent disablement in the circumstances as 'in limbo''*. Dr Khan reported to the Respondent that it would not be unreasonable to raise the question of permanent disablement and suggested that an opinion was sought of a psychiatrist before he advised further.

52. A medical report supporting her permanent disablement followed by a decision to compulsorily ill health retire the Claimant would enable her to access an enhanced, ill health pension scheme and commute part of it into a lump sum. Because of the financial benefits of such a decision, if her service was to be terminated, ill health retirement was the Claimant's preferred outcome.

53. The SSP met again on 10 January 2019, when it reviewed the Claimant's sick pay arrangements. Against the question *'has the individual been referred to the SMP?',* the answer *'no'* was indicated. As against the question *'is the absence due to an injury sustained whilst performing actual duties associated with their role which is not the fault of the individual and is the individual making active attempts to true to work?'* neither yes, nor no answer was indicated, but again, a manuscript note by JC *'PTSD according to FMA but Exec decision to go to ½ pay'.*

54. There was no evidence before us as to what was said about or on behalf of the Claimant at this meeting. The FMA, Dr Khan, had not reported to the Respondent of any belief he held that the Clamant was suffering symptoms of, much less had he confirmed that the Claimant had PTSD.

55. Consistent with the manuscript note, the SPP recommended *'no extension of salary'.*

56. On 14 January 2019, the Deputy Chief Constable wrote to the Claimant, notifying her of the Chief Constable's decision to no longer extend her sick pay from half pay to full, with effect from 1 February 2019. The Claimant was reminded of the limits of her statutory sick pay entitlement and reassured that on her return to work, she would be reinstated to full pay. The Claimant was provided with a named contact in the event that she had further queries, and signposted to various sources of support.

57. On 30 January 2019, the Respondent's 14th edition of its Absence Management Policy came into force.

58. On 1 February 2019, the Claimant's sick pay was reduced to half her salary rate. Although this self-evidently led to a drop in her income, the Claimant did not suffer any financial hardship in consequence.

59. On 6 February 2019, the Clamant was seen by Dr S Hussain, a consultant psychiatrist. The Claimant was accompanied by her husband. She described to Dr Hussain the stress that she had suffered in the last few years including the two incidents in 1999 and 2012. Dr Hussain noted that *'she did not describe them as reliving of those traumatic experiences'* and nor did she *'describe symptoms of clinical depressive disorder anymore'* although she found discussions or situations around her work very stressful and upsetting. She did not mention ideas of hopelessness, but said that she thought her work life had come to an end. Dr Hussein disagreed Dr Khan's suggestion – which was expressed by Dr Khan only in his referral letter to Dr Hussein - that the Claimant suffered symptoms of depression or PTSD. Instead, Dr Hussein opined that the Claimant appeared to be experiencing symptoms of prolonged adjustment disorder with mixed anxiety and depressive reaction of moderate severity, impacting her function to a significant level. He noted that the Claimant's state had gradually improved over the '*last many months'* and recommended an increase in medication and suggested cognitive behaviour therapy. He concluded that he was *'quite confident'* that the Claimant's mental state would improve significantly over the next

few months after which she may consider resuming her duties on a slow phased return to work.

60. On 14 February 2019, MK wrote to Occupational Health on the Claimant's behalf to state that the Claimant *'was resolute in her view'* that returning to work would adversely affect her health.

61. On 27 February 2019, the Claimant's GP wrote to Dr Khan. In that letter, her GP Dr Graham, whilst recognising the specialist qualification of Dr Hussein and not taking any issue with *'the main body'* of the report, requested Dr Khan to attach weight to his own experience of the Claimant, described as 8 appointments in 12 months. He stated that the Claimant had not, as described by Dr Hussein agreed to any treatment plan and that he could not see any alternative to retirement on health grounds.

62. In the meantime, the Claimant's GP continued to complete fit notes, declaring the Claimant unfit to attend work due to *'work related stress'.*

63. Dr Khan saw the Claimant on 28 February 2019. He reported that the Claimant disagreed with Dr Hussein's suggestion that the treatment plan he recommended had been agreed to by her; he stated that his experience and clinical judgment corresponded more closely with the Claimant's GP and that he was *'inclined to consider that there is sufficient medical evidence to raise the question of permanent disablement'.*

64. Dr Khan's report was released on 1 March 2019 and JC authorised referral of the Claimant's case to the Selected Medical Practitioner ('SMP') on the same day. The Claimant was written to confirming the same on 5 March 2019. A 'Guide to the Selected Medical Practitioners Referral Process' was also enclosed with the letter for information. The Guide states, beneath a timetable for each stage of the process, that from date of approval to refer to the SMP to the granting of ill health retirement the process may take 'more than 4 months' to complete. In particular, it stated that the SMP's opinion would be used *'to determine your suitability and aptitude for retention, the scope for such retention and whether or not you should be retained'.* The Claimant always understood that the ultimate decision was for the Respondent, not the SMP.

