



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4101350/2022

Held at Dundee on 17, 18, 19, 20 and 23 January 2023

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**Employment Judge W A Meiklejohn
Tribunal Member Ms E Coyle
Tribunal Member Ms P Fallow**

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Ms Jill Craig

**Claimant
Represented by:
Mr R Russell –
Solicitor**

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The Chief Constable of the Police Service of Scotland

**Respondent
Represented by:
Mrs D Fellows –
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claims brought by the claimant under section 15 (**Discrimination arising from disability**),
30 section 19 (**Indirect discrimination**) and sections 20/21 (**Duty to make adjustments/Failure to comply with duty**) of the Equality Act 2010 ("EqA") do not succeed and are dismissed.

REASONS

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1. This case came before us for a final hearing covering with both liability and remedy. Mr Russell appeared for the claimant and Mrs Fellows for the respondent.

Nature of claims

E.T. Z4 (WR)

2. The claimant brought claims under sections 15, 19 and 20/21 EqA. These were resisted by the respondent. The claimant's disability was described as "*complex PTSD*". Initially the respondent did not accept that the claimant was disabled within the meaning of section 6 EqA, nor that the respondent was aware of the claimant's disability at the relevant time (being the time of the alleged discrimination). However, both of these matters were conceded prior to the final hearing.

Procedural history

3. There had been three preliminary hearings. The first of these took place on 27 April 2022 (before Employment Judge Macleod). The outcomes were that (a) the claimant was to provide her medical records and a disability impact statement, (b) the respondent was thereafter to state whether disability status remained in dispute, (c) the respondent was to provide further and better particulars of the ET3 response, to which (d) the claimant was to respond and (e) the claimant was to provide a schedule of loss.
4. The second preliminary hearing took place on 6 July 2022 (before EJ Hosie). The outcomes were (a) the alleged disability was noted to have changed from "*PTSD*" to "*stress*" (that amendment having earlier been allowed by EJ Kemp), (b) the claimant's solicitor was directed to provide an impact statement and schedule of loss and (c) a preliminary hearing was fixed for 22 August 2022 to determine the issue of disability status. The reference to "*stress*" as the alleged disability appeared to be per incuriam as the amendment on behalf of the claimant (22) referred to "*anxiety*".
5. The third preliminary hearing was held on 22 August 2022 (before EJ Kemp). Prior to that date disability status (but not knowledge of disability) was conceded by the respondent and accordingly the hearing dealt with case management. The outcomes were (a) the case was to proceed to a final hearing, at which knowledge of disability remained an issue to be determined (b) the claimant's schedule of loss was to be updated, (c) the parties were encouraged to agree a list of issues and a statement of

agreed facts and (d) orders were made for exchange of documents and preparation of an inventory and joint bundle of documents.

6. In November 2022 Mrs Fellows (whose firm had by then been instructed by the respondent) applied to the Tribunal to amend the response to concede knowledge of disability. Despite an objection, this amendment was granted without a hearing (by EJ McFatrige). Thereafter in December 2022 the claimant's solicitor sought and was granted an order for production of documents, the result of which was the inclusion in the joint bundle of various emails relating to the claimant.

10 **List of issues**

7. Contained within the joint bundle was a list of issues (42-42A). Although described as a "Draft" we did not understand it to be disputed. The list was as follows –

1. **Disability Discrimination – Section 15 of the Equality Act 2010**

- 15 (a) *Did the Respondent treat the Claimant unfavourably? If so, what was the unfavourable treatment?*
- (b) *Did the Respondent treat the Claimant unfavourably because of something arising in consequence of her disability?*
- (c) *If so, can the Respondent show that that treatment was a proportionate means of achieving a legitimate aim within the meaning of section 15(1)(b) EqA 2010?*

2. **Disability Discrimination – Section 19 of the Equality Act 2010**

- 25 (a) *When the PCP was applied to the Claimant, did that put the Claimant at a particular disadvantage when compared to others without the Claimant's disability?*
- (b) *If so, what was the disadvantage?*
- (c) *If the claimant was put at a disadvantage, was the application of the PCP a proportionate means of achieving a legitimate aim?*

3. **Disability Discrimination – Section 20 of the Equality Act 2010**

- 30 (a) *Did the application of the PCP put the Claimant at a substantial disadvantage in comparison to persons who are not disabled?*

(b) *If so would either of the following steps be ones which were reasonable for the Respondents to take to avoid that disadvantage?*

5 (i) *Allowing the Claimant to carry out operational duties without wearing a face mask/covering.*

(ii) *Allowing the Claimant to enter a Police Station and work within the Police Station without wearing a face mask/covering.*

10 (c) *If yes, have the Respondents failed to comply with their duty under section 21 EqA?*

4. **Remedy**

(a) *If the Claimant is successful regarding all or any of her claims of Disability Discrimination under the Equality Act 2010, what, if any, award would be due to her for injury to feelings?*

15 8. The provision, criterion or practice (PCP) for the purpose of the claims under sections 19 and 20/21 EqA was the respondent's policy that all Police Officers must wear a face mask/covering when in Police buildings or on Operational Duties.

List of agreed facts

20 9. Also contained within the joint bundle was a list of agreed facts (41A-41B). While this was again described as a "*Draft*", we did not understand it to be disputed. The matters agreed between the parties are reflected in our findings in fact below.

Evidence

25 10. We heard oral evidence from the claimant. For the respondent we heard oral evidence from –

- Superintendent Iain Wales
- Ms Susan Beaton, Head of People, Health and Wellbeing
- Sergeant Ian Leslie
- 30 • Inspector Grant McGaughay
- Inspector David Gibson

11. We had a joint bundle of documents to which we refer above and below by page number.

Findings in fact

- 5 12. The respondent is responsible for policing in Scotland. It has some 22000 officers and staff. It operates from locations across Scotland. Its functions include contact centres which respond to 999 and 101 calls.
- 10 13. The claimant is employed by the respondent as a police officer holding the rank of Constable. Her operational role is as a Response Officer based in Arbroath. She moved to this role in December 2015, having previously been based in Montrose. As a Response Officer, the claimant was involved in front line policing and was expected to attend calls and incidents allocated to her as they occurred while she was on duty.

Background to claimant's disability

- 15 14. The claimant had experienced significant trauma when undergoing a tonsillectomy when she was a teenager. This left her with a fear of choking and she was unable to wear anything around her face or neck. She would not wear her hair down. She would not zip up the T shirt which formed part of her uniform. A medical report from her GP dated 10 June 2022 (71) described it in these terms –

20 *“Ms Craig presents with anxiety, particularly around a phobia of choking that arose from a surgical mistake in her early adulthood, she reports a phobia of mask wearing as a result.”*

The claimant wears a sunflower lanyard. This signifies that she has a hidden disability.

25 Lockdown in March 2020

- 30 15. Following the start of the coronavirus pandemic and in response to the rapid increase in Covid-19 cases, the governments across the UK introduced a national lockdown on 23 March 2020. This was followed by further measures in an effort to prevent the spread of Covid-19. The sequence of events between 23 March 2020 and 30 March 2022, including

the introduction and relaxation of these measures, was captured in the SPICe timeline (216-219). SPICe is an acronym for Scottish Parliament Information Centre.

Operation Talla

- 5 16. Operation Talla was the name used for the respondent's planning, preparation and response to the coronavirus pandemic. The command structure was established in February 2020. Strategic objectives were identified and set out in the Gold Strategy of which version 5 dated 9 October 2020 was included in the joint bundle (226-233). These included –
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Strategic Objective 1

To maintain critical policing functions to best serve changing public needs, through ensuring the impact of officer and staff absences are mitigated and the needs of the public are met.

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Strategic Objective 2

To protect and support our officers and staff, safeguarding their health, safety and wellbeing, through the development of appropriate guidance and policies, provision of appropriate PPE, hygiene products and other relevant equipment.

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Strategic Objective 3

To work in partnership providing an appropriate policing response at strategic, tactical and operational level, including any incidents involving COVID-19.

Strategic Objective 7

25 *To respond dynamically to the rapidly changing COVID-19 environment and to effectively plan our ongoing response to COVID-19 as we renew and rebuild our working practices in a way that captures and identifies organisational learning and opportunities for continuous improvement.*

17. As part of the respondent's Operation Talla response, guidance on face coverings was provided (125-149). This was available on the respondent's intranet. The material in the joint bundle was dated between 14 April 2020 and 14 April 2022. We refer to this below as "*Talla guidance*".

Scottish Police Federation

18. The Scottish Police Federation (SPF) represents some 18000 officers, including cadets and special constables, holding ranks up to Chief Inspector. SPF produced material during the pandemic. The material contained in the joint bundle (150-167) was dated between 17 March 2020 and 20 August 2021.

Scottish Government

19. The Scottish Government (SG) introduced legislation in response to the Covid-19 pandemic, principally the Coronavirus (Scotland) Act 2020 (passed on 1 April 2020), the Coronavirus (Scotland) (No 2) Act 2020 (passed on 20 May 2020) and the Coronavirus (Extension and Expiry) (Scotland) Act 2021 (passed on 24 June 2021). SG also introduced numerous regulations, for example the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, which included provisions relating to the wearing of face coverings.

20. SG also published Guidance relating to face coverings. The material contained in the joint bundle (168-215) comprised updates dated between 30 November 2020 and 28 February 2022.

Types of face mask

21. We heard evidence relating to two different types of face mask. The FFP3 mask offers significant protection to both the wearer and those who come into contact with the wearer. It requires to be fitted to the wearer and is quite uncomfortable to wear.

22. The Type 2 fluid resistant surgical mask (IIR) affords some protection to those who come into contact with a person suffering from Covid-19. The level of protection is less than that provided by the FFP3 mask.

23. The Talla guidance on face coverings dated 14 April 2020 included the following paragraphs (125-126) –

5 *“The UK Government Defence Science and Technology Laboratory and Public Health England advise that the type 2 fluid resistant surgical mask offers some protection to those who may come into contact with individuals suffering from COVID-19. As such, Police Scotland has determined that officers can elect to use this mask in LOW RISK situations where there is no indication of infection but where they may not be able to apply 2 metres social distancing between themselves and colleagues or members of the public.*

10 *Officers and staff will be provided with a supply of masks and can risk assess based on the current operational guidance as to whether or not to wear a mask in these circumstances.”*

15 ***“The current policy and guidance around the use of FFP3 masks has not changed. If there is any suspicion, or it is confirmed, that an individual has COVID-19, the current procedures to deploy with FFP3 remain in place. This includes, if required and appropriate to do so, withdrawing and requesting support from FFP3 fitted and trained officers.***

20 *IIR masks should never be worn as a substitute for FFP3 masks in situations where the force policy advises the use of an FFP3 mask. The IIR does not offer the same level of protection as an FFP3.”*

March-November 2020

24. As at 23 March 2020, when the first period of lockdown started, the claimant’s line manager was Sgt Leslie. He remained the claimant’s line manager until December 2020. The claimant continued to work as a Response Officer. She did not wear a face mask. She interacted with Sgt Leslie on a daily basis. Sgt Leslie did not tell the claimant to wear a face mask as he believed that she was exempt from doing so.

30 25. At this time (ie from March 2020) it was not mandatory that police officers wore face coverings. However they were encouraged to do so unless seated at a desk. Officers were expected to wear a face mask when

entering, leaving and moving around within a Police building, and were reminded to do so. They were also expected to wear a face covering when outside a Police building or in a Police vehicle.

26. Sgt Leslie became aware that the claimant could not wear a face mask.
5 The claimant told him about an occasion when she was visiting a shop with her daughter and suffered a panic attack. Sgt Leslie was also made aware by the claimant that she had suffered a panic attack when she attended for an FFP3 mask fitting.
27. Sgt Leslie sought guidance and was told to manage it on a case by case
10 basis. He put an entry on the claimant's record in SCOPE (the respondent's computer based HR system) that the claimant could not wear a face mask. In the list of agreed facts this was said to have occurred on 4 April 2020, whereas in the claimant's ET1 the date was said to be 14 April 2020. Nothing turned on this but it seemed to us more likely that the
15 later date was correct. The claimant's inability to wear a face mask meant that Sgt Leslie could not deploy her in any situation where it was necessary to use an FFP3 mask.
28. The claimant's individual absence history report (414AA) relating to the
20 period when Sgt Leslie was her line manager recorded that she had absences from work –
- Between 8 and 13 January 2020 when the reason was stated to be "*chest infection*".
 - Between 18 and 31 March 2020 when the reason for absence was stated to be "*Covid-19 – precautionary self-isolation*".
 - 25 • Between 30 April and 30 June 2020 when the reason for absence was stated to be "*stress*".
 - From 29 November 2020 – again due to "*stress*" – to which we refer in more detail below.
29. The response of SG to the Covid-19 pandemic evolved as the situation
30 developed. SG announced a route map out of lockdown which was implemented in phases from May 2020. Face coverings became mandatory on public transport from 22 June 2020, and mandatory in shops and other retail premises from 10 July 2020. As from 10 July 2020 non-

essential offices and call centres were able to reopen, but working from home (or flexibly) remained the default option.

