EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111387/2021 (A)

Held at Aberdeen on 23 May 2022, 7, 8 & 9, 13, 14 & 15 March, 11 April, 17 May, 26 June & 28 September 2023

Employment Judge J M Hendry
Members: Mrs D Massie
Mr R Dearle

Mrs C Watson	**Claimant** **Represented by** **Mr M Allison,** **Advocate**
Ministry of Defence Police	**Respondent** **Represented by** **Dr A Gibson,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is as follows:

1. **That the claim that the respondent did not deal with the claimant's Flexible Working Application in a reasonable manner not being well founded is dismissed.**
2. **That the claim for victimisation not being well founded is dismissed.**

3. That the claim that the respondent discriminated against the claimant on the grounds of her disability by failing to make reasonable adjustments to the claimant's shift pattern and hours succeeds.

4. There will be a remedy hearing to finalise compensation.

Reasons

1. The claimant made three claims in her ET1. She sought findings that she had been discriminated against on the grounds of her disability and that the respondents had failed to make reasonable adjustments to her hours/shift pattern. She also argued that they had acted unreasonably in their handling and refusal of a flexible working application ("FWA") made by her. In addition, the claimant made a claim for victimisation under Section 27 of the Equality Act 2010 ("EA").

2. The respondent's position was that they had fulfilled all the duties incumbent on them under Section 80 of the Employment Rights Act in relation to the FWA. In relation to reasonable adjustments their position broadly was that they did not require the claimant to work her "full" shift pattern and that the shift pattern worked did not put the claimant at a substantial disadvantage and no duty to make adjustments arose. They argued that the shift pattern proposed by her was unworkable and hence not a reasonable adjustment. They submitted that the claimant had not made a protected act engaging Section 27 of the EA and that in any event no victimisation had occurred.

3. The respondent led the following witnesses in evidence:

* Alexander Thomson Stuart, Group Superintendent, Clyde Group and
* Craig James Reid, Sergeant, MOD Police.

4. The claimant gave evidence on her own behalf. She also called the following witnesses:

- Keith Kelso Hussey, Consultant Vascular Surgeon, The evidence of Dr Pollock contained in his second report was agreed.

5. Parties lodged a Joint Bundle and the claimant's representatives a Supplementary Bundle to which by agreement additional documents were added in the course of the hearing.

6. Parties had also prepared a statement of agreed facts which we have incorporated into the findings in fact.

7. Parties were unable to agree a final list of issues but a draft list of issues was prepared. Ultimately the question of what issues we needed to determine was one for us as we examined the evidence in the light of the statutory claims advanced. However, the draft issues turned out to be a fair reflection of the issues we needed to consider and they were as follows:

Flexible Working Claim

1. Whether the respondent's consideration and determination of the claimant's flexible working request dated 17 January 2021 contravened s.80G of the Employment Rights Act 1996.

Reasonable Adjustments

2. Whether the PCP of requiring the claimant to work a fixed shift pattern (as detailed within her flexible working request dated 17 January 2021) put the claimant at a substantial disadvantage compared with non-disabled persons.

3. If so, whether the respondent failed to take reasonable steps to avoid or reduce that disadvantage (either by granting the claimant's flexible working request in whole or in part, or otherwise making adjustments to her work pattern and duties).

Victimisation

4.. Whether the claimant's grievance dated 8 September 2020 and the bullying and harassment complaint dated 29 October 2020 were protected acts by the claimant in terms of either s.27(2)(d).

5. Whether the refusal of the claimant's flexible working request was a detriment.

6. If the claimant did a protected act(s) and the said refusal was a detriment, whether that refusal was in any sense because of the protected act(s).

Remedy
Compensation re.Flexible Working Claim

7. What compensation is just and equitable?

Financial Loss

8. What financial loss has the claimant suffered to date because of:

(a) her absence between 4 June 2021 and 22 April 2022; and

(b) her ill-health retirement?

9. What financial loss is the claimant likely to suffer in the future because of her ill-health retirement?

Pension Loss

10. What pension loss has the claimant suffered/will the claimant suffer? In particular:

(a) what proportion (if any) of the sums received by the claimant following her ill-health retirement be off-set against her pension loss?

(b) What future pension (if any) is the claimant likely to receive?

Injury to Feelings and Psychiatric Award

11. What award for injury to feelings should be made?

Interest

12. What interest is the claimant entitled to in respect of:

(a) Injury to feelings;

(b) Past wage toss?