65. The SMP was an external occupational health physician, Dr Austin. He noted that the date on which he received a referral was 26 March 2019. He produced two documents,

a 'general work capability assessment checklist' dated 29 April 2019 and a report dated 9 May 2019.

66. The work capability assessment checklist indicated that the Claimant was capable of all functions identified in the checklist, save for 5 functions, which he indicated the Claimant was capable of, with adjustments. Next to the factor 'coping with stressors' he wrote 'avoiding criminal justice'.

67. In his report, Dr Austin adopted Dr Hussain's diagnosis of prolonged adjustment disorder with mixed anxiety and depressive reaction, although he was silent as to its severity. He noted that Dr Hussain's optimism about the future was *'at odds'* with the opinion of Dr Khan and the Claimant's own GP. He asserted that Dr Hussein had not referred to PTSD in his report and he was not aware of Dr Hussein's rationale for excluding the condition; Dr Austin stated that he believed it merited consideration. Dr Austin took the view that the Claimant displayed symptoms of PTSD. He also reported that he saw no evidence that the Claimant was likely to improve *'with any other treatment modality as yet not attempted'*. He concluded that the Claimant would make a recovery to return to gainful employment but would need to avoid working *'in the Police or Criminal Justice System'*. He continued *'she tells me she is highly motivated towards returning to some form of meaningful work activity as soon as possible. We discussed her qualifications, skills and experience and I believe this will be possible, particularly in view of her commitment and determination to do so'.* Dr Austin concluded that the Claimant should be considered for permanent disablement.

68. Dr Austin's conclusion that she was permanently incapacitated from the duties of an officer, was the outcome the Claimant sought. The Claimant believed that the report spelled an end to the process in the near future. She did not therefore did not appeal the report, nor did she indicate to the Respondent that she did not seek to appeal the report. She did not contact the Respondent to provide her interpretation of the consequences of that report.

69. On 18 June GR spoke to DJ. GR told him that no decision had yet been made on the issue of compulsory retirement and that roles were being looked at. DJ articulated his view that the delay was unacceptable and that the consequences of the report were self-evident.

70. On 24 June 2019, Deputy Chief Constable Dave Orford ('DO') wrote to the Claimant stating that he had asked the SMP for further clarification on any potential tasks and

roles he feels would be suitable, asking him for this to be carried out as soon as possible, acknowledging the need to resolve this as soon as possible.

71. The Claimant was totally bewildered on reading the contents of the letter; she wanted to know what the roles might be. In her oral evidence, she described DO as *'a decent man, I don't think he realised how [ill] I was'.*

72. On 24 June 2019, Sarah Davies ('SD') the temporary HR Manager wrote to the SMP, identifying that GR had requested further clarity with regard to potential tasks and roles which may be suitable for the Claimant. GR did not direct SD or anyone else in the Human Resources department as to which roles should be referred to Dr Austin for comment. SD's understanding of her role was taken from a conversation with another member of staff in Human Resources; she understood she was to look for low stress, possibly administrative roles. She was given the work capability assessment checklist and nothing else; she was not given the report. She enclosed the role of Prosecution Trial Team Supervisor.

73. On 3 July 2019, the Claimant's husband AP wrote to MK in an email headed 'Concerns', he confirmed he was grateful for MK's help, before proceeding to set out at length his concerns about what he described as inaction on the part of the Respondent and its effect on his wife's health.

74. On 5 July 2019, DJ, on behalf of the Claimant, wrote to the Respondent to request that her sick pay was reinstated to full pay rates. His request, he said was *'based on the principles expounded in the [PNB] circular'* and he made three submissions, the last of which amounted to a bare assertion that it would be *'a reasonable adjustment'* to extend sick pay, *'generally speaking to allow (further) reasonable adjustments to be made to enable the officer to return to work'* - although he did not address the Claimant's conviction that she could not return to work, nor their joint belief that Dr Austin's report ruled out any return to work. He concluded his letter by raising the possibility of the reduction in sick pay amounting to disability discrimination and the delay in concluding the ill health retirement process as '*further detriment'.*

75. On 11 July 2019, DO replied to the letter. He stated he would be happy to receive evidence to support the (implicit) contention that the Claimant had been injured during the execution of her duty. He stated that reasonable adjustments had been made by maintain the Claimant's sick pay at full rate until 1 February 2019 whilst she was

undergoing EMDR treatment and so as enable both parties to ascertain the scope for her improvement in health and potential to return to work. He confirmed that the Claimant's pay would remain frozen at half pay in accordance with the absence management policy.