30. SG announced new restrictions with effect from 23 September 2020. From mid-October 2020 the wearing of face coverings became mandatory
5 in workplace canteens and in communal workspace areas. SG launched face covering exemption cards for people who were unable to wear these due to health reasons, disabilities or other special circumstances.

31. The SG guidance published on 30 October 2020 (as updated on 30
10 November 2020 – 168-174) listed the types of premises where it was mandatory (ie required by law) to wear face coverings. The list included retail premises, hospitality premises, banks and building societies and courts and tribunal buildings. It did not include Police buildings.

32. The SG guidance also listed those who were exempt from the requirement to wear a face covering. This list included –

15 *“people who have a health condition or who are disabled, including hidden disabilities....”*

*“police constables or emergency response workers such as paramedics acting in the course of their duty. For these groups, relevant workplace guidance still recommends wearing a face
20 covering in most circumstances”*

33. The respondent’s response to the pandemic also evolved. The Talla guidance issued on 9 September 2020 (128-130) included the following paragraphs –

25 *“Summary guidance for the wearing of PPE has been published previously and can be viewed [here](#). This has not changed and it is more important than ever that we continue to adhere to the principles and intention of this guidance to ensure that we and the people we come into contact with, are protected from the virus.*

*If not followed this could lead to more people contracting COVID-19
30 and to large numbers of officers and staff having to self-isolate, placing*

unnecessary pressure on their colleagues and damaging our ability to provide an effective policing service to the public.”

This reflected a particular concern for the respondent that exposure to Covid-19 could lead to whole teams requiring to self-isolate, causing difficulty with resourcing. The PPE guidance of 13 August 2020 (144-145) included the wearing of IIR masks when physical distancing of 2 metres was not possible.

34. The Talla guidance of 9 September 2020 also included the following paragraphs -

10 *“...your first consideration should be to wear the mask and only consider not wearing in circumstances where you assess the risk of infection has been removed or significantly reduced by other mitigation factor or where it would significantly impinge on your ability to perform your operational duties.”*

15 ***“Workplace***

Across our estate, we have put in place physical distancing measures wherever possible. However, if you cannot maintain a two-metre distance between yourself and your colleague, or a member of the public, you should wear a face mask. This could include, but is not limited to, communal areas, corridors or toilets.”

25 35. The claimant’s evidence, which was not challenged or contradicted on this point, was that the wearing of face masks created problems for her colleagues. Those who wore glasses found that they steamed up. There were issues when dealing with people with impaired hearing, or where the lack of facial expression or sight of the officer’s mouth caused difficulties. This could arise when arresting a vulnerable person.

36. Included in the joint bundle was “*Coronavirus Guidance*” published on the D Division intranet local site on 25 September 2020 (146). This included the following –

30 *“The EXPECTATION of Div Command is that:-*

*All officers and staff should wear face coverings whilst in Police buildings in all circumstances when they are not within their own office, unless there is strong supporting evidence to suggest it is not required. This should include from the point of entering a Police building, while
5 within communal areas, including corridors, kitchen areas, toilets, etc. and where visiting the office of another member of staff.”*

37. The Talla guidance issued on 8 October 2020 (130-131) included the following –

“The Scottish Government has announced it will introduce regulations to extend the mandatory use of face-coverings in indoor communal and social settings – for example in corridors, workplace canteens and break rooms.

*Although no date has been announced for this measure being implemented in law, officers and staff should use face coverings in
15 these circumstances immediately.”*

38. The Talla guidance issued on 9 November 2020 (132-133) stated as follows –

“Important update on Police Scotland’s position in relation to face masks and face coverings for all officers and staff.

*Police Scotland’s position on this is clear: you should always wear a
20 face mask/covering within police premises, unless you are stationary at a desk or workstation. Some exemptions, such as medical reasons, apply. There are distinct differences between face masks and face coverings which apply to officers and staff. Please ensure you
25 understand what is relevant to you.”*

39. This guidance advised all officers and staff *“If you are exempt, please inform your line manager immediately”*. The guidance also stated –

*“You must wear a face covering when moving around any Police Scotland building, this includes indoor communal areas, such as
30 corridors, stairs, lifts, staff rooms, training rooms, canteens and entrances.”*

40. The guidance concluded with this paragraph –

“Finally, if you can work from home, you should continue to do so. Home working for those who can will remain in place until the end of March 2021.”

5 41. The claimant continued to work as a Response Officer until 29 November 2020. She did not wear a mask and believed she was exempt from doing so. She came in to contact with Sgt McGaughay and Insp Aitken while working in Arbroath. She also had contact with others who were senior in rank to her, for example when taking arrested persons to Bell Street in
10 Dundee. She was at no point challenged for not wearing a mask.

42. The claimant began a period of absence from work on 29 November 2020. The reason for her absence was recorded as “stress” (see paragraph 28 above). This coincided with the claimant’s daughter, for whom she had sole caring responsibility, requiring to go into hospital in Edinburgh for
15 major surgery in January 2021.

Claimant returns to work

43. On or around 31 January 2021 the claimant met with Sgt McGaughay, who had taken over from Sgt Leslie as her line manager, in Arbroath. She did not wear a mask. Sgt McGaughay was also not wearing a mask during
20 their meeting as he was not required to do so when seated at his desk. His practice was to wear a mask when in the office unless seated at his desk.

44. During this meeting they were joined by Insp Aitken. The claimant’s evidence was that Insp Aitken was not wearing a mask. Sgt McGaughay was unsure whether or not Insp Aitken had been wearing a mask. He said
25 that Insp Aitken was strict about mask wearing and so he was confident that he (Insp Aitken) would have been wearing a mask when he entered the office. Neither Sgt McGaughay nor Insp Aitken raised with the claimant the issue of her not wearing a mask at this meeting.

30 45. The claimant returned to work on 4 March 2021. It was agreed that she would do so on a phased return basis. She was based at Carnoustie police office. We understood that this was more convenient for her in

terms of proximity to her daughter's school. She was in a shared office with others coming and going. She spent her time at work catching up on training and emails.

5 46. Sgt McGaughay conducted an Attendance Support Meeting with the claimant in Carnoustie on 5 March 2021 (235-237). He noticed that the claimant was not wearing a mask. He asked the claimant about this and she told him that she had never done so, and had never been challenged. Sgt McGaughay found it strange that the claimant could have done this (ie not worn a mask on Police premises) for so long. In so finding, we preferred the evidence of Sgt McGaughay to that of the claimant who said that the issue was not raised with her. Given what happened next, it seemed to us more probable that there had been some reference to the claimant not wearing a mask. Indeed, the claimant's evidence was that she understood Sgt McGaughay had raised the matter of her not wearing a mask with Insp Aitken.

10 47. Sgt McGaughay spoke to Insp Aitken about the claimant working in the Carnoustie office without wearing a mask. He understood that Insp Aitken took further guidance about this. He (Sgt McGaughay) was then told (presumably by Insp Aitken) that the claimant would have to go home and would not be able to return to the Carnoustie office.

15 48. On 12 March 2021 the claimant received a phone call from Insp Aitken. He told her that he had just been made aware that she did not wear a face mask and, as a result of this, she would not be allowed to resume operational duties. She was to stay at home and alternative arrangements would be made for her work situation. The claimant was upset by this.

20 49. The claimant perceived an inconsistency in Insp Aitken's reference to having "*just been made aware*" that she did not wear a face mask when he had seen her at the meeting on 31 January 2021 without a mask. We did not agree. There was no reference in the evidence of the claimant and Sgt McGaughay to the subject of face masks having been raised during that meeting. It seemed to us likely that Insp Aitken was referring to what he had been told by Sgt McGaughay, after the Attendance Support Meeting on 5 March 2021, about the claimant not wearing a face mask.

50. Following the Attendance Support Meeting, Sgt McGaughay made a referral to Optima, the respondent's occupational health adviser. He reported to the claimant by email on 17 March 2021 (238) that "*Optima have replied to me and as this is not medical, they are unable to provide any guidance*".

51. Sgt McGaughay emailed the claimant again on 29 March 2021 (239) to say that he had chased the IT department for a laptop and was awaiting an answer. We understood that this related to the provision by the respondent to the claimant of equipment to enable her to undertake work from home.

Claimant's homeworking

52. The respondent decided that it was not possible to provide the claimant (in her current role) with sufficient work which she could do from home, and that she should be moved to a temporary post within the Risk and Concern Hub ("R&C") for as long as mask wearing remained an issue. While R&C would have day to day line management responsibility for the claimant, welfare support would continue to be provided by her existing line manager. Supt Wales confirmed these arrangements in his email to Insp Aitken and others on 1 April 2021 (243-244).

53. Supt Wales tasked Insp Aitken with advising the claimant of her new role. The claimant was not consulted about the change. We were satisfied that this was not uncommon, and that it was not always possible or practicable for a change of role to be discussed in advance. By his email of 2 April 2021 (242-243), Insp Aitken delegated the task of informing the claimant to Sgt McGaughay. No risk assessment was undertaken at this stage.

54. Sgt McGaughay spoke to the claimant on 3 April 2021. The claimant accepted the position but was not happy. This was reflected in the email Sgt McGaughay sent to Insp Aitken on 3 April 2021 (240-242) which included –

"....In short, she is unhappy at the way she has been treated in respect of being made to work at home. For something she has no control over, she feels she is being discriminated and isolated. I do get that

part of it as she was eager to return to work and have her colleagues around to support her and vice versa.

5 *She is of the opinion she cannot be the only officer in this situation and intends to find out how this is being managed cross the country. I do have concerns about her eventual return to work and integration back into the team if the wearing of masks continues for months if not years.*

I noted Yasmin's latest email dated 30/03/21.

Medical Reason/Exempt

10 *If there is a medical reason – explore safe working practices – adhere to 2m safe distancing and explore other extra safety measures such as a singular office, area to work where there is less foot traffic and risk to themselves and others.*

15 *Whilst I appreciate the office is currently in use, the obvious option would have been to place her in the old Sgt's office in Carnoustie. It's the first office as you enter the building and doesn't interfere with anyone else. There are toilet facilities immediately opposite.*

20 *I understand the decision has come from senior management and H&S however I think we need to provide Jill with some answers and rationale as to why she cannot enter a Police building. As she has pointed out, any member of the public can enter a Police building without a mask i.e. front counter.*

I am just conscious there are various notices about including the following which technically suggests if you are exempt from wearing a mask, you can move about without one."

25 Sgt McGaughay attached what appeared to be Talla guidance dated 5 November 2020 relating to the introduction by SG of an exemption card for people exempt from wearing face coverings.

55. Insp Aitken replied to Sgt McGaughay on 5 April 2021 (240) included the following –

30 *"I discussed this issue with Supt Wales last week.*

The advice that was circulated by HR last week was incorrect.

5 *The National decision that the Head of HR/Talla Gold I believe have decreed is that if an Officer cannot wear a face covering then they cannot be within a Police building. The rationale as I understand is that it is not about the Officer that cannot wear the face covering and more about the responsibility the organisation has to care/look after everyone that works within the Police estate.*

10 *Given this it has been decided that if you cannot wear a face covering for whatever reason (I fully appreciate that Jill's is a genuine and significant one) then you cannot work from a Police building."*

56. Sgt McGaughay was sympathetic towards the claimant's suggestion that she should be permitted to work within the Carnoustie office. He advised the claimant that she should, during his absence on leave between 9 and 23 April 2021, direct any questions to Insp Aitken.

15 57. The claimant emailed Insp Aitken on 14 April 2021 (251-251A) in terms which included –

"I appreciate my situation raises issues for the organisation, but I ask what consideration has been given to make "reasonable adjustments" for me to allow me to return to work?"