Grossing Up

13. What grossing up (if any) requires to be undertaken.

Facts

Overview Background and Chronology

1. The claimant is Mrs Caroline Watson. She resides at 191 Bettyhill, Thurso, in Sutherland KW177SP. Her date of birth is 11 January 1969.
2. The respondent is the Ministry of Defence Police MDP"), MDP Headquarters, Wethersfield, Braintree, Essex, CM7 4AZ.
3. The claimant started her Police career in November 1997 with the then Dumfries and Galloway Constabulary before joining the respondent as a Police Constable. She commenced her service on 31 October 2005. She had various postings after joining the MDP Police before being posted to Vulcan Naval Reactor Test Establishment ("Vulcan") at Dounreay, Caithness, with effect from 2015.
4. The claimant lives in Bettyhill in Caithness with her husband and children. Her youngest child is due to finish secondary school in June 2025. Her husband worked at Vulcan in the same section as the claimant before taking early retirement.
5. The claimant has always maintained her fitness to a high level despite having a leg condition called May-Thurner Syndrome. She and her husband walk their dogs and take part in hillwalking. The claimant is a keen cold water swimmer and paddleboarder. The claimant has considerable experience in managing her condition and which activities exacerbate it.
6. The claimant was, throughout her service with the respondent, an Authorised Firearms Officer ("AFO"). The MDP is an armed force that protects various sites throughout the UK. This requires the claimant to maintain high levels of fitness. She was tested annually.

7. The claimant for many years worked in an administrative role in the Operations Support Department until October 2020.. For most of this period she worked alongside her husband, Alan Watson, who held the role of Sergeant. Part of the claimant's duties was to make up the work rota for the MDP staff at Vulcan. She was aware of the demands on her employers to fill the rotas and keep shifts up to the agreed complement and knowledgeable about how the system operated in practice.

Working Pattern

8. Prior to her redeployment in October 2020 to general duties, the claimant worked four days per week from Tuesday to Friday from 06:00 to 16:00.

9. The claimant was, at all material times, disabled in terms of s.6 of the Equality Act 2010 as a consequence of a physical impairment having developed May-Thurner Syndrome. She had undergone venoplasty surgery in 2018 when a stent was fitted in her left leg. In December 2020 she was diagnosed with having May-Thurner Syndrome. This is an uncommon vascular condition that affects a vein in her pelvis which had become compressed leading to blood being unable to flow properly around her body. The symptoms were pain and swelling in the leg. The claimant also developed varicose veins.

10. As a consequence of her May-Thurner condition the claimant has various symptoms which are exacerbated by standing for prolonged periods. These included pain; swelling; tenderness and blood pooling. The symptoms became marked following periods of standing. If the claimant lies down or sits this alleviates the symptoms. If the claimant develops these symptoms they subside naturally after a couple of days rest and with elevation of the limb. It is a lifelong condition.

11. Relations between the claimant and the senior officer at Vulcan, Inspector Vincent Reid, became strained. The claimant had to work closely with him in her administrative role. The claimant did not know why the relationship began to break down as they previously had a good working relationship. By early 2020 the difficulties in the relationship caused the claimant to become stressed and anxious. One cause of conflict between them was that he had refused her requests to work from home and had displayed displeasure when she had

asked for time off at the same time as her husband who worked in the same department.

12. Not getting time off with her husband meant that the claimant found it difficult to attend events such as family gatherings which were often held in or around Dumfries. Given the distance from Caithness it took almost a day's travel to get there. She felt this was unfair and that she was being penalised for being married to someone she worked with.

13. The claimant commenced a period of absence due to work related stress on the 27 April 2020. She remained absent until 23 November 2020.

14. On 3 June 2020 the claimant sent an email (JBp79-88) to Superintendent Alexander Stewart who was Inspector Reid's line manager. This set out a series of complaints and concerns about Inspector Vincent Reid. She wrote that he had become *"business-like, cold and rude, impersonal, off hand and dismissive."*

15. On 17 June 2020 an Occupational Health Report from Optima Health (JBp93-94) was received by the respondent. The report confirmed the claimant remained unfit for work and unfit to engage in mediation about her complaints.

16. On 15 July 2020 a further Occupational Health report (JBp95-96) was received by the respondent. It was described as an 'interim report'. It indicated that the claimant attributed her symptoms to work related stress. It recorded that she had consulted her GP who had given her medication to lift her mood which was being adjusted. It stated that the barriers to her returning to work were not medical but management related, it said: *"addressing these in a timely manner as her mood lifts will be crucial to effecting a successful return to work."*

17. A further report was received on the 12 August 2020 (JBp97-98). It recorded that the claimant had gone off sick *"due to overwhelming perceived work stress."* It noted that the medication from her GP had recently been increased. The claimant was assessed as being physically fit to attend work and that her unresolved work issues *"needs to be resolved through MOD procedures... ."* The author recommended, amongst other things, that temporary redeployment should be considered.

18. The claimant decided to bring a formal grievance against her line manager. On 8 September 2020 the claimant submitted a grievance (JBp100-103). It related to the conduct of and her dealings with Inspector Vincent Reid. In it she complained about the change in his attitude, his becoming more critical of her, ostracising her, difficulties in her getting leave at the same time as her husband and feeling intimidated.