76. On 5 July 2019, SD received a reply from Dr Austin in which he stated *'the only restriction is to work in the Criminal Justice System. The role is identified is in the Criminal Justice System and so is unsuitable. Ideally the Authority will identify several (3-5) possible comparator roles for consideration'*. We are unclear what it is that Dr Austin meant by his use of the word 'comparator' – it was suggested that this was a term used in a separate exercise to determine whether an officer was injured in the course of their duties which at that time was not being explored - or indeed what realistic alternatives he envisaged, but on the evidence before us, we are satisfied that Dr Austin did not close down the possibility of an alternative role, at least in theory.

77. On 9 July SD wrote again to Dr Austin, attaching two further roles for consideration as to suitability. They were for junior civilian roles, Clerical Officer and Front Counter Clerk, both with the Respondent.

78. On 12 July 2019, the Claimant telephoned the office of Dr Austin and was told by the office manager that Dr Austin was on leave and that the Respondent had sent the two junior civilian roles to Dr Austin for his consideration.

79. We accept that the Claimant was genuinely very upset upon learning this. Having heard her evidence on the point, we are less clear whether she was upset because she believed that either or both those roles would be imposed upon her by the Respondent, or that she believed they were to be offered to her (or might be offered to her), or might simply be discussed with her, or perhaps never have been raised with her at all if considered to be unsuitable by either the SMP or the Respondent on review.

80. We address one particular aspect of the Claimant's case; on her account, the delay in the procedure the Dr Austin report dated 9 May 2019 to 15 July 2019 (when the decision compulsorily retire her was communicated to the Claimant) was not only caused by the Respondent, but caused deliberately. Whilst criticising no particular individual, she believed *'the Respondent'* was deliberately trying to *'push her over the edge, force her to resign or cause her to commit suicide'.* AP also formed the view that the delay was deliberate done for the purposes of avoiding having to deal with the matter, and his view as to its motive by July 'very much aligned' with that of his wife.

The Claimant adduced no evidence that any delay on the part of the Respondent between end April 2019 and mid July 2019 was 'deliberate'. It is unnecessary for us in the disposal of the issues, to determine whether there was a worsening of the Claimant's condition after the Dr Austin report; in any event, we were referred to no medical evidence for that period and the Claimant is not, we find, an accurate historian of the state of her own mental health.

81. The Claimant's husband AP emailed MK on 12 July 2019 setting out his concerns for his wife's health and noting that he was at a loss to understand what was happening.

82. On 15 July 2019, the Respondent wrote to the Claimant confirming that it accepted Dr Austin's recommendation that she was permanently disabled from performing the duties of a member of the police force, and that her service would be terminated on 12 August 2019. Her sick pay was increased from half pay to full pay between 15 July 2019 and termination on 12 August 2019.

83. In July 2020 Dr Austin confirmed that in his opinion, the Claimant was injured at work; her extent of her disablement was considered to be slight.

The Law

Discrimination Arising in Consequence of Disability

84. Section 15(1) of the Equality Act concerns discrimination arising out of disability and provides:

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.*

85. We had regard to the guidance in Pnaiser v NHS England [2016] IRLR 170, EAT, paragraph 31.

86. The Supreme Court stated in Williams v The Trustees of Swansea University Pension & Assurance Scheme [2018] UKSC 65 that 15 there is probably little difference between "unfavourable" treatment and other phrases such as "disadvantage" or "detriment" found in other provisions.

87. Where a disability case is concerned with attendance management it is the treatment that requires justification, not the underlying policy, save in rare instances: Buchanan v Commissioner of Police of the Metropolis [2017] ICR 184.

88. A Respondent may objectively justify unfavourable treatment if it can establish that the treatment was a proportionate means of achieving a legitimate aim. To be proportionate, the treatment must be an appropriate means of achieving a legitimate aim and also reasonably necessary in order to do so: Homer v Chief Constable of West Yorkshire [2012] UKSC 15 at [20-25].

89. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. It is for the Tribunal to conduct that balancing exercise and make its own assessment of whether the latter outweighs the former; there is no range of reasonable responses test. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys and Hansons plc v Lax [2005] EWCA Civ 846 Pill LJ at [19-34].

The Duty to Make Reasonable Adjustments

90. We have had regard to the provisions of s.20 and 21 of the Equality Act 2010 as well as the correct approach to their interpretation as set out in Environment Agency v Rowan [2008] IRLR 20 EAT.

91. Mr Feeney drew our attention to the CA decision in Finnigan v Chief Constable of Northumbria Police [2013] EWCA Civ 1191, for the proposition that a PCP, properly framed, should strip out any element of adjustment. That principle, in the employment context, is to be found at paragraph 40 of the EAT decision of General Dynamics v Carranza [2015] ICR 169:

    a. *40. . . .The PCP should identify the feature which actually causes the disadvantage and exclude that which is aimed at alleviating the disadvantage.*

Harassment

92. Section 26 Equality Act 2010 provides as follows:

    a. *A person (A) harasses another (B) if—*
        (a) A engages in unwanted conduct related to a relevant protected characteristic, and
        (b) the conduct has the purpose or effect of—
            i. violating B's dignity, or

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

. . .