20 *I feel incredibly isolated currently, not least given the fact that as at today's date, Wednesday 14th April 2021, have still not been given the necessary equipment to allow me to work from home. I took delivery of a laptop yesterday, but I have no designated workspace, no desk, no chair, and no home working risk assessment has been conducted,*
25 *or indeed even requested."*

58. Insp Aitken replied later on 14 April 2021 (251B-251D) –

30 *"...I would firstly state that I acknowledge and am very aware that you wish to return to the workplace to continue your phased return and to get yourself back into your operational role. That said the fact that you cannot wear a face covering unfortunately precludes this from happening at this time. This is a national decision I believe throughout*

Police Scotland and I can assure you, you are not the only Officer that is being asked to work from home for this reason.

I note that you detail within your e-mail that given this decision you feel isolated having been asked to work from home. I would like to assure you that you are very much part of the team within Arbroath. Sgt McGaughay I believe has had regular contact with you. You are aware of my contact details and should you have any further concerns then please don't hesitate to let me know. As you are aware the plan in the short to medium term is to get you to carry out work for the Risk and Concern Hub. This will hopefully allow to have daily contact with your colleagues and give you daily, meaningful work to hopefully allow you to be fully engaged until circumstances change. Although the Risk and concern staff will task you with work I would again reiterate that you remain very much a member of Arbroath and Angus LPA."

- 15 59. Insp Aitken emailed the claimant on 19 April 2021 (252) attaching a home working risk assessment. He followed up regarding this on 20 April 2021 (253).

Organisational risk assessment

- 20 60. The respondent produced what Ms Beaton described as a "generic risk assessment which covered any area of work" (260-309). This bore a number of dates, the earliest of which was February 2020 and the latest (in the version which was produced) 20 July 2021. It identified the activities carried out by police officers and staff, the risks associated with these activities and the control measures in place to reduce those risks.

- 25 61. The risk assessment disclosed that it had been reviewed on 1, 9 and 21 April 2020, 6 and 15 May 2020, 23 June 2020, 28 July 2020, 16 September 2020, 14 and 31 December 2020, 22 February 2021 and 20 July 2021.

Change of line manager

- 30 62. At or around the end of May 2021 Temporary Sgt Kirsty Fotheringham replaced Sgt McGaughay as the claimant's line manager. The claimant was continuing to work from home, with her work being allocated by R&C.

63. The claimant and Sgt Fotheringham exchanged emails at the start of August 2021 (309A-309F) about the claimant's police radio. In the course of this exchange, Sgt Fotheringham asked the claimant about a request she had submitted for a transfer to Dundee. The claimant replied that she assumed this was on hold until her return to work (ie in a Police building) was authorised.
64. The claimant told us that this remained the position. Her request was to become a Response Officer in Dundee. She had submitted her request after being told that she would require to work from home. She told us that she was "*struggling*" to see how she could return to work under Insp Aitken and the Sergeants who had required her to work from home. She had also heard that there was talk about her "*skiving*".
65. The claimant commenced a further period of absence from work on 13 August 2021. Her Fit Note (415) gave the reason for absence as "*Stress at work – professional isolation*". The claimant said that she was "*suffering badly from anxiety*". She felt isolated and found the nature of the work she was doing "*difficult*".
66. Between 1 September and 13 October 2021 Sgt Fotheringham and the claimant messaged each other (317A-317M). The tone of Sgt Fotheringham's messages was supportive. She mentioned a possibility of getting the claimant "*an exemption*" (a reference to the SG exemption card scheme) and offered the opinion that the respondent could not "*go against government guidance*".
67. There was a further exchange of emails between Sgt Fotheringham and the claimant on 11 and 21 September 2021 (309G-309J). There had clearly been some discussion between the claimant and Sgt Fotheringham because the latter referred to clarifying some points for the claimant. She told the claimant that she had "*been in touch with HR and the Supt etc and the position on masks in Police buildings has not changed*".
68. Sgt Fotheringham asked the claimant a number of questions in her email of 11 September 2021 to which the claimant responded in her email of 21 September 2021. The claimant –

1. Confirmed that she had been in contact with EAP (the respondent's Employee Assistance Programme).
2. Said that she believed a referral to Optima would be *"futile"*.
3. Thanked Sgt Fotheringham for letting her know that Insp Aitken and Supt Wales were willing to take either a call or an email from her, but indicated that she was *"happy that we try to work towards a solution to this issue ourselves"*.
4. Stated that the nature of the work she was doing for R&C *"absolutely contributed"* to her being absent. The claimant described the subject matter of the work as *"for the most part harrowing"* and referred to the support of colleagues mitigating that if she was working in an office environment. She complained of being tasked by email and having *"no telephone contact with anyone for weeks at a time"*.

69. On 21 September 2021 Supt Wales emailed Sgt Fotheringham in relation to the claimant (321). He stated as follows –

"The current PSoS position remains unchanged. In order to work in a PSoS building a face covering must be worn between the entrance door & the workspace & at any time whilst moving around the building. This policy is designed to protect our staff from potential transmission from Covid. It is irrelevant whether or not a member of staff has an exemption.

Whilst this policy is in place then the only way Con Craig can return to work is to adhere to the policy. It is important to stress here that we are only asking this officer to wear a face covering for a minimal amount of time. She would have to remain modified as she would still be required to wear a face covering if operational.

I am keen that you maintain contact with Con Craig and try to encourage her to return to work, albeit working from home. You can assure her that if she returns to home working then we will build in agreed contact parameters from the Sergeant that is supervising her on a day to day basis. I cannot ask a Sergeant to visit her at home for

obvious reasons but I am sure we can put in place measures to support her home working.”

70. There was a further exchange of emails between Sgt Fotheringham and the claimant between 1 and 26 October 2021 (309K-309R). In her email
5 of 1 October 2021 Sgt Fotheringham told the claimant that she had been liaising with HR and Supt Wales and –

*“The result of my enquiries regarding yourself are that Police Scotland’s stance on the wearing of masks in Police buildings remains unchanged. I have been informed that this is a policy decision based
10 on the protection of staff at work and they will not make allowances, regardless of medical exemptions due to their Health and Safety protocols.*

*However, if you feel that you would manage to wear one for a minimal amount of time, ie whilst moving around a building, then we could look
15 at getting you back to work, potentially in Carnoustie, on a modified basis.*

If this is unsuitable for you, I’m informed that you would have to remain working from home....”

71. In relation to the nature of the work the claimant was doing, Sgt
20 Fotheringham said that she could not promise a change but that it was something she could look into. Sgt Fotheringham also told the claimant that, while she had hoped to visit the claimant at home, *“I’ve been advised that this is not encouraged due to COVID”*.

72. The claimant described this as *“devastating”* because Sgt Fotheringham
25 had given her some hope there might be a solution. The claimant said that she felt *“I was the problem”* and that she was made to feel *“like a leper”*. In her reply of 8 October 2021 the claimant explained that it was not that she was unwilling to wear a face mask but that she could not *“under any circumstances”* comply due to *“suffering from an unseen
30 disability”*. The claimant was clearly finding her situation distressing, as can be seen from her email to Sgt Fotheringham –

5 *“Having been open to home working, I was given a role that led to a deterioration in my mental health as a result of the harrowing subject matter combined with extreme isolation. My home should be a safe place, and the current situation has taken that from me, thus resulting in my most recent absence. I am looking to you for your support to ensure that I will not be subjected to further stress and upset moving forward in my continued attempt to return to work.*

10 *My understanding is that under these circumstances, Optima should be utilised to offer assistance in reaching a solution agreeable to both myself and the organisation. Can you confirm that you have, as previously discussed, referred me back to them?*

15 *I note you have been advised visiting me at home is not encouraged due to Covid. Can you clarify the grounds for justification of this decision? And who has given this advice as a suitable course of action? I would highlight that I was visited at home by officers who delivered the items required for homeworking, this was during the height of the pandemic when restrictions were far tighter than they are now.*

20 *Can you please clarify that my inability to wear a face mask precludes me from being deserving of the same care and wellbeing considerations that are afforded to my colleagues and the general public?*

Please be advised that the decision preventing me being visited at home only adds to my feeling of work related stress and isolation.”

25 73. Sgt Fotheringham responded on 26 October 2021 in terms which were clear but which did not help the claimant –

30 *“I have sought advice from management and HR. The bottom line is that the stance is not going to change in terms of mask wearing in Police buildings. So your options are to return to working from home or remain on sick leave if you cannot wear a mask....”*

“In terms of working from home, I’ve been informed that you would be returning to the work you had been undertaking in the Risk and Concern Hub again, as there is currently no scope for an alternative.”

74. Sgt Fotheringham made reference to the fact that the claimant was due to go onto half pay and suggested that the claimant contact the SPF to make a claim through the Group Insurance Scheme to boost her pay. She told the claimant that she had *“negotiated a bit regarding home visits”* and it had been agreed that these could be done. Sgt Fotheringham also told the claimant that she was about to undertake COP26 duties and, during those and her period of leave, Insp Gibson would be the point of contact.

Inspector Gibson becomes involved

75. Insp Gibson took up his post of Response Locality Inspector on or around 6 September 2021. As such he was Sgt Fotheringham’s line manager. He emailed Sgt Fotheringham on 16 September 2021 (320) to advise that he had spoken to Ian Paton of Health and Safety. The advice from Mr Paton was that the claimant could not wear a shield instead of a face mask. Insp Gibson stated that, unless the claimant could wear a face covering, she would be unable to enter a Police Station.

76. Insp Gibson emailed the claimant on 27 October 2021 (329). They arranged to meet at the claimant’s home on 28 October 2021. Insp Gibson undertook to submit a referral to Optima and confirmed in his email to the claimant on 27 October 2021 (331) that he had done so.

77. Insp Gibson visited the claimant at her home on 28 October 2021. He wanted to get a first hand account of the claimant’s situation. During their discussion the claimant told Insp Gibson that she was being discriminated against. Insp Gibson did not agree and said that the respondent’s policy applied to all officers and staff.

78. Insp Gibson raised with the claimant the fact that her Fit Note dated 13 August 2021 (covering a period of absence of one month) had expired. The claimant alleged that she had been *“bullied”* by Insp Gibson into obtaining a further Fit Note, an allegation which he strongly denied.

79. Our view of this was that the claimant considered herself fit to return to work, and wanted to do so at Carnoustie. She felt that she was compelled to obtain another Fit Note. Insp Gibson clearly regarded it as an appropriate matter to raise with the claimant, as she remained absent from work and would shortly be going onto half pay. We did not believe Insp Gibson had bullied the claimant. We considered that he had “*struck a raw nerve*” when he brought this up, and that coloured the claimant’s perception.
80. Insp Gibson followed up his visit with an email to the claimant on 29 October 2021 (333). He indicated that he might have a plan that would allow the claimant to return to homeworking in an amended role and to do so before moving to half pay. He reminded the claimant of the need to produce a Fit Note.
81. Between 2 and 9 November 2021 Insp Gibson exchanged emails with Optima (415-416). Optima advised that there was little they could offer and recommended a stress risk assessment. Insp Gibson emailed the claimant on 4 November 2021 (334) attaching a stress risk assessment for her to complete and return. The claimant returned the completed risk assessment (389-400) on 5 November 2021.
82. On 5 November 2021 Insp Gibson emailed the claimant (340) proposing a phased return to homeworking. He indicated that he and Sgt Fotheringham would manage the claimant’s contact/wellbeing on a regular basis, and that he would aim to speak to the claimant at least twice per week. The claimant returned to home working as from 8 November 2021. Her work changed from R&C to assisting with the service of court citations.