19. On 30 September 2020 the claimant was interviewed by Chief Inspector Niven about her grievance. A "Witness Statement" was completed setting out the grounds for the grievance in more detail (JBp108-115). He had characterised her difficulties in getting time off at the same time as her husband as possible discrimination. This struck a chord with the claimant.

20. The respondent's HR department advised the claimant that the issues she had raised in her grievance were *"more akin to a bullying and harassment complaint".* She was signposted to the relevant policy. As a consequence of this advice on 29 October 2020 the claimant submitted a bullying and harassment complaint (JBp134-142). That complaint alleged bullying and harassment by Inspector Reid.

21. On 6 November 2020 the respondent received an Occupational Health report (JBp144-145). It said: *"Mrs Watson is fit for work in my opinion, with adjustments, if management can accommodate it. I have been informed that a phased return has already been provided in a previous report and I fully support Mrs Watson returning after her annual leave, on four hours initially for the first week. I would suggest that you continue with the advice given in the previous report regarding a rehabilitation plan. I believe that this would help build her resilience and confidence again*[1]*.* The report warned that in the author's view the claimant's anxiety and depression was likely to be considered a disability.

22. The claimant felt that she could not return to work with Inspector Reid. This meant that she could not return to administrative duties which involved working with him.

23. On 17 November 2020 a further Occupational Health was received by the respondent (JBp146-147). This report was an assessment in contemplation of the claimant being redeployed to active operational AFO duties. It suggested getting a report from her GP in relation to her capabilities for the AFO role.

24. The claimant received an email from Sergeant Reid on the 23 November. This followed an earlier telephone call from him. It confirmed a phased return 0800-1200 hrs for the first three weeks. The first two weeks were to be worked from home. He indicated some training courses the claimant would have to undertake to get up to date before commencing an AFO role. There was no actual work for the claimant to do at home other than do the courses which were online.

25. On 3 December 2020 Chief Inspector Mark Rowe was appointed by MDP Professional Standards as Investigating Officer in respect of the claimant's bullying and harassment complaint. He wrote to the claimant on 7 December 2020 (JBp177-178). On 8 December 2020 the claimant sent Chief Inspector Rowe an email (JBp182-183). This identified witnesses in respect of her complaint. It also raised concerns in relation to her return to work arrangements.

26. On 10 December 2020 Chief Inspector Rowe conducted an interview with the claimant in respect of her complaint. He prepared a record (JBp187- 210). (The text in black is C.I. Rowe's pre-prepared questions. The text in red is 0.1. Rowe's account of the claimant's replies. The text in purple is the claimant's account of her replies. The text in blue is the claimant's explanation of each of her complaints).

27. An Occupational Health report was received on 31 December (JBp211-212). The author was a Consultant Occupational Health Physician. It confirmed that the claimant was feeling well and was no longer on medication for her stress. It indicated that the claimant was on blood thinning medication for her leg condition. It cautioned about the risk of head injury in such circumstances and the need to modify her duties and risk assess any duties for this particular risk. With such adjustments in place it confirmed that she was able to provide *"regular and effective service for the foreseeable future."* It also stated: *"The condition, which requires her to be on the anticoagulant medication, is likely to be found to be a disability as defined by the Equality Act. The only required adjustment at the moment appears to be that she needs to undertake the above dynamic risk assessment. Should she experience difficulties with shifts*

requiring her to be on her feet for prolonged periods, she needs to be encouraged to report those."

28. Chief inspector Rowe concluded his initial report in early February. He found the bullying and harassment complaints not proven. He sent the report to Detective Chief Inspector Murray Kerr (JBp232-233). He made various recommendations to try and resolve the dispute between the claimant and Inspector Reid.

Submission of FWA

29. The MDP Police stationed at Vulcan are armed "AFOs". They guard the installation checking anyone entering and leaving the site. They carry out armed mobile patrols and patrol the perimeter. They work an 88 hour shift pattern which is unique to Vulcan.
30. Historically the MDP have found it difficult to recruit enough personnel from the local area. According gaps in the rota are filled by officers from other sites in the central belt of Scotland who are sent on detached duties ("DDs").
31. The claimant was concerned that returning to work as a full time AFO would be bound to involve considerable periods of standing that would then impact on her condition. The usual shift pattern was to work 8 days with 8 hour shifts on the first and last day and 12 hour shifts for the rest followed by 5 days rest, it was known as the "Vulcan" shift pattern and was unique to that site. It was known to be very demanding.
32. On the 18 January 2021 the claimant submitted a FWA (JBp213-217). She sought to work a fixed rota of Tuesday, Wednesday and Thursday, 06:45 to 18:45 (3x12 hours). She gave as the reason her medical history of difficulties with her leg. She indicated that in her view the business impact would be beneficial as the organisation was 10 officers below complement. She suggested that any gaps could be filled by new recruits who were expected at that time or by not returning a DD to their home station. The form contained a Section headed "Section 8-Line Manager's Declaration" which gave instructions to the manager in the event of the application being refused to

complete section 6 of the form and give it to the employee who might then appeal.