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

93. We had regard to the guidance given by the EAT in Richmond Pharmacology v Dhaliwal [2009] IRLR 336 as reviewed by the CA in Pemberton v Inwood [2018 EWCA Civ 564 per Underhill LJ at [85-88].

Jurisdiction

94. The Tribunal has no jurisdiction to consider and rule upon acts of discrimination not included in the claim form: Chapman v Simon [1994] IRLR 124.

95. Finally, both parties drew the Tribunal's attention to R v Commissioner of Police of the Metropolis ex parte Weed [2020] EWHC 287 (Admin).

Discrimination Arising In Consequence of Disability – Conclusions

96. The burden rests upon the Claimant to establish on the balance of probability that she was subjected to unfavourable treatment. Counsel agreed that there are two strands of unfavourable treatment advanced. 'Treatment A' was said to be the decision not to pay the Claimant sick pay at her full salary rate of pay between 1 February 2019 and 15 July 2019. The Respondent accepts that Treatment A amounts to unfavourable treatment.

97. 'Treatment B' is the alleged failure to return the Claimant to full pay or reimburse her the same (alleged) shortfall in her sick pay over the same period; we understand the Claimant to use the word 'reimburse' in the sense of 'to make good a deficit'. The Claimant maintains that this amounts to unfavourable treatment and, furthermore, treatment that is distinct from Treatment A; they are not, it said, two sides of the same coin. Despite Mr Feeney's best efforts, we have not found the Claimant's case altogether very easy to understand. Treatment B was described it as an 'omission not

an act' amounting to 'a conceptual difference' thereby requiring, it was argued, a different objective justification defence.

98. We disagree. Both sets of alleged unfavourable treatment necessarily presuppose that the Claimant expected, in some objective sense and on some identifiable basis (however broadly described), to be paid the alleged shortfall in sick pay in the first place. If there is no obligation (however loosely described) on the Respondent to pay those monies at all, we fail to see how the Claimant meaningfully distinguishes the failure to pay those monies, on the one hand, from the alleged failure to reimburse those same monies on the other.

99. Indeed, that much appeared to be uncontroversial, since setting out his argument, Mr Feeney's first proposition was that the Claimant was entitled to full pay. It was clarified that the source of the entitlement was 'the general right to pay', which we understood to be a reference to the common law duty to pay wages; Mr Feeney was unable to assist us as to why that right subsists in these circumstances where, on the Claimant's own case, she was not available to work.

100. In the alternative, it was submitted that the Claimant was entitled to wages pursuant to the Police Regulations. The Regulations confer a right to 6 months at full rate of pay followed by 6 months at half rate. The Claimant had no legal right to be paid above half rate beyond 23 October 2018 and no legal right to any sick pay at all beyond 23 April 2019. In the absence of a favourable exercise of discretion by the Chief Officer, no entitlement exists to receive anything other than half pay in the period 1 February 2019 to 23 April 2019.

101. We understand the Claimant to say that discretionary power recognised in Annex K of the Regulations and the PNB Circular are said to be relevant to the Claimant's claim, although the submissions we received on the point were not altogether clear or consistent. We set out our findings in more detail than we otherwise might, in order to reflect the importance that the Claimant attached to this matter.

102. In light of the decision in Weed, the Claimant did not seek to maintain her pleaded case that the PNB Circular created a 'quasi-statutory presumption that in the case of reinstatement of an officer's sick pay this should be granted if an officer seeks and is granted [ill health retirement]' (emphasis applied). Nor does she seek to argue, as was argued unsuccessfully in Weed, that she had a 'legitimate expectation' of reinstatement to full pay. Instead Mr Feeney argued that the Respondent should 'have

regard to' the contents of the Circular, notwithstanding the fact that Weed proceeded on the basis of a concession to that effect by the Defendant in that case, and no such concession is not made by the Respondent here (and nor was it invited to do so). We are not prepared, on the basis of a bare assertion, to accept that the Respondent should 'have regard to' the Circular; that was a point for the Claimant to establish. Nevertheless, we proceed as if that submission was well founded.

103. The Claimant accepts, as she must, that the exercise of the discretion referred to in the Circular is a factually sensitive one, but she did not suggest that there were any facts or matters peculiar to her case would otherwise indicate or otherwise add weight to her contention that the discretion should be exercised in her favour. Instead it was said that two of the three grounds set out at paragraph 7 of the Circular were made out. We disagree;

a. In the first instance, there was not, in fact, at any point prior to the termination of the Claimant's services a stage when 'the chief officer [was] satisfied' that the Claimant's incapacity was sustained in the execution of her duties; not only did the Claimant seek any such a determination prior to termination, she did not respond to the email of DO inviting evidence on the issue on 11 July 2019;
b. The second instance relied upon is not satisfied because Mr Feeney was unable to assist us on the question of whether the Claimant's case was 'being considered in accordance with the PNB Joint Guidance in Improving the Management of Ill Health'.