Guidance

83. On 12 November 2021 Ms E Malcolm emailed Supt Wales and others (who we understood to be of comparable seniority) with HR “*Guidance for those who cannot wear a mask for medical purposes*” (345-347). This contained “*Advice for Business Leads/Heads of Functions*” in these terms –

5 *“Police Scotland’s policy around face coverings continues to be that re-useable face coverings must be worn while moving around Police buildings, unless seated at a desk or eating/drinking. It is also a requirement for officers and staff to wear IIR masks from the time they leave a Police building until they return, including while travelling with others in vehicles.*

10 *Where an officer or member of staff is unable to wear a face covering owing to a medical condition or a disability, supervisors are reminded of their responsibility to explore all other reasonable adjustments to accommodate that officer or member of staff, including whether it would be possible for the officer or member of staff to work from home or from another location. Exemptions exist for staff and officers in certain circumstances; if wearing a mask causes an individual extreme anxiety or distress OR where an individual has a physical or mental*
15 *illness or disability which means they can’t wear a mask. The following are not considered reasons not to wear a face covering; not wanting to wear one, mild discomfort when wearing one, suffering from a health condition or disability which does not prevent you from wearing a face covering, being deaf and lip reading.*

20 *In the event that no reasonable solution can be found, supervisors should contact People Direct who will provide further information and guidance around individual cases but where a member of staff or an officer is unable to wear a mask and requires to come into the workplace a risk assessment must be completed by the individual’s*
25 *line manager ensuring that in all circumstances, any member of staff or officer unable to wear a face covering will be able to maintain 2 metres physical distancing from colleagues at all times.”*

84. Ms Malcolm’s email then set out a process to be followed in cases where a member of the respondent’s workforce indicates they cannot wear a
30 mask. This concluded as follows –

“In all circumstances where masks cannot be worn then LMs must be advised that they require to undertake the following steps:

A risk assessment must be carried out;

The details and reason for non-mask wearing must be recorded;

Disability must be updated on SCOPE;”

85. A central message of this Guidance was captured in the following sentences –

5 *“It is vitally important that the individual understand that the
organisation has a duty of care to **all** employees and must balance the
welfare and responsibilities of all. It is important also for managers to
recognise that anxiety can arise in other workers where individuals
cannot wear a mask – and that any direct discrimination as a result
10 from other workers could constitute disability discrimination and must
therefore be proactively managed.”*

Other employees

86. Ms Beaton told us that within the respondent’s contact centre in Govan
there were a few members of staff who could not wear masks and whose
15 work could not be done from home. A risk assessment was undertaken
and screens were installed, facilities for lateral flow resting were provided
and the lunch area was set up so that social distancing could be
maintained. Staff whose work could be done remotely (eg IT staff) worked
from home. We regarded this as demonstrating that the respondent’s
20 policy of requiring face coverings to be worn by officers and staff in Police
buildings was capable of adjustment in certain circumstances.

87. We heard from Supt Wales that while Officers were expected to be clean
shaven to wear FFP3 masks, a number were unable to comply with that
requirement for religious reasons. These Officers were allowed to wear
25 an IIR mask instead. This meant that they could not be deployed
operationally (ie in public) and were utilised for office based work.

88. Supt Wales also told us that the respondent’s approach to those who were
medically exempt from wearing a face mask was to look at the individual
circumstances to ascertain if the employee was able to wear a mask from
30 the point of entering the front door of the Police building until they reached
their desk, and when moving around the building. All but two people with
medical exemptions were able to comply with this; one of these was the

claimant. Supt Wales said that he took Health and Safety advice, and that it was seen as a reasonable adjustment to require these employees to work from home.

- 5 89. It emerged during the evidence of Insp Gibson that the other person with a medical exemption worked in Perth. Insp Gibson knew this because he had been sent a copy of a risk assessment done for the other person. He thought this had come from Supt Wales, and it had been around the time that he was to do a risk assessment for the claimant in relation to Forfar. Insp Gibson said that he did not "*know the specifics*" but he thought the other person was allowed to work in a Police station without a mask.
- 10

Inspector Gibson takes advice

90. Insp Gibson spoke to Mr Paton about the claimant working within the Carnoustie office. Following a request from Chief Insp Blacklaw that this advice be documented, Mr Paton emailed Insp Gibson on 24 November 15 2021 (349-350). His advice was not recorded in the form of a formal risk assessment. We were satisfied that the layout of the Carnoustie office was well known to both Insp Gibson and Mr Paton.

91. In his email Mr Paton quoted the guidance he had provided in response to what he termed "*a similar enquiry*". This related to the Police 20 Headquarters in Bell Street, Dundee. His rationale was that two metre distancing "*at all times*" could not be achieved.

92. Insp Gibson described the Carnoustie office as an old building with narrow corridors. He said that there was a significant chance of meeting people in the corridor. The female toilet was located at the far end of the corridor 25 (ie distant from the old Sergeant's office which the claimant wished to use). There was a small galley kitchen. Insp Gibson said that he regularly used the old Sergeant's office and knew how busy the corridor could be. He said it was not feasible to restrict access to the Carnoustie office to planned visits. If Response Officers stationed there were moved to 30 Arbroath, it would add some 10 minutes to response times. Also, dog handlers were booked out of Carnoustie and kept their vehicles there.

93. Insp Gibson also stated that it would not be feasible to require people using the Carnoustie office to wear FFP3 masks. These were uncomfortable and were for single use only. Insp Gibson demonstrated the use of an FFP3 mask.

5 94. Mr Paton said in his email, under reference to “*reasonable adjustments*”, that –

“...*adjustments are a legislative requirement as noted in the guidance but H&S legislation places a duty of care on employers to protect all employees which takes precedence over this.*”

10 When the respondent’s witnesses were asked to comment on this, they sought to distance themselves from Mr Paton’s bold proposition that health and safety legislation trumped the Equality Act. We considered that they were right to do so.

15 95. While no formal risk assessment was produced in relation to the claimant using the Carnoustie office (in contrast to what we record below in relation to Forfar), we were satisfied that the interaction between Insp Gibson and Mr Paton did constitute an assessment of the risks associated with the claimant working there. Insp Gibson said that it would have been “*futile*” to do a risk assessment for Carnoustie in November 2021. However, he
20 also said that if the advice from Mr Paton had been that Carnoustie was possible, he would have generated a risk assessment for that office.

Further dialogue

25 96. There was an exchange of emails between the claimant and Insp Gibson on 30 November 2021 (351-355) which followed on from a phone call from Insp Gibson to the claimant on 29 November 2021. They had a further email exchange on 10-14 December 2021 (356-358). The claimant referred to a suggested Teams meeting with Supt Wales and asked what he planned to discuss with her. Supt Wales had asked the line managers of the claimant and other officers to enquire if it would be helpful to have
30 such a meeting so that he could explain the respondent’s rationale. Meetings went ahead with other officers but the claimant did not take up the offer.

Court attendance

97. There were a number of occasions when the claimant was required to attend to court to give evidence, and it is convenient to deal with these here.
- 5 98. On or around 13 October 2021 the claimant was cited to attend a High Court criminal trial. She was told by Sgt Fotheringham that she could attend court without a face mask as long as she wore her lanyard. However she was not permitted to enter the Police station to collect her notebook, without wearing a face mask. The claimant regarded this as
10 contradictory, but in our view it simply reflected the different regimes operated by the respondent and Scottish Courts and Tribunals Service.
99. The claimant was required to attend as a witness at a High Court trial in Glasgow on 31 January 2022. She was informed by an email from Sgt Steven Smith dated 26 January 2022 (371A) that all the Police witnesses
15 would give evidence remotely from the Police Headquarters in Bell Street, Dundee. When the claimant enquired how this affected her (by her email of the same date – 371B), she was told that she fell into the category of “*exceptional circumstances*” which meant that she would have to travel to Glasgow by train and give evidence in person, if she was required as a
20 witness. The claimant was surprised that she was allowed to travel by public transport and enter the court without a mask and yet she was refused entry to a Police station where she considered the risk of infection to be lower.
100. In or around the week commencing 15 February 2022 the claimant was
25 required to attend court as a witness in Forfar. Her colleagues were advised to wait in the canteen at Forfar Police station until contacted by the court officer. The claimant however was required to wait outside the court building in her car because she was not allowed to enter the Police building without a face mask. The claimant said that she felt isolated from
30 her colleagues. She did not believe that the respondent considered the risk to others.

January – February 2022

101. Towards the end of January 2022 the claimant undertook training as a Firearms Enquiry Officer. By this time she had initiated ACAS Early Conciliation (“EC”) on 11 January 2022. The claimant described not
5 having enough work to do at home in January 2022. We understood that her Firearms Enquiry Officer training was with a view to her undertaking this work in Forfar where there was a need for it. Insp Gibson acknowledged that he had received an email from People and Development about the claimant’s EC but refuted the suggestion that the
10 “Forfar option” was in response to this. Given we were told (and accepted) that there was a need in Forfar for this type of work, we found that to be credible.

102. On or around 21 February 2022 Insp Gibson told the claimant that she would be returning to her R&C work. The claimant resisted this, citing the
15 effect on her mental health. The move back to R&C did not proceed.

103. The SPICe timeline (216-219) includes the following –

- 25 January 2022

Scottish Government announce that from Monday 31 January businesses can resume hybrid working arrangements.

- 22 February 2022

Current legal requirements on the use of face coverings and the collection of customer details for contact tracing purposes are expected to be lifted on 21 March

25 These changes reflected a reduction in the level of risk posed by Covid-19.

Forfar

104. On 25 February 2022 Insp Gibson emailed the claimant (373) referring to “some positive news I would like to discuss with you”. Insp Gibson told us that he had received an email from People and Development referring to

readiness for people to return from home working to an office environment. He wanted to discuss with the claimant how this affected her situation.

105. On 2 March 2022 Insp Gibson completed a risk assessment (375-381) in respect of the claimant working in Firearms Licensing, located on the ground floor of Forfar Police station. He emailed this to Supt Wales on the same date (374-374A). He explained the rationale for choosing Forfar in these terms –

- *PC Craig will be working as part of Firearms Licensing – with colleagues from this business area working from the same building.*
- *Forfar Police Station has wider corridors than Carnoustie Police Station which works in terms of maintaining 2m distancing.*
- *PC Craig on entering Forfar Police Station would have a short distance to walk to her office and has been briefed that should she encounter a colleague, that the strict 2m distance must be maintained.*
- *Forfar benefits from an Inspector, Response Sergeant and Community Sergeant, which provides a level of supervision and support where required.*

106. In his email to Supt Wales, Insp Gibson also set out the following conditions for the claimant working in Forfar –

- *PC Craig will work from Forfar Police Station, remaining on her current working hours.*
- *The office identified is single occupancy and is at the end of a corridor closest to the external access point, it is also closer to amenities meaning PC Craig will be limited in passing others whilst attending the toilet/kitchen area.*
- *The office will be for the sole use of PC Craig only and will have appropriate cleaning materials for sanitising phone/computer.*

- *PC Craig will keep her belongings within her office and will not have a shared locker.*
- *PC Craig will not have use of any other office, nor will she hot desk.*
- *PC Craig will not have use of any Police Vehicle, nor will she be carried in one.*
- *PC Craig will not share utensils and will provide her own for sanitary reasons.*
- *PC Craig will not use the kitchen area unless it is empty, she will be permitted to leave for lunch or eat at her desk – she can attend the shared canteen but only when safe to do so.*
- *PC Craig will not have contact with the Public.*
- *PC Craig will maintain social distancing of 2m at all times, with no exceptions.*
- *PC Craig's wellbeing and welfare contact will remain with her Team 4 Sgt/Inspector in Arbroath and her work will be tasked direct from Firearms Licensing.*

107. Insp Gibson emailed his Forfar risk assessment to the claimant on 2 March 2022. He wanted her to sign it to signify her agreement to its terms. A Sergeant took a paper copy to the claimant's house but the claimant did not sign. She emailed Insp Gibson on 3 March 2022 (382-383) and her reaction to the Forfar risk assessment was expressed as follows –

"I cannot comprehend the need for such over the top measures pending my return to the work place, particularly given the recent announcement by the Scottish Government in relation to mask wearing no longer being a legal requirement from 21 March 2022. I would like to see confirmation of how long the measures contained within your Risk Assessment will be in place?"

The isolation I have felt over the last 12 months of home working are by no means going to be eased by my returning to work under these circumstances. If anything, the measures you are suggesting as

necessary only serve to increase these feelings. Singling me out in this manner makes me feel like a leper, that my disability is something to be embarrassed by, and the negative impact this situation has and will continue to have on my mental health cannot be overlooked.

5 Placing these restrictions on me is an outdated measure in light of the current COVID 19 situation.

Given the nature of this Risk Assessment I have to question why it was not carried out and implemented 12 months ago? If I can be accommodated within Forfar Police Office now, before masks are no longer a legal requirement, I should have been in March 2021.”

10

108. Although most of this chapter of our findings in fact relates to events which took place after the claimant presented her Tribunal claim on 28 February 2022, we have included it for the sake of completeness.

Claimant's medical records

15 109. We noted the letter from the claimant's GP (71) referred to above. We also had the claimant's GP records covering the period of approximately two years between July 2020 and June 2022 (76-79) and various items relating to her referral to Angus Adult Psychological Therapies Service (72-75 and 80-85).

20 110. We observed the following from the claimant's GP records –

03/12/2020 "Stress at home....No symptoms of depression. Doesn't feel she can manage work just now...."