33. Following the issue of Chief Inspector Rowe's report Detective Chief Inspector Murray Kerr issued an interim adjudication (JBp271-288) in respect of the claimant's complaint on 23 February. The grievance was rejected. The final report was due to be issued by D.C.I. Kerr in June 2021. However, the claimant then went on long-term sick leave. The final adjudication decision was issued to the claimant by Superintendent Matt Spiers on 4 March 2022.

34. On 12 April 2021 the claimant's flexible working request was refused.

Additional Findings

FWA

35. The respondent have various staff policies and procedures available to employees accessible through their intranet. This includes information in relation to FWA requests, a policy headed "Policy to assist Managers with Reasonable Adjustments" (JB11B) and a policy on "Reasonable Adjustments" (111A).

36. In January 2021 the claimant was unsure as to how to go about asking her employers formally to reduce her hours. She considered making a flexible working request but didn't know which forms to use so she consulted Kathryn Foster an Attendance and Capability Manager with the respondent to get her advice (JBp219). She told Ms Foster that she had a medical condition that was likely to be considered a disability. For medical reasons she said that she did not want to work 8 day shifts on and then 7 off and then 8 nights with 5 off. She asked what the correct process was for MDP Officers to use. The claimant did know whether to use the same forms as those used by civilian workers. Ms Foster wrote to her on the 18 January 2021 (JBp218) giving her a link to make a query and added *"My understanding is that you can apply under the statutory right, and that a reduction in hours can be <u>considered</u> as a reasonable adjustment."*

37. Superintendent Stewart became aware of the claimant's FWA. It would normally have been determined either by or in consultation with Inspector Vincent Reid but because of the outstanding bullying and harassment complaint he decided to keep an overview of the process. He instructed Sergeant Craig Reid who would be the claimant's line manager on her return to AFO duties to deal with the matter. He was aware that as the senior officer at Vulcan Inspector Reid would have to be consulted about the practicability of any proposal.

38. The claimant liaised with Sergeant Reid. She developed a good relationship with him and found him approachable. He asked her to put more information in her application to allow him to fully understand the position. She responded on the 30 January 2023 (JBp221-222). She provided further information about her left leg and the condition she had developed including the history. She wrote: *"I have had May-Thurner Syndrome since birth and know how to manage it. The operational role at Vulcan requires most of your time on your feet. This is not in itself an issue and I am sure I can manage it, what would cause an issue would be doing this for 8 shifts in a row. I have previously covered operationally for shortfalls and after a couple of shifts have found symptoms just starting to present so I think 3x12 hour shifts would be a comfortable compromise and reasonable adjustment, allowing me 4 days off to rest and recuperate, alleviating these symptoms ready to commence another three shifts."*

39. Inspector Reid became aware of the terms of the application after it was sent to him by Sergeant Reid (JBp227) who asked him to forward it to Superintendent Stewart for his consideration.

40. On the 6 February 2023 Inspector Reid emailed Superintendent Stewart with a copy of the FWA. He said that while sympathetic to the application *"it cannot be approved"* and then gave reasons for its refusal. He said that if the claimant did Early Relief (ER) they would be over complement needing 8 officers and having 9. When the claimant was not working they would be one officer short. There were, he said, insufficient permanent officers to backfill for her. Deploying DD Officers (Officers from elsewhere usually Rosyth) would be

costly. The claimant would be working with 4 different sections making management difficult and that it was not feasible to cover the gap with a new recruit of DD as this was unfeasible. He also queried how the application sat with her medical condition as he perceived *"an uncertainty and contradictory element''* in what she wanted as she had not wanted to work early relief in the past to avoid working with him. He observed that her request would mean working with four different sections and she had previously expressed concerns about Covid. He indicated that he was happy to discuss the matter further before sending a draft reply to Sergeant Reid refusing the application.

41. Superintendent Stewart responded asking if all the permanent staff work the week on/off rota (JBp226). Inspector Reid responded that this was the situation. Superintendent Stewart responded (JBp225): *"Is it possible to get her onto 4 on 4 off? Maybe with Alan? If we can have them working as one person that might work? Just something to look at as we may get criticised for 8 days if this goes to appeal/ET."* Inspector Reid indicated that the proposal was difficult and Alan Watson would have to agree to work 4 on 4 off *"and we could be opening a can of worms."* They agreed to discuss matters further.

42. On the 8 February Inspector Reid discussed the FWA with Kathryn Foster who, referring to their discussion, emailed him (JBp230) indicating that the FWA was linked to the claimant's disability. She wrote that the business *"must consider the flexible working and part-time working as a reasonable adjustment under the MOD Equality & Diversity Policy."* She referred to reasonable adjustments and to advice that could be taken from a specialist team called the DBS Reasonable Adjustment Team of RAST. There was a telephone discussion involving the claimant, Inspector Reid, Superintendent Stewart and Sgt Craig Reid on 10 February to discuss the situation.