104. On that basis, the Claimant fails to establish any basis upon which she might objectively have expected the exercise of discretion in her favour in accordance with the Circular.

105. Further, and in any event, were the facts such that a favourable exercise of discretion is indicated (and we do not find they were), it seems to us that on a plain reading of the Circular, that in the event of situation that might call for a favourable exercise of discretion, that can be met, within the definition set out at paragraph 3 of the Circular, by deciding to maintain pay at a certain level. The title of the Circular itself 'Guidance to Chief Officers on the Use of Discretion to Resume / Maintain Paid Sick Leave' supports our interpretation. Whilst it is certainly open to a chief officer to increase sick pay from half pay to full pay (paragraph 2) it does not follow that that is the only manner in which the discretion is discharged favourably. We reject as fanciful Mr Feeney's submission that the definition at paragraph 2 of the Circular should be

read so as to include the words 'maintain paid sick leave 'at full pay', not least because it would render otiose paragraph 2 of the Circular.

106. Finally, we turn to the Claimant's case that she was referred to the SMP in or around 20 December 2018. That contention was maintained by the Claimant in her evidence. Had we found in her favour on the point, in accordance with the 14th edition of the Policy, her pay would have been frozen at that full rate of pay. The contention that she had been referred to the SMP on or around 20 December 2018 was not withdrawn until closing submissions, by Mr Feeney, and it was rightly withdrawn – it was wholly unstainable on the facts.

107. Mr Feeney, submitted, somewhat ambitiously, that the 14th edition of the Absence Management Policy was 'front and centre' of the Claimant's case; in fact, no mention of it was made in the Claimant's pleadings, witness statements, or list of issues; her complaint was that she was not paid in accordance with the PNB Circular. What criticisms were made of the 14th edition were put, for the first time in cross-examination, to witnesses who could not fully respond to them. For that reason, as well as the fact that it was unexplained to us how, even if the 14th edition of the Policy was not the subject of collective consultation and/or agreement, or was not appropriately equality impact assessed, that adversely affected the Claimant's case, we disregard those criticisms.

108. We see no conflict on the facts of this case between a decision taken to freeze the Claimant's pay at half pay on referral to the SMP (in accordance with the 14th edition of the Policy) and the PNB Circular which allows a discretion to 'maintain pay' in such circumstances.

109. As to the specific points in the chronology at which the Claimant illustrates her unfavourable treatment;

a. The contention (it did not form part of the Claimant's pleaded case) that the Respondent had 'failed to pay and/or reimburse' the Claimant on those occasions the Respondent had pleaded that it had reviewed her case. In light of the withdrawal of that part of the Respondent's pleadings[1], as well as the lack of any factual basis for it, that contention is unsustainable.

b. The contention that the Respondent should have reimbursed the Claimant on or around 15 July 2019; whereas the 13th edition of the Absence Management

[1] On the morning of the second day, by Mr Rathmell, accepting that it had been erroneously pleaded

Policy appears to provide for a reimbursement, the 14th edition, which had by then been implemented.

110. We therefore agree with Mr Rathmell that what the Claimant complains about is akin to the argument that was explored and rejected in Williams; had her disability arisen more suddenly, greater advantages would have been conferred upon her since she would have been referred to the SMP at a time when she was in receipt of full pay and therefore her pay would have been frozen at full rates.

111. The Claimant fails to establish any basis upon which she might expect (whether by way of a legal right, an exercise of discretion or otherwise) to be paid sick pay at full rates from 1 February 2019 to 15 July 2019. During this period the Claimant was legally entitled to half pay from 1 February 2019 until only 23 April 2019 pursuant to the Regulations after which in the absence of an exercise of discretion in her favour, she was legally entitled to no sick pay at all. We see nothing intrinsically unfavourable or disadvantageous about being paid sick pay in the period she complains about, not only in excess of her legal entitlement but also consistent with the Respondent's published sick pay policy. The Claimant fails to demonstrate any basis upon which she, objectively, suffered a shortfall, and we fail to see how a 'failure to reimburse' in those circumstances can be said to be 'in any sense to be unfavourable'. On the contrary, as stated above, the essence of her claim is that it was open to the Respondent to pay a higher rate of sick pay that it did (on grounds she failed to make out in the PNB Circular) and therefore the treatment she did receive was not sufficiently favourable: Williams.

112. We recognise that by finding an absence of any entitlement (legal or in any other sense advanced by the Claimant) to full pay during this period would in all likelihood be equally relevant to the question of whether the first treatment (failure to pay) also amounts to unfavourable treatment. Nevertheless, the fact that Treatment A was conceded by the Respondent to amount to unfavourable treatment cannot and does not inform our own findings in relation to Treatment B.

113. We turn to objective justification and note that the burden of proof is on the Respondent to establish a defence of justification.