13/08/2021 "struggles to wear face mask, initially not a problem, now work needs a mask & working from home. Feels isolated & negatively affectively mental health. Work won't allow....currently doing research child protection – finds it harrowing & can't do it as completely isolated & no support. Doesn't feel depressed – concerned will deteriorate. Requests line with isolation on reason"

25

06/10/2021 "....Also ongoing problems at work. Works in police service. Cannot wear a mask as she thinks she has PTSD from a traumatic experience aged 19....Cannot wear

30

necklaces/scarves/have hair around her neck following this. Work are not letting her in the building with no mask on. She has been working from home but finding this increasingly isolating. Is researching child abuse and finding this increasingly difficult with no one to talk to. Has spoken to employee assistance programme who have arranged 6 sessions of counselling. She is raising issue with work as she feels she is being discriminated against for medical disability....”

30/11/2021 “got a line until 13th September, struggling with working from home or wearing mask in order to attend employment. At end of line texted boss regarding what was happening as line has finished and they did not return call with advice regarding how you could return to work. Unable to wear mask as becomes very anxious and struggling with professional isolation at home. Is not fit to work without amended duties which employer is not able to accommodate, due to work-related stress, personal isolation and anxiety”

08/03/2022 “....ongoing anxiety, employer has declined occupational health assessment, ongoing psychology review regarding phobia of mask wearing, psychologist investigating possibility of trauma

06/04/2022 “....anxiety levels really high at the moment related to ongoing stress with employer and does not feel able to attend court in any capacity due to her anxiety....”

111. We found that the claimant’s mental health had been negatively impacted by a combination of (a) the requirement to work from home in isolation from colleagues, (b) the nature of the work the claimant had undertaken while working from home and (c) her perception that she was being treated in a discriminatory manner relating to her disability.

Claimant’s career plans

112. In 2019 the claimant had attended a course at Tulliallan Police College to train as a Family Liaison Officer. Her ambition was to become a SOLO (Sexual Offences Liaison Officer). She had work experience of shadowing SOLOs.

113. The note of an Absence Support Meeting on 11 November 2022 (400A-400B) between Insp Ahmad (who had taken over the claimant's welfare support from Insp Gibson) and the claimant recorded that the claimant had agreed with Insp Ahmad that *"the ultimate goal for her and the organisation is for her to return to full operational duties, however long that may take"*. It was apparent from her evidence that the claimant had reservations as to whether she would be able to continue her career with the respondent. She said *"I don't see how I'm going to make that happen"*.

114. In that context we noted, and particularly wanted to record, a statement made by Supt Wales at the end of his evidence in chief. He was asked about the impact of the events referred to above and the current proceedings on the claimant's career, and whether she would be viewed as a troublemaker. His response was *"I give the claimant a personal guarantee that there will be nothing like that. I just want to see the claimant back at work, and her career will go on."*

Comments on evidence

115. It is not the function of the Employment Tribunal to record every piece of evidence presented to it and we have not attempted to do so. We have sought to focus on those parts of the evidence which we considered to have the closest bearing on the issues we had to decide.

116. All of the witnesses were subject to robust, but never oppressive, cross-examination. They were all prepared to make concessions where it was appropriate to do so. We found all to be credible. There was in any event little in the way of factual dispute which was unsurprising in a case where the sequence of events was well documented.

Applicable law

117. Section 15 EqA (**Discrimination arising from disability**) provides, so far as relevant, as follows –

(1) A person (A) discriminates against a disabled person (B) –

(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 legitimate aim....

118. Section 19 EqA (**Indirect discrimination**) provides, so far as relevant, as follows –

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

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

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

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

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

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

(3) The relevant protected characteristics are –

20 *....disability....*

119. Sections 19 and 20 EqA (**Duty to make adjustments/Failure to comply with duty**) provide, so far as relevant, as follows -

20 Duty to make adjustments

25 *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*

(2) The duty comprises the following three requirements.

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

5

21 Failure to comply with duty

(1) *A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*

(2) *A discriminates against a disabled person if A fails to comply with that duty in relation to that person....*

10

120. Section 39 EqA (**Employees and applicants**) includes the following provision at subsection (2) –

An employer (A) must not discriminate against an employee of A's (B) –

15

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

20

(d) by subjecting B to any detriment.

121. Section 136 EqA (**Burden of proof**) provides, so far as relevant, as follows –

(1) *This section applies to any proceedings relating to a contravention of this Act.*

25

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

(3) *But subsection (2) does not apply if A shows that A did not contravene the provision.*

(4)....

(5)....

5 (6) *A reference to the court includes a reference to –*

(a) an employment tribunal....

Submissions

122. It was agreed on 20 January 2023, and confirmed at the conclusion of the evidence on 23 January 2023, that the parties' representatives would provide written submissions by 3 February 2023. We are obliged to Mr Russell and Mrs Fellows for those submissions and the evident care taken in their preparation.

10

For the claimant

123. Mr Russell in effect accepted that the respondent had demonstrated a legitimate aim for their policy that a Police Officer who did not wear a mask could not be in a Police building, but argued that the proportionality of this measure was "*completely obliterated*" by the evidence which emerged during the hearing of five other individuals for whom an exception was made. This undermined the respondent's assertion of inability to accommodate one of the adjustments contended for by the claimant –

15

20 "*The Respondent making adjustments for others but not the Claimant immediately unravels the justification defence and the Respondent's witnesses' evidence defending their position.*"

124. Mr Russell submitted that the respondent had "*knowingly and deliberately concealed information*". Their defence of the claim, based on the adjustments contended for being unreasonable, was submitted when they knew that others had received the adjustment of working in Police buildings without a mask. The information about the others should have been disclosed.

25

125. Mr Russell described the offer to the claimant of a return to work in March 2022 as a *“major contradiction”*. The offer came at a time when the law, and the respondent’s policy, was that face masks had to be worn. The offer was based on a risk assessment which proved that an adjustment could have been made earlier, as it was for others. Mr Russell described the attempt to explain this on the basis that *“things were getting better”* as *“feeble”* and *“contrived”*.
5
126. Mr Russell invited us to find that the claimant’s inability to wear a mask was connected to her disability of anxiety. This was not disputed by Mrs Fellows and so we need say no more about it.
10
127. Mr Russell focussed his criticisms of the respondent’s witnesses on Supt Wales and Ms Beaton. He submitted that the evidence of Supt Wales was *“spectacularly contradicted by the revelations about others who received the adjustment asked for by the Claimant”*. His real attitude was revealed by the statement in his email of 21 September 2021 (321) that *“It is irrelevant whether or not a member of staff has an exemption”*. Mr Russell described this as *“discriminatory and dismissive”* of the respondent’s obligations under EqA.
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128. Mr Russell invited us to find that Supt Wales had not carried out a risk assessment in relation to Carnoustie. He reminded us that in the respondent’s answer to the claimant’s request for information (60-62) there was no reference to such a risk assessment. He highlighted what he said was the *“clear contradiction”* between Supt Wales’ statement in his email of 1 April 2021 that the claimant would continue working from home *“As long as the mask wearing remains an issue”* and the claimant being offered a return to work in Forfar in March 2022 at a time when it remained the law, and the respondent’s policy, that masks should be worn.
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129. Turning to Ms Beaton, Mr Russell said that she had accepted the *“very obvious criticism and contradiction in the Respondent’s defence”* that others had received the adjustment contended for by the claimant. He argued that the difference in treatment made no sense at all and was fatal to the respondent’s defence of the claim.
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130. Mr Russell pointed out that Insp Gibson told the claimant on 25 February 2022 that he had some positive news to share with her. However, his Forfar risk assessment was dated 2 March 2022 which demonstrated that the respondent was going to allow the claimant back to work without wearing a face mask before the risk assessment was carried out. Mr Russell said that it was apparent from Insp Gibson's evidence that the offer to work in Forfar was driven by operational requirements and not by the duty to make a reasonable adjustment for the claimant. Mr Russell also invited us to find that the offer was made in response to the claimant's impending Tribunal application (of which the respondent was aware by reason of her ACAS notification).
131. In relation to the reasonable adjustments claim under sections 20/21 EqA, Mr Russell referred to the PCP (as set out above) and the adjustments contended for. He said that the claimant relied on a hypothetical comparator. The claimant, as someone suffering from anxiety and her inability to wear a face mask because of that, was more likely than someone without her disability to be placed at a substantial disadvantage. Mr Russell submitted that the respondent knew, or ought reasonably to have known, that the PCP put the claimant at that disadvantage.
132. Mr Russell articulated the substantial disadvantage to the claimant as follows –
- (i) She was unable to attend her place of work, ie Police stations or buildings.
 - (ii) She was unable to carry out her operational duties.
 - (iii) She was unable to interact with work colleagues, resulting in stress and professional isolation to the detriment of her mental health.
133. Mr Russell argued that the steps contended for would have prevented these disadvantages. He asked us to note that the claimant's pled case referred to allowing the claimant to enter and work within "*a Police station*", ie any Police station. This, Mr Russell submitted, was any Police station within reasonable commuting distance of the claimant's home. This could be Arbroath, Carnoustie, Forfar, Dundee or Perth. It was the place of work

which was central to the adjustment contended for. The claimant simply needed a space within a building where she could perform whatever duties she was given.

134. Mr Russell referred to Article 5 of the Equal Treatment Framework Directive 2000/87/EC. He quoted from this but we will set it out in full –

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“In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.”

In this case, Mr Russell submitted, it was known that the respondent made the adjustment for others which confirmed that the burden on the respondent was not disproportionate.

135. Mr Russell referred to the guidance in ***Smith v Churchills Stairlifts plc [2005] EWCA Civ 1220*** and ***Royal Bank of Scotland plc v Ashton [2011] ICR 632*** as confirming that the reasonableness of a step must be objectively assessed. This was relevant in the present case because the respondent had made one of the adjustments for other employees and had provided no plausible or cogent reason why it could not have been done for the claimant.

136. Mr Russell submitted that, while a failure to carry out a risk assessment was not of itself a failure to make a reasonable adjustment, the case of ***Project Management Institute v Latif 2007 IRLR 579*** illustrated that such a failure could be important, as it could result in the employer failing to make adjustments he ought reasonably to make. Mr Russell argued that the respondent’s failure to carry out a risk assessment earlier than March 2022 was a significant failing on their part. It meant that Supt Wales

was not in an “*informed position*” when he refused to allow the claimant to work in a Police building.

137. Mr Russell referred to the guidance in ***Hewage v Grampian Health Board 2012 IRLR 870*** on the burden of proof (a reference to section 136 EqA).

5 This was a two stage process and the burden had shifted to the respondent. It was good practice to apply this test.

138. Mr Russell argued that the first adjustment contended for, allowing the claimant to carry out operational duties without wearing a face mask, could have been achieved. The claimant had done so in 2020. Her line manager knew this, understood her disability and did not challenge her. Mr Russell invited us, when assessing the reasonableness of the first adjustment, to take into account (a) that in terms of the SG guidance Police Officers exempt from wearing masks, (b) the roll out of the vaccination programme and lateral flow testing and (c) that the claimant would have continued to wear her lanyard and carry her exemption card.

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139. In relation to the second adjustment, allowing the claimant to enter and work in a Police station, Mr Russell submitted that the crucial evidence was that other staff were allowed to work in Police buildings without wearing a mask due to medical exemptions. On an objective assessment, this point alone should persuade the Tribunal that the adjustment contended for was reasonable. The fundamental problem, Mr Russell argued, was the attitude of Supt Wales and the advice of Mr Paton.

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140. Moving to section 15 EqA (**Discrimination arising from disability**), Mr Russell reminded us of the two step process, as explained in ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305*** –

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“The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus on the words ‘because of something’, and therefore has to identify ‘something’ – and second upon the fact that that ‘something’ must be ‘something arising in consequence of B’s disability’, which constitutes a second causative (consequential) link. These are two separate stages.”

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141. Mr Russell submitted that the “*something*” was the claimant’s inability to wear a face mask (step one) and that this was due to her disability (step two). He described the unfavourable treatment as –

(i) Excluding her from carrying out operational duties.

5 (ii) Excluding her from attending and/or working in any Police station/building in Scotland.

(iii) Forcing her to work from home.

The reason for this treatment of the claimant was her inability to wear a face mask because of her disability, which was because of and directly connected to her disability of anxiety.