43. The claimant emailed Ms Foster on the 11 February (JBp268) about the discussion which she had heard about from Sgt Reid. She gave further information about the history of her working at Vulcan in operational support. She said that she did not want to request a change of shift pattern but *"working the Vulcan pattern would cause medical issues for* me"(JBp268). She explained that she was doing various activities to get ready for resuming the

AFO role such as undertaking the required fitness test, taser shooting and tactics.

44. Ms Foster responded (JBp267) indicating that she was providing advice only and not a decision maker. She said that she had *"pointed them"* to the appropriate policies.

45. The grievance report (JBp270) circulated to parties, including Inspector Reid, on the 23 February was critical of the claimant. He indicated in the report that he intended to find a resolution rather than take conduct action against the claimant. Inspector Reid argued that formal action should be taken.

46. On the 2 March Inspector Reid wrote to Superintendent Stewart (JBp289) with a copy of Sgt Reid's views. He once more suggested a refusal of the application noting that most of the options were unfeasible because of the burden of additional costs, inability to reorganise work amongst existing staff and the detrimental effect on the ability to meet customer's demands. He wrote:

"Craig has carried out due diligence in considering a number of options although realistically most of them are unfeasible due to the following reasons:

Burden of additional costs

Inability to re-organise work amongst existing staff.
Inability to recruit additional staff.
Detrimental effect on ability to meet customer demands.
In summary, if granted flexible and part-time working, the Shifts will either be over or under complimented. There is also the cross-over of Shifts which may not be CV19 compliant as this will occur every week. The only way gaps left by PC Watson can be filled is by deploying an additional LTDD Officer at a considerable cost, or running short when PC Watson is not on duty days. It maybe that PC Watson can be granted flexible although not part-time working. It is going to be difficult to justify additional costs and/or shift allowances to allow PC Watson to drop 4 hours per week. I would be in favour of her remaining with her Shift as identified at Option 6 below although it could open the door for other permanent officers to request similar. This argument does not take account of PC Watson's medical circumstances although as you see it is difficult to marry both her request and the needs of the business.

Option 1: This entails PC Watson working 4x10 hours Shifts Tuesday- Friday although she would be switching between all 4 Sections making it harder to maintain CV19 compliance. This option does not give her part-time working

which was her initial request but obviously negates her working 8 days in a row.

Option 2: This entails PC Watson working 3 x ERs and alternatively 3 x NRs. This reduces her working week to 36 hours allowing part-time working as requested and does not require her to work 8 days in a row. By switching between ER and NR it limits her to only working with 1 and 3 Section making this option more CV19 compliant and also easier to line manage.

On both options the cells with blue backgrounds identify who could cover PC Watson's absences with the serious caveat that these officers would need to be willing to cover the requisite Shifts. Another option is to have an LTDD remain at Vulcan when the shift numbers would be over when PC Watson is on duty or to have an LTDD/STDD officer to attend Vulcan for 3 or 4 days to provide cover. This option is going to incur further costs in terms of Hotel, T & S and consequential overtime at Clyde or Coulport. The final option is to run under the required 8/time CONSTS on duty for the days PC Watson does not work.
The word attachment details the additional overtime that would be occurred for both options. I shall see it makes grim reading.
It is too difficult to move officers RD to accommodate covering PC Watson's absences as it would have a detriment effect on officer's work/life balance."

47. The claimant was due to have a decision on the FWA by the 17 April 2021.

48. Sgt Reid prepared a summary of his findings after discussing the FWA with the claimant and liaising with her about various options. Included with the document was costings showing the impact on overtime (JBp292).

49. On the 3 March Superintendent Stewart emailed Inspector Reid and Sgt Reid that he was content to trial option 3 for up to 3 months. He cautioned that it might not be possible to get a DD from the nearest area which was called Clyde and covered the central belt. This was because the area was short of staff.

50. A further discussion was arranged with Kathryn Foster. She emailed Inspector Reid on the 5 March (JBp297) *"Just to clarify this is not a TRA as Caroline can do her full range of duties she is just requesting a change to her working pattern. In theory it's no issue trialling one or more options but I would strongly advise seeking DBS advice as to how you do that, especially if there is a reduction to her core hours."*

51. A Skype meeting was arranged. Before the meeting Inspector Reid emailed those attending on the 26 March (JBp301) with 2 mock rosters and details of

the financial impact. He wrote in relation to additional overtime needed to make either option work *"it makes grim reading."* A skype meeting took place with Superintendent Stewart, Inspector Reid, Sgt Reid and Ms Foster on the 29 March. The meeting was not minuted.