114. We concur with Mr Rathmell's submission that it is the treatment of the Claimant that requires justification and not the absence management policy and Mr Feeney did not argue otherwise; both editions of the Policy permit the Respondent to

adopt one of a number of responses to an individual officer's circumstances: Buchanan. The 14th edition did not cause the treatment of being paid half sick pay; it is relevant only to the extent that it explains why the Claimant suffered no further prejudice by avoiding a further reduction in her sick pay to nil.

115. There is no dispute between the parties that the aims relied upon by the Respondent are potentially legitimate aims.

116. Turning to the first two aims relied upon by the Respondent, namely the objective of operating a sick pay scheme designed to encourage and incentivise officers to return to work where possible; and the objective of encouraging and rewarding good attendance.

117. The Respondent's sick pay scheme is designed to financially support officers who are unable to return to work in the short term and the longer term. The sick pay scheme was one of a range of support measures provided by the Respondent such as those set out at paragraph 36 above. It is not unlimited and provides for 6 months full pay followed by 6 months half pay, thereby providing a graduated reduction in pay and avoiding a sudden cessation of pay. The scheme was capable of being tailored so as to accommodate the individual needs of an officer; the Claimant benefitted from this discretion to extend full sick pay from 23 October until 1 February 2019. The Respondent is publicly funded and is required to utilise its finances responsibly. Simply paying sick pay at full rate for an indefinite period of time, irrespective of an officer's individual needs and circumstances would not only be contrary to the Respondent's requirement to responsibly apply its funds, but also for some officers at least, act as a disincentive to return to work. The treatment, therefore, of reducing sick pay from full rate to half rate is capable of achieving the two legitimate aims above.

118. The Respondent must establish that the treatment is reasonably necessary to achieve the aims. It is not necessary for the Respondent to demonstrate that the treatment was the only way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.

119. The Respondent has the ability to tailor the sick pay scheme to the individual needs of an officer thus the ability to reduce sick pay from full pay to half pay is reasonably necessary since without that ability, the Respondent would be compelled to maintain pay at full rates indefinitely, or at least until dismissal.

120. At no stage after the commencement of sick leave did the Claimant, her GP, or the FMA Dr Khan or the SMP Dr Austin indicate that she was capable of returning to work as an officer in the foreseeable future. Save for one comment to the SPP in October 2018, in which the Claimant expressed an aspiration to return to work, she had consistently maintained to the Respondent that a return to work would have an adverse effect on her recovery; on her own case, by December 2018 she was permanently incapable of returning to work. By January 2019, when the decision was made to no longer maintain discretionary sick pay at the full rate, the Claimant's counselling sessions and EMDR therapy had concluded and no further treatment was planned. By February, the Claimant was indicating via MK that a return to work, as planned for by Dr Hussein, would be adverse to her health and her GP wrote to Dr Kahn stating that he did not believe there was any realistic alternative to ill health retirement. There was no other evidence to indicate that the Claimant's health improved after January 2019 until 15 July 2019 (when her sick pay was reinstated to full rate) so as to suggest a real possibility that she may be fit to return to work.

121. In the circumstances above, we identify the discriminatory effects of the treatment on the Claimant as minimal; on her own case, extending her sick pay, by increasing it from half pay to full pay, or changing it in any other manner would have had no effect on her prospects of returning to work.

122. We also consider relevant to the question of balancing exercise that we are required to perform between the needs of the Respondent as represented by the legitimate aims pursued, against the discriminatory effect of the treatment on the Claimant the following matters: that maintaining pay at full rates indefinitely (or until dismissal) without regard to an officer's individual circumstances would amount to a usurpation of the Respondent's management practices; it would also have the effect of elevating the effect of the PNB Circular beyond anything the document itself contemplates and the Respondent might be expected to have regard to. Furthermore, in being subject to the sick pay scheme operated by the Respondent the Claimant received a warning that her statutory sick pay entitlement was to be reduced from 23 October 2018; that she was able to and did submit representations to the SPP to extend her pay; that she enjoyed extensions to her sick pay from 23 October 2018 until 1 February 2019; that each extension was identified as being subject to review, so that each extension was expressed as being 'without prejudice' to future decisions; that at the time her pay was reduced, the circumstances in which that reduction was made,

were all known to her; that on reduction from sick pay to half rate, the Claimant did not, on her own account, suffer any financial hardship.

123. There was, on the evidence before us, nothing to suggest that operating the sick pay scheme in a different manner would have, in those circumstances, encouraged the Claimant or for that matter any other officer in her position to attend work, or allowed the Respondent to operate a sick pay scheme that incentivised the Claimant to return to work. The treatment was therefore reasonably necessary, since no less discriminatory means could have achieved the two aims identified.

124. In summary, having considered the Respondent's aims, the means of achieving those aims and the impact of the treatment on the Claimant, we find that the treatment was a proportionate means of achieving the two legitimate aims of operating a sick pay scheme designed to encourage and incentivise officers to return to work where possible; and the objective of encouraging and rewarding good attendance.