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142. Turning to objective justification under section 15(1)(b) EqA, Mr Russell conceded that the aim contended for – protecting Police Officers and members of the public from the risks presented by the Covid-19 pandemic – was a legitimate aim and the respondent’s PCP was capable of achieving that aim. However, he argued, the key question was whether the respondent’s “*no mask no entry to a police station*” policy was a proportionate way of achieving that aim.

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143. In ***Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15*** Baroness Hale emphasised that a proportionate measure had to be both an appropriate means of achieving the legitimate aim and reasonably necessary to do so. Mr Russell submitted that, given the impact on the claimant’s health and the fact that the respondent was aware that other staff had benefitted from the adjustment contended for, it had to follow that the “*no mask no entry*” policy was not proportionate in the circumstances.

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25 The measures deployed for staff with medical exemptions should have been adopted in the claimant’s case. Mr Russell argued that the respondent had many different buildings in the Tayside area. If they had risk assessed a building and done an individual risk assessment for the claimant, a place of work within a Police building could have been found for her.

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144. Moving finally to section 19 EqA (**Indirect discrimination**), Mr Russell said that the particular disadvantages suffered by the claimant were

(a) being unable to enter or work from a Police station/building and (b) carry out her operational role. He argued that those who did not share the claimant's disability were not removed from their role, refused entry into any Police station nor isolated from colleagues at home. Mr Russell adopted the same arguments on objective justification as he had articulated in relation to the section 15 claim.

145. Mr Russell referred to the case of ***Shields v Alliance Healthcare Management Services Ltd, Tribunal cases nos 4110642/2021 and 4101741/2022*** and highlighted the differences between the circumstances of the claimant in that case and those of the claimant in the present case.

146. In his submissions on remedy Mr Russell urged us to make an award to the claimant for injury to feelings at the top of the third Vento Band (a reference to ***Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA Civ 1871***) in the sum of £49300. He also contended that this should be uplifted by at least £30000 on the basis that it was just and equitable to do so.

For the respondent

147. Mrs Fellows reminded us of the impact of the pandemic on the respondent. The nature of the work undertaken by Police Officers meant that coming into close proximity with colleagues and members of the public could not be avoided. Absence rates increased dramatically. The respondent had to mitigate the risk for all of its staff.

148. Mrs Fellows addressed criticisms in Mr Russell's submissions under the heading "***Conduct of the case and treatment of the Claimant***". The suggestion that the respondent had no defence because individuals working elsewhere could be accommodated in a Police building was an over-simplification of the circumstances and the issues relating to proportionality. She disputed that, because a reasonable adjustment could be made for employees carrying out a specific role in a certain building in a certain geographic area (ie the Govan Contact Centre employees), it could be made for another employee (ie the claimant) in a different role, in a different location with different buildings.

149. Mrs Fellows also disputed that there had been any concealment of information. Five questions were asked and answered (60-62). None of these related to whether it had been possible to make an adjustment to the respondent's face mask policy for anyone elsewhere in Scotland.
5 There was, Mrs Fellows submitted, no evidence to show that Supt Wales knew that other people had been accommodated in a Police building without wearing a face mask. There was also no evidence as to whether (or when) the Perth employee had returned to work in a Police building.

150. Dealing with the section 15 EqA claim, Mrs Fellows referred to
10 **Weerasinghe** (see paragraph 140 above) and to **Pnaiser v NHS England and another 2016 IRLR 170** from which she distilled the following summary of what the Employment Appeal Tribunal described as the "proper approach" to determining section 15 claims –

15 *"1. The tribunal must identify whether the claimant was treated unfavourably and by whom.*

2. It then has to determine what caused that treatment, focussing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the motive of the alleged discriminator in acting as he or she did is irrelevant.

20 *3. The tribunal must then determine whether the reason was "something arising in consequence of [the claimant's] disability, which could describe a range of causal links. That stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.*

25 *4. The knowledge required is of the disability; not knowledge that the "something" leading to the unfavourable treatment was a consequence of the disability."*

151. There was no statutory definition of "unfavourable treatment" but in
30 **Williams v Trustees of Swansea University Pension & Assurance Scheme and another [2018] UKSC 65** the Supreme Court found that it required Tribunals to answer two simple questions –

- What was the relevant treatment?
- Was it unfavourable to the claimant?

152. Mrs Fellows submitted that the relevant treatment – the requirement to work from home – was not unfavourable to the claimant. The context was a global pandemic when the instruction from the UK Government and SG was that everyone should work from home unless that was not possible. It was possible for the claimant to work from home, carrying out modified duties.

153. Mrs Fellows went on to argue that if the Tribunal found there had been unfavourable treatment, the respondent had an objective justification for it as a proportionate means of achieving a legitimate aim. She accepted that it was for the respondent to establish the objective justification defence on the balance of probabilities. In **Homer** Lady Hale said this (at paragraph 22) –

15 “*To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so.*”

154. Mrs Fellows referred to **Land Registry v Houghton and others UKEAT/0149/14** and **City of Oxford Bus Services Ltd (t/a Oxford Bus Company) v Harvey UKEAT /0171/18**. In the latter case the EAT said the following –

25 “*proportionately requires a balancing exercise with the importance of the legitimate aim being weighed against the discriminatory effect of the treatment....an employer is not required to prove that there was no other way of achieving its objectives (Hardys & Hansons plc v Lax 2005 IRLR 726). On the other hand, the test is something more than the range of reasonable responses (again see Hardys).*”

155. In support of her argument that the respondent’s face mask policy (and the requirement for the claimant to work from home because she was unable to comply) was a proportionate means of achieving a legitimate aim, Mrs Fellows highlighted that –

- (a) The respondent's policy was implemented and had evolved in response to advice from SG and others.
- (b) The respondent carried out a thorough organisational risk assessment and regularly updated this and its policies.
- 5 (c) As the claimant accepted, Covid-19 was a life threatening virus and the provision of policing services was impacted by it during the pandemic.
- (d) The continuation of the respondent's services was essential, so that the respondent had to do everything it could to mitigate the risk of transmission.
- 10 (e) Where the respondent recognised that its policy could not be complied with for medical reasons, the primary adjustment was the work from home instruction.
156. Mrs Fellows said that Supt Wales had, in or around April 2021, considered whether the claimant could work in a Police building without wearing a mask, and had concluded that this could not be achieved because physical distancing of two metres could not be maintained at all times. The risks outweighed the disadvantage to the claimant. Although no written risk assessment had been done, Supt Wales knew the layout of the buildings within his Division and had clearly assessed all the relevant risks in the context of the pandemic.
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157. Mrs Fellows said that requiring the claimant to work from home because she could not wear a face mask was "*a necessary response at an unprecedented time*". She detailed the steps the respondent had taken including modifying the claimant's duties to facilitate home working and maintaining contact with her. Mrs Fellows stressed the impact that an outbreak of Covid-19 would have on the delivery of essential policing. The respondent had explored alternatives but there was no lesser measure which would have served the respondent's legitimate aim.
- 25
- 30 158. Referring to the Police Officer exemption in the SG guidance, Mrs Fellows submitted that this was intended to cover situations where for operational

reasons it might not be possible to wear a mask. It did not mean that Police Officers could not be required by the respondent to wear masks.

159. Mrs Fellows moved on to the section 19 claim (**Indirect discrimination**). She said that the statutory test required the claimant to show group disadvantage – that the respondent’s PCP put (or would put) people with whom the claimant shared a protected characteristic at a particular disadvantage when compared to others.
160. Mrs Fellows said that the respondent accepted that it applied the PCP to the claimant and to persons who did not share her protected characteristic. The respondent did not however accept that the PCP (the face mask policy) put persons with whom the claimant shared the protected characteristic at a “*particular disadvantage*” when compared with persons who did not share the characteristic.
161. The claimant’s disability was anxiety in connection with which she could not wear a face mask. The Tribunal had no evidence that inability to wear a face mask was a symptom of anxiety for people other than the claimant. Her anxiety related to a particular surgical mistake in her early adulthood. Mrs Fellows said it was not accepted by the respondent that group disadvantage had been established. It was also not accepted that being required to work from home was a disadvantage. If however the Tribunal was not with her on this, Mrs Fellows relied on the same justification defence as articulated in the defence of the section 15 claim.
162. Turning to the claim under sections 20/21 EqA (**Duty to make adjustments/Failure to comply with duty**) Mrs Fellows said that the respondent did not accept that the PCP put persons with whom the claimant shared her protected characteristic of anxiety at a substantial disadvantage. No evidence had been presented that people with anxiety were more likely not to be able to wear a face mask. Mrs Fellows suggested that people with anxiety might in fact be more nervous about the risks of Covid and therefore more likely to wear a face mask.
163. In relation to the first adjustment (carrying out of operational duties without wearing a face mask) Mrs Fellows noted that the claimant acknowledged that physical distancing was sometimes not possible for Police Officers on

operational duties. Mrs Fellows argued that the claimant's inability to wear a face mask meant a "*clear increased risk*" of close contact with colleagues and members of the public resulting in Covid transmission or (if the claimant caught Covid) a need for self-isolation.

5 164. Mrs Fellows said that there was also an increased risk because two metre
physical distancing could not be maintained at all times within Police
buildings in Dundee and Angus – that was Supt Wales' evidence. That
this applied to Carnoustie Police station was also confirmed by the
evidence of Insp Gibson and the letter from Mr Paton (349-350). Mrs
10 Fellows submitted that it was not an answer to this to say that there had
not been an outbreak of Covid in the period when the claimant remained
operational between face masks becoming compulsory and her absence
commencing at the end of November 2020. Allowing the claimant to return
to operational duties without wearing a face mask was not a reasonable
15 adjustment.

165. In relation to the second adjustment (allowing the claimant to work in a
Police building without a mask) Mrs Fellows said Insp McGaughay, Supt
Wales and Insp Gibson had been clear in their evidence that two metre
distancing could not be maintained at all times within Carnoustie Police
20 station. She invited us to accept that Supt Wales had considered all the
Police buildings in Dundee and Angus to which the claimant could
reasonably be expected to travel. Physical distancing was not possible
and so, Mrs Fellows argued, allowing the claimant to work in any of these
without wearing a face mask would not have been a reasonable
25 adjustment.

166. Mrs Fellows submitted that none of the measures suggested by the
claimant to facilitate her working at Carnoustie Police station was feasible.
Specifically –

(a) Asking others to wear FFP3 masks was impracticable as the masks
30 were single use only and uncomfortable. The Tribunal should
consider not only factors relating to the disabled person but also the
effect on the rest of the workforce – **Chief Constable of Lincolnshire
Police v Weaver UKEAT/0622/07.**

(b) Relocating officers away from Carnoustie or limiting access to the building would have caused significant disruption and inconvenience to officers who worked or routinely used the facilities there.

5 (c) Suggesting that the claimant could manage her movements around the building was unrealistic. The corridor was narrow and the female toilet was at the far end from the old Sergeant's office.

(d) Implementing such measures might have resulted in the claimant working alone in Carnoustie which would not have reduced any feeling of isolation.

10 167. Mrs Fellows contended that the prevailing circumstances in March 2022, when a return to work for the claimant in Forfar was proposed, were different. Home working was no longer the default position. Self-isolation was no longer required for those who were double vaccinated. The vaccination programme was advanced. Covid-19 rates were lower. While
15 the law on mask wearing remained in place, the wider context had changed and the risk of allowing the claimant to return was much lower.

168. Mrs Fellows noted that the claimant complained that the safeguards to be put in place to allow her to work in Forfar were too restrictive and a return on that basis would not have alleviated her feelings of isolation. However,
20 Mrs Fellows submitted, any proposal around an earlier return would have entailed restrictions which were no less restrictive.

169. Mrs Fellows also noted that the claimant criticised the respondent because there was no risk assessment relating to a possible return to a Police building prior to March 2022. She submitted that a failure to carry out a
25 risk assessment could not be a failure to make a reasonable adjustment as no PCP was involved. Mrs Fellows referred to ***Tarbuck v Sainsbury Supermarkets Ltd UKEAT/0136/06***.

170. Mrs Fellows referred to the case of ***Shields*** which, she contended, was relevant. In that case Alliance (the respondent) had introduced a
30 requirement that all staff should wear a face mask to protect the workforce and ensure operation at full capacity was maintained. Mrs Shields was

disabled. She suffered from vertigo, and objects close to her face triggered anxiety and panic attacks. She was unable to comply.

171. Alliance argued successfully that the underlying aim of their policy was legitimate. They were also able to show that they had acted proportionately. Other measures were considered but deemed impracticable or ineffective to prevent the spread of Covid. Mrs Shields' claim of failure to make reasonable adjustments did not succeed. Mrs Fellows argued that the result should be the same in the present case.