52. On the 26 March the claimant also wrote in support of her position (JBp303-304). She had been told on the 19 March that her request was still being considered and that several options were being considered and that mock rosters were being looked at to identify shortfalls (JBp303-304) She responded :

"Craig with reference to the above subject I know we have not yet discussed any outcome or decision yet but would like to add some reasoning to my request of applying for part-time flexible working 3x consecutive 12 hour shifts, as I appreciate we're getting close to the timescale for a final decision.....1 note from the rosters that weekly staffing sheets over the last year there had been numerous occasions where Constable numbers in shift had dropped below the accepted number of 8 to 6 and 7. Sometimes these shortfalls in shifts have been covered by offering permanent officers Overtime and at other times there has been no cover available and the shift has run short.
If my request was granted for 3 x 12 hour shifts per week then I could cover some of these shortfalls saving on overtime costs.

Furthermore some permanent officers would not to do the "built in" overtime. My request to work 3x12 hour shifts could mean a saving OT by allowing officers who don't want the built in overtime to be rostered additional days off and me filling their absence.
Being back operational now having worked a "day shift rotation and into a 3 of a nightshift rotation" I can report the medical difficulties this has had.
Day 1 Of my "8 day shift rotation" I was at the range. On my return to duty on station I noticed that I was rostered A L on Saturday, 13 March 2021 this was a rostering error and (not requested by me) however after doing the shoot following by 3 x 12 hour shifts the condition of my leg and the pain and discomfort that I had along with the offer of taking leave if I wanted, I decided to take the A Las rostered, to allow some recovery time before doing a further 2x12 hour shifts.
I wear medical compression whilst at work to help with any side effects but the effectiveness is limited. I am on medication for my conditions (May Thurners Syndrome and Chronic Venous Insufficiency), however there is nothing else I can take or do that would alleviate my symptoms (other than not having my leg vertical for numerous days in a row without a break).
Referring to 25 March the claimant wrote "Day 1 of my "8 night shift rotation" was particularly difficult as I have to get up at my normal time (0700 hrs) and was on the go all day before coming into work for the night which aggravates symptoms immediately. Having had these conditions for many years, I have

become proficient at possible dealing with the symptoms, however there are times that if not managed they go into cause other conditions such as Phlebitis, Cellulitis and Ulcers too which I have previously suffered on several occasions. I am and have been passed fit for the role, I keep myself physically fit and maintain a healthy weight/BMI however the current shift pattern of 8 consecutive shifts will result in a deterioration of my leg. I have requested a referral to the NHS Vascular Consultant who fitted me with an MTS specific stent in 2018 for further advice, although the last time I saw him (2019) he said there was no further treatment he could do to my leg which would provide any improvement, as there are only so many veins within the leg and I've already had numerous procedures carried on them.

As previously stated I am content to work 3 consecutive shifts per week (days or nights to suit the business needs) which will leave 36 hours per week with 4 consecutive days off for rest and recovery.

I'm not sure if and when I will get a consultation with the NHS Vascular Consultant (due to COVID) but the advice from a Consultant Occupational Physician that deemed me fit for operational Duties for the foreseeable future did raise during the current "Vulcan pattern'' with NHS would be an issue for me."

The claimant also indicated that the station compliment was down by 2 officers and out of the current permanent staff one Sergeant was not expected to return. The respondent's position was that Vulcan was running 2 Sergeant's short and 5 PCs short.

■53. Inspector Reid commented on the claimant's email (JBp307) to Sergeant Reid. He asked him to discuss the mock rosters with the claimant and keep her informed. He stated that any option would require the agreement of other permanent officers to work the overtime caused by her extraction. He stated that an agreement to satisfy PC Watson could not come at the cost of any adverse effect on those officer's health and work/life balance.

54. A discussion was arranged for the 29 March involving Superintendent Stewart Inspector Reid and Sergeant Reid. Prior to the meeting Superintendent Stewart set out his thoughts in an email sent that morning (JBp306). It began: *''Part- time working is possible, however, to attain this a number of issues need to be overcome or exceptionally authorised (higher than me)".* He then listed the difficulties as he saw them.

" Authorisation for Vulcan to work under borne when Caroline's set of 3 shifts are complete or,

2) Authorisation for the use of overtime to cover the shortfall or,

3) Authorisation to keep an additional P/D officer at Vulcan for the period of his shift is short, which would mean that the shift would be over numbers when

Caroline was on duty (as it would not be financially viable to bring an LTDD up for 4/5 days). ??check
4) Approval of overtime would still be subject to this being accepted by staff as their life work balance will change.
5) Approval of overtime will mean staff will break Op HODDER limits, which would need further approval from HQ (unlikely).
6) Approval to roster short would mean discussions with HoE (very unlikely).
I believe the above points are fundamentally the issue of such a pattern at a station that is primarily LTDD. That is, the drivers are staff and finance centric. Welfare and wellbeing of current staff and giving them more hours and the cost of such, which is likely to be against the European Working Time Directive."

55. Superintendent Stewart had not made any enquiries to higher management or through them to the operators of the site as to whether there was any room to allow/fund additional overtime or to run one person short on shifts for limited periods as they periodically did in any event. No assessment had been carried out of as to whether there were busier periods or days on which the complement fell below contracted levels which would allow the claimant to backfill or if she could be deployed to reduce the large volume of overtime being worked by core staff.