Failure to Make Reasonable Adjustments - Conclusions

125. The first PCP relied upon by the Claimant is said to be one whereby the Respondent 'drop[ped] officers to half pay after six months of sick leave'.

126. The Tribunal heard no evidence of the existence of any such PCP, only the existence of a sick pay policy that requires a panel to meets monthly to review the individual circumstances of an individual case in order to assist the Respondent in deciding whether to reduce or maintain sick pay in the sixth and subsequent months of ill health absence.

127. The Claimant fails to discharge the burden upon her to establish such a PCP, and therefore any claim based on this PCP must fail.

128. In the alternative, therefore, the Claimant relies upon the second PCP, which is framed as a PCP wherein the Respondent *'Drop[ped] officers to half pay after a particular period of time on sick leave (with the relevant period of time determined by the Respondent'.*

129. This is a reference not only to the Respondent's sick pay scheme, but also an explicit reference to the manner in which it operates so as to accommodate the

individual circumstances of an officer's case; that the PCP framed in this way includes in part an adjustment intended to alleviate the disadvantages of disability is illustrated by the fact that the Claimant herself enjoyed an extended period of time on full pay before being 'dropped to half pay after a particular period of time on sick leave (etc)'.

130. A claim based on this PCP must fail since put this way for the same reason that Mr Feeney withdrew – correctly – reliance on the remaining PCPs i.e., it includes the feature of the sick pay scheme which allows for adjustments; General Dynamics v Carranza.

131. No satisfactory PCP having been identified by the Claimant, her claim/s for a failure to comply with the duty to make reasonable adjustments also fail.

Harassment - Conclusions

132. Two acts of harassment are identified by the parties in their list of issues are not identified in the Claimant's own pleadings which were settled by her legal representatives. At paragraph 42 of her Grounds of Complaint, under the heading 'Harassment', the Claimant identifies a singular act, being that of *'an offer stated at paragraph 25 above to offer her entirely unsuitable roles'* (emphasis applied). Paragraph 25, nor paragraph 26 (in the event of a typographical error) relate to an offer of any role.

133. Our primary finding is that the Tribunal does not, in those circumstances have jurisdiction to consider and rule upon those two acts identified in the list of issues: Chapman v Simon.

134. We consider it appropriate, however, in light of the diffuse manner in which the Claimant did plead the matters at paragraphs 25 and 26 and responded in submissions, to make findings in the alternative.

135. Since context is relevant to the s.26(4) exercise and is equally applicable to both harassment claims, we set out our findings in this regard at the outset. When giving evidence, the Claimant's anger towards 'the Respondent' was both palpable and indiscriminate; we could see no basis whatsoever, on the Claimant's own case, for any criticism of the Respondent between April 2018 and early May 2019. We do not minimise the fact that giving evidence is in itself a stressful process and that

revisiting this period of time would be more stressful to the Claimant than might otherwise be the case. But she was a senior officer and she will be familiar with the role of evidence in the determination of her case. The Claimant regarded the report of Dr Hussein as an obstacle, inconsistent with her aim to be compulsorily retired. As for the period between 9 May 2019 and 15 July 2019, we accept that the Respondent could and arguably should have done more to update her of the position, but we also note that the Claimant was aware from the Guidance about the process that it could take in excess of 4 months to conclude. On the evidence before us, in the unanimous view of the Tribunal, the Claimant held a perception, perhaps one that grew over time, that the ill health retirement procedure was something that she could elect to embark upon and that, with the support of her own GP and Dr Khan, the outcome was an inevitability and the process itself a formality. There was little room in her mind that Dr Austin's report left questions unanswered, or that 'the Respondent' might have acted slowly, inefficiently, or mistakenly in circumstances where she herself had not made her position known to the Respondent. Her upset about both acts complained of is set against this context.

136. Turning to the first allegation i.e. on or after 24 June 2019, the Claimant received a letter from the Respondent indicating that it was seeking further clarification from the Selected Medical Practitioner ('SMP') about which roles she could perform. The claim fails for the following reasons.

137. We are not satisfied that the conduct complained of can be properly described as 'unwanted'. As Mr Rathmell points out in a submission that applies to both allegations of harassment, it was the Claimant who asked to be subject to the ill health retirement process; she cannot properly suggest that when the Respondent embarks on a distinct and recognised step of that process being the decision about her suitability and aptitude for retention, that that part was unwanted in the legal sense. More specifically in relation to this act, on the Claimant's own case, she was seeking a progress update on the procedure and she received it. We are not satisfied that simply because the update consisted of information that disappointed her (that the Respondent did not immediately confirm that it intended to compulsorily retire her), that the conduct can be elevated to 'unwanted' in the legal sense.