172. In relation to the injury to feelings award sought by the claimant, Mrs Fellows observed that the level of award was substantially more than the amount stated in the claimant's schedule of loss. No revised schedule of loss had been provided. In the absence of medical evidence it was not justified.

Discussion

173. The parties' representatives having provided their written submissions, we held a deliberation day on 7 February 2023. We were able to reach a unanimous view on all points.

174. The backdrop to this case was the coronavirus pandemic and the measures taken by SG and employers, including the respondent, to address the impact of the spread of Covid-19 infections.

175. This was a particularly difficult time for the claimant because she had a hidden disability and was unable to wear a face covering. This meant that what might have appeared a simple expedient, such as wearing a face mask briefly while entering and leaving a Police building, was a complete impossibility for her. The pandemic coincided with other pressures on the claimant, such as her daughter's operation, and we recognised that she faced challenges which went well beyond those experienced by others.

176. It was also a difficult time for the respondent. This was recognised in the strategic objectives of Operation Talla. It was inevitable that a consequence of the spread of Covid-19 would be increased absence levels amongst Police officers and staff. Meeting public need required the maintenance of critical policing functions. The nature of those functions

necessitated interaction with members of the public. Front line policing and home working were incompatible, hence the importance of safeguarding the health, safety and wellbeing of the respondent's officers and staff.

5 177. The nature of the operations undertaken by the respondent meant that there was a significant risk that any infection could cause a whole team to become unavailable, putting strain on the resources available to maintain policing functions. A further challenge was the changing nature of the pandemic and the measures required to respond to it. In these
10 circumstances it was difficult to criticise the respondent for being risk averse.

178. We approached matters by working through the agreed list of issues.

Disability Discrimination – section 15 EqA

15 ***(a) Did the respondent treat the claimant unfavourably? If so, what was the unfavourable treatment?***

179. We considered that we should deal with this by (a) identifying the treatment about which the claimant complained and (b) deciding whether and, if so, why that treatment was unfavourable. We found that the treatment was being sent home and thereafter denied access to any
20 Police building. It was not in dispute that this had happened. It was an agreed fact that "*Where staff could not wear a face mask/covering owing to a medical condition or a disability, where possible these staff members were required to work from home*". The decision in relation to the claimant came from Supt Wales and reflected his understanding of the
25 respondent's national policy at the time.

180. It was clear from the evidence that the claimant wanted to return to office based work in Carnoustie and was not permitted to do so. It was also clear that the claimant felt isolated when required to work from home. We reminded ourselves that section 15 EqA does not involve a comparative
30 exercise. Whether treatment is unfavourable does not depend upon whether an employee who is not disabled would have been treated differently.

181. The Equality and Human Rights Commission: Code of Practice on Employment (2011) (the “Code”) states as follows –

5 *5.3 Direct discrimination occurs when the employer treats someone less favourably because of disability itself...By contrast, in discrimination arising from disability, the question is whether the disabled person has been treated unfavourably because of something arising in consequence of their disability.*

10 *5.4 Indirect discrimination occurs when a disabled person is (or would be) disadvantaged by an unjustifiable provision, criterion or practice applied to everyone, which puts (or would put) people sharing the disabled person’s disability at a particular disadvantage compared to others, and puts (or would put) the disabled person at that disadvantage.*

15 *5.5 In contrast, discrimination arising from disability only requires the disabled person to show they have experienced unfavourable treatment because of something connected with their disability....However, as with indirect discrimination, the employer may avoid discrimination arising from disability if the treatment can be objectively justified as a proportionate means of achieving a legitimate*
20 *aim.*

25 *5.6 Both direct and indirect discrimination require a comparative exercise. But in considering discrimination arising from disability, there is no need to compare a disabled person’s treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.*

182. We found that being sent home and being denied access to any Police building was unfavourable treatment of the claimant. It was unfavourable because –

- 30 (i) the claimant was not able to continue with her duties as a Response Officer,
- (ii) she was unable to have day to day contact with her colleagues,

(iii) she was not permitted to enter a Police building to collect her notebook in advance of appearing in court as a witness, and

(iv) she was not able to assemble with other officers who were to be giving evidence remotely from a Police station.

5 **(b) Did the respondent treat the claimant unfavourably because of something arising in consequence of her disability?**

183. We then considered whether this unfavourable treatment arose in consequence of the claimant's disability. The disability was anxiety. A feature of this was the claimant's inability to wear a face covering. As a result of that inability, the claimant was not able to continue her duties as a Response Officer, nor have day to day contact with her colleagues, because she was required to work from home and not permitted to enter any Police building. These restrictions on the claimant were in place because she could not wear a face covering. She could not wear a face covering because of her disability. Accordingly, we found that the unfavourable treatment did arise in consequence of the claimant's disability.

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20 **(c) If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim within the meaning of section 15(1)(b) EqA?**

184. We noted the following provisions of the Code, reminding ourselves that these appear in the section dealing with indirect discrimination –

25 *4.27 The question of whether the provision, criterion or practice is a proportionate means of achieving a legitimate aim should be approached in two stages:*

- *Is the aim of the provision, criterion or practice legal and non-discriminatory, and one that represents a real, objective consideration?*
 - *If the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?*
- 30

4.28*The health, welfare and safety of individuals may qualify as legitimate aims provided that risks are clearly specified and supported by evidence.*

5 4.29 *Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An Employment Tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it,*
10 *taking into account all the relevant facts.*

185. We found that the respondent's aim was as set out in the Gold Strategy – Operation Talla (226-233) to which we refer above (see paragraph 16). The introductory paragraphs of the strategy document included the following –

15 *"To ensure that appropriate plans were in place to deliver a full response to this evolving situation, an operational response capability was stood up in February 2020 to respond to incidents associated with the COVID-19 pandemic, and a command structure was established under the name Operation Talla. Contingencies have been developed*
20 *recognising the high profile nature of these events, the significant potential for community impact, and early significant absences from the police workforce.*

These contingencies continue to be reviewed and refined as our responses to the pandemic continue to evolve and new challenges
25 *emerge such as localised outbreaks requiring a localised response and the potential organisational impact of Test and Protect isolation requirements.*

More importantly, there will be clear focus on business continuity, and maintaining critical policing functions to serve changing public needs
30 *during this unprecedented time. There will also be a focus on protecting officers and staff required to deliver policing functions throughout this period and in doing so maintaining public trust and confidence in Police Scotland as a service provider and as an effective*

professional partner in supporting the combined partnership response to this developing event.”

186. We have quoted (at paragraph 16 above) some of the strategic objectives set out in the Gold Strategy. We had no difficulty in finding that the respondent’s strategic objectives were “*legal and non-discriminatory*” and represented a “*real, objective consideration*”. It seemed to us that it was self-evident, such as to require no further explanation, that these constituted a legitimate aim. We then considered whether the respondent’s treatment of the claimant represented proportionate means, ie appropriate and necessary, of achieving the legitimate aim.

187. The respondent’s reason for requiring the claimant to work from home and not enter any Police building was to protect other officers and staff with whom the claimant might come into contact from the risk of Covid-19 infection. That this was the respondent’s objective could be seen from the language of the Talla guidance. For example, the guidance issued on 22 January 2021 stated (at 134) –

“It is clear from a number of serious outbreaks of coronavirus infection in Police Scotland that instructions around face coverings, PPE and measures such as physical distancing, which are in place to protect officers and staff from coronavirus, are not being followed by everyone at all times.”

188. The discriminatory effect on the claimant was the unfavourable treatment described above (see paragraph 179). The Code (at paragraph 4.31), having explained that “*proportionate*” means “*appropriate and necessary*”, says this –

But “necessary” does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.”

189. We reminded ourselves that section 15 EqA refers to “*treatment*” and not to the application of a PCP. However, we noted that the language of sections 15 and 19 – “*to be a proportionate means of achieving a*

legitimate aim” – was identical, save only that section 15 refers to “*treatment*” while section 19 refers to “*a provision, criterion or practice*”. That this language should be interpreted in the same way in both sections was supported by the Code - when dealing with objective justification under section 15, the Code (at paragraph 5.11) refers back to the relevant paragraphs relating to section 19 (4.25 – 4.32).

5

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190. Our view was that the risk against which the respondent was seeking to protect other officers and staff was of Covid infection from contact with someone not wearing a face covering. In relation to a building such as Carnoustie Police station which had narrow corridors where physical distancing could not be achieved, we were satisfied that this risk could not be adequately addressed by any less discriminatory means than excluding the claimant from the building.

15

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191. In saying that, we do not for a moment doubt that if the claimant had been permitted to work in Carnoustie, she would have behaved responsibly and complied with whatever precautionary measures were required of her. The difficulty which the respondent faced was that, given the layout of the building as described by Insp Gibson, the risk of infection would remain for as long as the claimant was working there without a face mask and other officers and staff were using the building. The risk was one which could be eliminated by excluding the claimant. This was in contrast to the risk posed by others, such as members of the public, entering Police premises without a face covering where the risk could at best be managed.

25

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192. We did not believe it would have been feasible or reasonable to exclude or relocate other officers and staff if this would impact adversely on response times, which would have been the case if officers had been moved to Arbroath. It would also not have been feasible or reasonable to require others using the Carnoustie building at the same time as the claimant to wear FFP3 masks, given that these were uncomfortable and single use only.

193. For these reasons, we decided that the respondent had shown that the unfavourable treatment of the claimant was a proportionate means of

achieving a legitimate aim. This meant that her claim under section 15 EqA did not succeed.

Disability Discrimination – section 19 EqA

194. Within her submissions Mrs Fellows broke section 19 down into its various
5 elements and we found that a helpful starting point, before returning to the list of issues. She described those elements thus –

- *A applies to B a PCP.*
- *B has a disability.*
- *A applies (or would apply) that PCP to persons who do not have B's*
10 *disability.*
- *The PCP puts (or would put) those with B's disability at a particular disadvantage compared to other persons.*
- *The PCP puts (or would put) B at that disadvantage.*
- *A cannot justify the PCP by showing it to be a proportionate means of*
15 *achieving a legitimate aim.*

(a) When the PCP was applied to the claimant, did that put the claimant at a particular disadvantage when compared to others without the claimant's disability?

195. The PCP was the respondent's policy that all Police Officers must wear a
20 face mask/covering when in Police buildings or on operational duties. It was not in dispute that this was applied to the claimant, who is disabled. We proceeded to look at the other elements of section 19(2) EqA.

196. Firstly, had the respondent applied the PCP to persons with whom the
25 claimant did not share the relevant protected characteristic? The answer to this was yes. It was applied to all Police Officers.

197. Secondly, did the PCP put persons with whom the claimant shared that characteristic at a particular disadvantage when compared with persons with whom the claimant did not share it? This was not a complicated

comparative exercise. The PCP was applied to all Police Officers. The characteristic was a disability which prevented the disabled person from wearing a face covering. The particular disadvantage was while Police Officers who were not so disabled could comply, those who shared the characteristic could not. This was the group disadvantage.

198. Thirdly, did the PCP put the claimant at that disadvantage? Again, the answer was yes. The claimant could not comply with the PCP and was therefore put at the particular disadvantage.

(b) If so, what was the disadvantage?

199. The disadvantage was that the claimant was unable to enter any Police building or undertake operational duties.

(c) If the claimant was put at a disadvantage, was the application of the PCP a proportionate means of achieving a legitimate aim?

200. This was the same question that we asked ourselves and answered in the terms set out in paragraphs 184-193 above. The application of the PCP was a proportionate means of achieving a legitimate aim. This meant that the claimant's claim under section 19 EqA did not succeed.

Disability Discrimination – section 20 EqA

(a) Did the application of the PCP put the claimant at a substantial disadvantage in comparison to persons who are not disabled?

201. We have already answered some of the questions posed by section 20. The PCP was the respondent's policy that all Police Officers must wear a face mask/covering when in Police buildings or on operational duties. The disadvantage in comparison with persons who are not disabled was that the claimant was unable to enter any Police building or undertake operational duties.

202. Was that disadvantage "substantial" in comparison with persons who are not disabled? Section 212(1) EqA defines "substantial" as "more than minor or trivial". Being unable to enter any Police building or undertake operational duties very clearly (a) was a "relevant matter" for the purposes

of section 20(3) EqA and (b) had an effect on the claimant, as a Response Officer, which was more than minor or trivial. The answer to this question was therefore yes.