56. Sgt Craig Reid emailed Amanda Hinchliffe on the 29 March (JBp313-314) prior to the meeting:

"…Caroline has applied for flexible/part-time working (36Hrs per week) due to her medical condition (backed up by an OH Report) that means she is struggling to carry out the shift pattern at the Vulcan which is 8 shifts in a row before any time off. I am working with Caroline and the station/Clyde SPOs to come up with a solution that both suits Caroline and the MDP. I have a Skype meeting with the boss this evening that will hopefully finalise a trial of a flexible working arrangement."

57. On the 30 March Inspector Reid emailed Superintendent Stewart and Sergeant Reid that the 2 permanent officers in section 1 were not willing to commit to working the overtime proposed in the mock roster. He had asked Sergeant Reid to check with the 3 permanent officers in section 3. No record was made of their position and no enquiries made to officers in other shifts nor was the possibility of job sharing raised with other sections or more widely in the organisation.

58. Inspector Reid set out the difficulties as he saw them of the two possible trial periods mooted on the 31 March 2021. He said that flexible part time working

was impossible because of the severe financial cost and impact on the work/life balance on other officers. He wrote:

"4. There have been occasions recently when Vulcan have deployed only 7 officers per shift rather than the GSSOR commitment of 8. However, these have been unplanned and unavoidable due to sickness, domestic distress, the compressed assumption of firearms training and other reasons. Vulcan are supported by the Clyde Group with the provision of short notice, short-term detachments to Vulcan although this is not always possible due to commitments at Clyde of Coulport. This is different formally agreeing a permanent understaffing of officers.

5. *Whilst understanding PC Watson's medical condition, the rationale provided by Sgt. Reid at paragraph 3 above makes it impossible to agree a request at Vulcan. Further options would be PC Watson applying again in 2022 in the hope there are more permanent officers at Vulcan or PC Watson considering IHR. Given all the evidence and explanation for several options it is difficult to recommend approval of PC Watson's request for part-time/flexible working at Vulcan".*

He ended by saying that the claimants request was not impossible *"but looks highly unlikely."*

59. On the 31 March the claimant contacted Detective Chief Inspector Kerr as requested by him to arrange to discuss the grievance report.

60. On the 31 March Inspector Reid emailed Superintendent Stewart with Sergeant Reid's report. He wrote: *"In summary, It will be almost impossible to authorise without a major cost and detrimental impact on other officers or reaching an agreement to run on short occasions. PC Watson does not wish to consider job sharing (although currently there is no other officer willing to job share with her) or IHR. Part time/flexible working could perhaps have been favourably considered at a station with a bigger compliment but not at Vulcan"* He also wrote (JBp350):

"There have been occasions recently when Vulcan have deployed only 7 officers per shift rather than the GSSOR commitment of 8. However, these have been unplanned and unavoidable due to sickness, domestic distress, the compressed assumption of firearms training and other reasons. Vulcan are supported by the Clyde Group with the provision of short notice, short-term detachments to Vulcan although this is not always possible due to commitments at Clyde of Coulport. This is different formally agreeing a permanent understaffing of officers.

Whilst understanding PC Watson's medical condition, the rationale provided by Sgt. Reid at paragraph 3 above makes it impossible to agree a request at Vulcan. Further options would be PC Watson applying again in 2022 in the hope there are more permanent officers at Vulcan or PC Watson considering IHR. Given all the evidence and explanation for several options it is difficult to recommend approval of PC Watson's request for part-time/flexible working at Vulcan."

61. The meeting was not minuted. A report was prepared by Sgt Reid (JBp348) narrating the history of the matter and the decision, it stated:

"On 10 February 2021 a Skype meeting took place to discuss the application. Attendees were:

SUPT. Stewart;

INSP. Reid;

PS. Reid and

Kathryn Foster.

The decision was that the initial application could not be supported due to the falling business reasons:

A. Burden of additional costs;

B. An inability to re-organise work amongst existing staff;
C. An inability to recruit additional staff;
D. Detrimental effect on ability to meet customer demands.
It was agreed that alternative solutions should be considered to meet her obligation. I updated PC Watson with the outcome of the meeting on the same day and invited her to be involved in this process. On 1 March 2021 1provided a number of options that I have considered. They were:

A. Job sharing with another officer - this idea was not rejected by PC Watson but on initial review she would be working less than 36 hours per week which does not suit.
B. The issue of working (either the 3, 4 or 5 day working week) as an extra officer above the 8 required PCs.
C. Extended External Mobile Patrols - would still cause issues with her condition.
D. Remain on current Shift Pattern minus the weekend to provide recovery days.
E. Alternative shift pattern suggestions from OPS Support.
F. Advice/guidance from the Reasonable Adjustment and Support Team (RAST) - PC Watson does not require a TRA as she can carry out full operational duties however this may change and the RAST may be able to provide solutions.
G. OH Workplace Assessment - only if PC Watson was office-based which there is not at Vulcan.
H. More suited to another station - PC Watson does not live near any other station and would be unable to commute from home on a daily basis, unaware of any detached duty options that would be available to her.