138. The Claimant's contention that it the purpose of the letter was to harass her must fail. She explicitly does not criticise any individual officer of the Respondent. She described the author of the letter, DO, as *'a decent man, I don't think he knew how ill I*

was'. Since such a claim requires an analysis of the alleged harasser's motive or intention and she argues no other basis upon which the Tribunal could conclude that it was the motive of any person to harass her by sending her the letter of 24 June 2019, her claim fails.

139. Turning to the alternative case i.e. that the conduct complained of had the effect of violating her dignity or creating a hostile, degrading, humiliating or offensive environment for her. We are not satisfied that the Claimant perceived herself to have suffered the effect in question; on her own description in her witness statement of her reaction to receiving the letter was one of *'total bewilderment',* wondering which roles the Respondent could have in mind for her; we consider this to fall significantly short of test at s.26(1)(b).

140. The second harassment complaint is said to be *'the decision by the Respondent to consider the Claimant / ask the SMP to consider the Claimant for two roles namely (a) counter clerk and (b) clerical officer'.*

141. For the same reasons as before, we are not satisfied it amounts to unwanted conduct when the step was a distinct step in the procedure the Claimant sought to be considered for.

142. Again, whilst the Claimant does not withdraw reliance on the purpose of the conduct having the proscribed effect at s.26(1)(b) but nor does she name any individual harasser, much less does she advance any primary facts from which an inference could be drawn about their motive. Any claim on this basis therefore fails.

143. We consider whether the conduct is said to have the proscribed effect, in the alternative. We have no difficulty accepting that the Claimant was very upset when she learned of the referral to Dr Austin of the two junior roles and that she perceives herself to have suffered the effect at ss.(1)(b) and 26(4)(a).

144. However, when considering whether it was reasonable for the conduct to be regarded as having that effect (the objective question) and taking into account all the other circumstances of the case, we reject the Claimant's claim. Whilst we consider there to be considerable overlap between these questions we attempt to address them separately.

145. We do not consider it reasonable for the conduct to have had the proscribed effect for the following reasons. First, the manner in which the Claimant learned of the conduct complained about is highly relevant; she learned about the job roles being sent to Dr Austin not because that information was conveyed to her by the Respondent, nor was it even provided to her on behalf of the Respondent; the Claimant called the office of an external occupational health physician and in his absence sought information about her case from the office manager. In those circumstances, it was there was significant scope for the Claimant to acquire incomplete, or even erroneous, information. That point is, we consider, illustrated by the Claimant's inability to articulate what she anticipated might happen with the job roles - including whether they would ever even fall to be discussed with her by the Respondent – in circumstances where she commenced proceedings alleging that the Respondent had made offers of those roles to her.

146. The nature of the roles is also highly relevant. They were not only civilian roles, but also very junior roles. The Claimant described how absurd it would be for her, as the Detective Inspector one day, to be sitting as a front desk clerk the next. We agree; it was so odd that it plainly required further exploration and explanation. She did not seek an explanation for the matters she learned of, from the Respondent. The Claimant may well have the skills or aptitude to perform the roles, but we are not satisfied, on the Claimant's own evidence, that she ever truthfully believed that this was anything other than a box ticking exercise and, if she did, that it was reasonable in the circumstances for her to do so. In addition, on the Claimant's own description of him, we find the Claimant knew that her concerns about the matter would have received a fair reception by DO.

147. The other circumstances of the case are: Dr Austin reported that the Claimant was not disabled from regular employment; he reported that she was largely fit for regular work, albeit with 5 adjustments; his work capability assessment checklist was separate to the report and made no cross reference to it and SD did not have both documents. Dr Austin had not responded to the first job role of Prosecution Trial Team Supervisor (of which the Claimant knew nothing of at the time) by calling an end to the search for alternative employment; on the contrary, he suggested '3-5 comparator roles' be searched for; it was neither surprising nor unreasonable for SD to search for further alternatives, in order to complete her role. Where the SMP does not entirely close the door to alternative employment, and reports that an officer is highly motivated to return to work, an employer must have proper understanding of the extent and

nature of any possibilities before either speaking to the officer (particularly where the officer has given no indication of their own view), or deciding to compulsorily retire them (which we understood to be suggested by the Claimant). Dr Austin did not report to the Respondent that the Claimant's health deteriorating, or that process should be expedited for any other reason.

148. Given the manner in which the information was acquired, the type of roles she learned of, the Claimant's inability to express what she believed the Respondent was planning to do with the roles we find that, taking into account all the circumstances, including whether objectively it was reasonable for the conduct to have the effect of violating the Claimant's dignity, we are not satisfied that the conduct had the proscribed effect. This claim, too, fails.

149. Each of the Claimant's claims of disability discrimination are therefore dismissed.

Authorised by Employment Judge Jeram

Date: 22 February 2021

This was a remote hearing which was consented to by the parties. The form of remote hearing was V: via CVP. A face to face hearing was not held because the parties agreed to the hearing being conducted via videolink.

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