5 **(b) If so, would either of the following steps be ones which were reasonable for the respondent to take to avoid that disadvantage?**

(i) Allowing the claimant to carry out operational duties without wearing a face mask/covering.

10 **(ii) Allowing the claimant to enter a Police Station and work within the Police Station without wearing a face mask/covering.**

203. Once again we considered the Code. It includes the following paragraphs –

15 *6.23 The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.*

20 *6.27 If making a particular adjustment would increase the risk to health and safety of any person (including the disabled worker in question) then this is a relevant factor in deciding whether it is reasonable to make that adjustment. Suitable and sufficient risk assessments should be used to help determine whether such risk is*
25 *likely to arise.*

6.28 The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- *whether taking any particular steps would be effective in*
30 *preventing the substantial disadvantage;*

- *the practicability of the step;*
- *the financial and other costs of making the adjustment and the extent of any disruption caused;*
- *the extent of the employer's financial and other resources;*
- 5 • *the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and*
- *the type and size of the employer.*

10 6.30 *The Act does not permit an employer to justify a failure to comply with a duty to make a reasonable adjustment. However, an employer will only breach such a duty if the adjustment in question is one which it is reasonable for the employer to have to make. So, where the duty applies, it is the question of "reasonableness" which alone determines whether the adjustment has to be made.*

15 204. Would it have been reasonable for the respondent to have allowed the claimant to carry out operational duties without wearing a face mask/covering? We considered that the answer to this depended on when the question was asked and, linked to that, what the prevailing circumstances were.

20 205. We have referred above to events between March and November 2020 (paragraphs 24-42). Throughout this period the claimant continued to work as a Response Officer without wearing a face mask. We noted a number of reasons for this –

- (a) Sgt Leslie believed that the claimant was exempt.
- 25 (b) It was, for most of this period, not mandatory that the claimant should wear a face mask.
- (c) When Sgt Leslie sought advice, he was told to manage it on a case by case basis. In the case of the claimant, he did this by not deploying the claimant in a situation where she would otherwise have required

to wear a face mask. He told us that this was an issue on only one occasion.

(d) The Talla guidance changed during this period. The guidance issued on 9 September 2020 encouraged the wearing of face coverings but was not expressed in terms which indicated that this had become mandatory. The update on 8 October 2020 expressed the need for face masks as “*should use....immediately*”. Not until the update on 9 November 2020 did the phrase “*You must wear a face covering....*” appear.

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10 206. The “*coronavirus guidance*” published on the D Division intranet local site on 25 September 2020 expressed the need for mask wearing as an “*expectation*” (albeit in capital letters for emphasis). Matters might have come to a head (in terms of the claimant not wearing a face mask and remaining on operational duties) if she had been challenged before commencing the period of absence which began on 29 November 2020, but this did not happen.

15
20 207. The language of the Talla guidance in September/November 2020 reflected a shift in attitude within the respondent towards the need for face coverings. This was unsurprising given the evolving SG guidance and regulation. In particular, the wearing of face coverings became mandatory in workplace canteens and communal workspace areas from mid-October 2020. Mask wearing then became mandatory in various types of premises around the end of October 2020.

25
30 208. The claimant was absent from work between 29 November 2020 and 4 March 2021. During that period of absence she attended a meeting with Sgt McGaughay in the Arbroath Police station on 31 January 2021. Insp Gibson was present for part of this meeting. The claimant did not wear a face mask and no mention was made of this. However, by the time the claimant returned to work, it had evidently been decided that she would not simply resume normal operational duties as an Arbroath based Response Officer since she was now to be based at Carnoustie Police station (although this was also to assist the claimant with her childcare responsibilities).

209. This was almost a year on from the start of the first period of national lockdown. The omicron variant had emerged. A further period of national lockdown had commenced shortly after Christmas 2020. The prevailing circumstances in March 2021 were different from what they had been before the claimant's period of absence. They were reflected in Insp Aitken's email to the claimant on 14 April 2021 (251B-251D) when, referring to a return to her operational role, he told the claimant that "*the fact that you cannot wear a face covering unfortunately precludes this from happening at this time. This is a national decision....*".
210. We were satisfied that allowing the claimant to return to operational duties as a Response Officer from the time she returned to work in March 2021 would not have been a reasonable step for the respondent to take. Looking at the provisions of the Code, we considered that allowing the claimant to undertake operational duties alongside her colleagues without wearing a face mask increased the risk to the health and safety of both the claimant and those colleagues. It also posed an increased risk to the health and safety of any member of the public with whom the claimant came into contact or close proximity.
211. This was not a case where the cost of the adjustment or the respondent's financial resources or the availability of financial or other assistance or the respondent's size were relevant factors. The practicability of allowing the claimant to return to operational duties and the type of the respondent's undertaking were relevant. By March/April 2021 face mask wearing had become the norm. As a matter of common sense, to allow a Police Officer to perform a public facing role at that time without wearing a face mask would have been almost unthinkable.
212. It appeared to us that after the claimant was told on 12 March 2021 that she would require to work from home, she accepted that decision in terms of not returning to operational duties. The focus shifted to her not being permitted to enter a Police building. She felt isolated from her colleagues, and the nature of the R&C work she was doing exacerbated this. We did not find any particular significance that the claimant was not consulted about being assigned the R&C work – the evidence indicated that a change in role could be imposed without prior discussion.

213. The claimant's line managers were sympathetic towards the claimant in her desire to work within the Carnoustie office. Sgt McGaughay, Sgt Fotheringham and Insp Gibson each explored whether it might be possible for the claimant to do so. We have recorded above the action taken by
5 Sgt McGaughay (paragraphs 54-56), Sgt Fotheringham (paragraphs 66-74) and Insp Gibson (paragraphs 76-82).
214. In the course of Sgt Fotheringham's involvement she received Supt Wales' email of 21 September 2021 (321). This contained the statement that "*It is irrelevant whether or not a member of staff has an exemption*". Supt
10 Wales refuted the suggestion, put to him under cross-examination, that he did not want the Tribunal to see this email. It was included within the documents produced in response to the Tribunal's Order referred to in paragraph 6 above. He told us that "*policy is policy*" but the respondent would "*look at reasonable adjustments if a person has an exemption*".
15 That was not a message which his email conveyed.
215. We considered the matter of the employees in Govan Contact Centre who were permitted to work within that building without wearing a face mask. It was a fair question for the claimant to ask – if an exception to the rule could be made for them, why not for her? We heard no evidence as to
20 whether any of the Govan employees with a medical exemption from wearing a mask was actually disabled. However, if being allowed to work in a Police building was an adjustment which could be made for those employees and they were not disabled, there was a strong argument that it was all the more a reasonable adjustment for the claimant.
216. The answer to this, it seemed to us, was that what might have been a reasonable adjustment for the claimant had she worked at Govan Contact
25 Centre was not necessarily a reasonable adjustment in an operational Police station, such as Carnoustie. Should the claimant, having applied to transfer to Dundee, have been permitted to work within the Contact
30 Centre at Bell Street? The difficulty with this, for the claimant, lay in Mr Paton's email of 24 November 2021 (349-350). He quoted there from his response to a similar enquiry, saying in essence that because 2m distancing could not be maintained within the Bell Street premises, he

“could not find a way for a risk assessment to justify” their use by persons not wearing a mask.

217. In relation to the Perth employee, it was not clear from the evidence (a) whether this person was actually allowed to work in a Police building without wearing a mask and (b) if so, when the relevant risk assessment was done. Given that a copy of this risk assessment was provided by Supt Wales to Insp Gibson prior to the latter producing his Forfar risk assessment dated 2 March 2022, we believed it was more likely than not that it was done not long before that date, ie at a time when it was known that mask wearing requirements were to be relaxed.

218. We did not find that Insp Gibson had, as alleged by the claimant, *“bullied”* her in to obtaining a further Fit Note. We could however understand that this was the claimant’s perception. She believed as at 28 October 2021 that she was fit to return to work and she wanted to do so, but in Carnoustie rather than from home. Insp Gibson was telling her to do something with which she did not agree, but he did not bully the claimant.

219. There was a marked contrast between the action which Insp Gibson took in respect of the claimant’s proposed move to Forfar in March 2022 and the action he took regarding the possibility of her working in Carnoustie in November 2021. There was a formal, documented risk assessment for Forfar (375-381). It was a fair question to ask as to why, if this could be done for Forfar, it could not have been done for Carnoustie? Indeed, the advice from Mr Paton was only documented in his email of 24 November 2021 (349-350) because Chief Insp Blacklaw had requested this.

220. Insp Gibson’s answer to this is set out at paragraph 95 above. He knew the layout of the Carnoustie office and he described a risk assessment as *“futile”*. He also said that if the advice from Mr Paton had been that Carnoustie was possible, he would have generated a risk assessment (by which we understood him to mean a formal risk assessment similar to the one he did for Forfar). As we said in that paragraph, we were satisfied that the interaction between Insp Gibson and Mr Paton did constitute an assessment of the risks associated with the claimant working in Carnoustie. It would have been better if this had been more formally

documented, but what was done was enough to meet the Code's recommendation that there should be a "*suitable and sufficient*" risk assessment.

221. It was argued for the claimant that if the respondent could bring her back
5 to work within the Forfar office in March 2022, before the legal requirement for face coverings was lifted, why could they not have done so earlier? We found that there were reasons for this.

222. Firstly, the decision on Forfar was taken at a time when it was known that
10 mask wearing requirements were to be lifted (see paragraph 103 above). The position was different when it was decided that the claimant could not work in the Carnoustie office. Secondly, the layout of the Forfar office meant that a key objection to Carnoustie, ie the narrow corridor where physical distancing was not possible, did not apply. Thirdly, there was supervision and support available in Forfar – we could understand the
15 claimant's view that this was to keep an eye on her but, viewed objectively, it was a reasonable consideration.

223. We came to the view that, in all the circumstances and for the reasons set
out above, the steps of allowing the claimant (i) to carry out operational
duties and (ii) to enter and work in a Police station without wearing a face
20 mask/covering were not ones which it was reasonable for the respondent to take.

(c) If yes, have the respondents failed to comply with their duty under section 21 EqA?

224. As we found that the steps contended for by the claimant were not ones
25 which it was reasonable for the respondent to have to take, there was no failure to comply with the duty to make reasonable adjustments.

Burden of proof

225. We considered the operation of section 136 EqA (**Burden of proof**) in this
case. We reminded ourselves of the terms of sections 136(2) and (3).
30 Because we found in relation to the claims under sections 15 and 19 EqA that it was necessary for the respondent to show that the treatment (section 15) and the application of the PCP (section 19) were a

proportionate means of achieving a legitimate aim, it was academic to consider whether the burden of proof had shifted to the respondent.

226. In relation to the section 20 EqA claim, we found that the PCP had been applied and that it put the claimant at a substantial disadvantage. That meant that potentially the burden of proof shifted to the respondent “*in the absence of any other explanation*”. However, we also found that it would not have been reasonable for the respondent to have made the adjustments contended for in this case. The respondent’s evidence about those adjustments could be regarded as the “*other explanation*” needed under section 136(2) or as showing that it had not contravened the provision under section 136(3). Either way, if the burden of proof had shifted, that burden had been discharged.

227. For the sake of completeness, we refer to case of **Shields**. Unsurprisingly, Mrs Fellows had highlighted the similarities between that case and this, while Mr Russell had highlighted the differences. It seemed to us that cases relating to mask wearing rules were necessarily fact specific so that while both **Shields** and the present case related to a mask wearing rule, the outcome turned on the circumstances in which that rule was introduced and how it was enforced.

20 **Decision**

228. For the reasons given above, the claims brought by the claimant do not succeed and require to be dismissed.

Final comments

229. We had considerable sympathy for the claimant. The situation in which she found herself was not of her making and was outwith her control. Her hopes of a resolution were built up by her line managers in their efforts to be supportive of her, only to be dashed. This must have been extremely difficult for her.

230. In saying that, we do not seek to criticise those line managers. We were satisfied that their desire to help the claimant was genuine. They had to tell the claimant when their efforts did not bear fruit, and that to some

extent soured their relationship with the claimant, which was understandable but unfortunate.

231. It was disappointing to hear the claimant speak negatively about her future career prospects with the respondent. She is an experienced Police Officer and is clearly intelligent and articulate. It seems to us that she still has much to offer. We hope she will take on board Supt Wales' assurance about her Police career.

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Employment Judge :- WA Meiklejohn

Date of Judgment : 16 February 2023

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Date sent to parties : 20 February 2023