I. Ill-health retirement - this would be a very last option for PC Watson, and not an option she has considered in any seriousness to date.

4. After considering these options (of which I can go into further detail of my considerations if required, closer interrogation into Option B (3 or 4 day working) was carried out, including the creation by Vulcan Ops Support of 2 proposed rosters and a breakdown of the financial costings the flexible working plan could have. The proposed two rosters were shown to PC Watson prior to the next meeting.

5. On 29 March 2021 another Skype meeting between Supt. Stewart, Insp Reid and I took place to discuss all of the above. It was agreed that part time working is possible and it has been seriously considered for PC Watson, but it may be too difficult to implement at Vulcan. The main concerns raised were that authorisation would be required for:

A. Vulcan to work under borne when PC Watson's set of 3 shifts are complete or;

B. Overtime being used to cover the shortfall or;

C. Keep an additional D/D officer at Vulcan for the period the shift is short, which would mean the shift would be over numbers when Caroline was on duty (as: it would not be financially viable to bring a LTDD up for only 4/5 days). It was also highlighted that:

D. Approval of overtime would still be subject to this being accepted by staff as their work life balance will change, impacting on their welfare and potentially breaching the European Working Time Directive;

E. Approval of overtime will mean the likelihood of staff breaching the Op Hodder limits;

F. Approval to roster short would need authorisation from the HoE at Vulcan; Whilst sympathetic to PC Watson's issues, it is clear that the business needs would not benefit under these proposals and approval from HQ may be difficult to obtain.

6. I spoke to PC Watson directly after the meeting and provided her with an update. PC Watson's current medical condition is still of concern to her, and she feels the continuation of an 8-day shift pattern will result in deterioration in her leg. I have spoken to her about mitigation. I can implement on shift immediately), and I will constantly review this with PC Watson to ensure she has all the support available to manage her condition."

62. On the 12 April Inspector Reid sent the rationale for refusing the FWA to Chief Inspector Fiona Kerr. She had taken over Chief Superintendent Stewart's responsibilities in an interim capacity during his absence (JBp363). He advised that Sergeant Reid would inform the claimant on the 12 April that her FLA was to be refused. These actions were authorised by Chief Inspector Kerr who agreed with the rationale (JBp368). She also wrote: *"PC Watson did volunteer to return to the station agreed shift duties but if there are now medical issues.*

/ would suggest that an RA is updated to reflect and a review of the duties to meet with OH guidance give that a reduction in working hours is not achievable."

63. The claimant was given a Form 085 dated 12 April 2021 (JBp377-381) signed by Sergeant Reid. It refused the application on the grounds of the burden of additional costs, an inability to reorganise work amongst exiting staff, an inability to recruit additional staff and a detrimental effect on the ability to meet customer demand. It stated:

"The burden of additional costs
An inability to re-organise work amongst existing staff.
An inability to recruit additional staff.
Detrimental effect and ability to meet customer demand……
There is not the capacity to cover the absences which would be created by PC Watson's absences without having a significant impact on the health, well-being and welfare of other officers. Significant options were investigated to ascertain if the opportunity to approve flexible part-time working was viable to suit PC Watson and the needs of the Business. Given the constraints of the NDP operation at Vulcan the application of flexible/part-time working is refused."

64. Box 8 of the form made reference to appeal. The right to appeal was also referenced in the policy that the claimant was aware of.

65. The claimant was disappointed at the refusal both of the FWA and the failure as she saw it to make any accommodation regarding her leg condition. Discussions did not continue with the claimant to identify a possible solution whereby either the length of shifts or their pattern could be altered to assist her nor were enquiries made as to what financial support could be provided to facilitate any change. In addition other bases were not contacted to see if they could assist in any way either by providing staff for short term relief or to the site operator to allow for periods where the shift was under compliment. Where officers are sent to Vulcan on detached duty this incurs costs in providing accommodation.

66. The claimant had returned to the AFO role on the 12 March. She required to carry out some retraining and was not immediately put on shifts. When working she was allowed to rest her leg and minimise periods standing.

67. Following the refusal of the FWA the claimant as an AFO at Vulcan was required to return to a normal rota.

68. The claimant had considerable concerns that she would not be physically able to complete a full 8 day shift because of her leg condition. Nevertheless, she felt she had no option but to try and work a full shift given the refusal of the FWA, the failure as she saw it of the respondent to offer her any reduction in her expected shift rotation and her concern about using up her sick pay entitlement.

69. The claimant had approached her GP initially in May 2020 reporting increased anxiety and panic attacks.

70. The claimant went off sick on the 4 June 2020 and was referred to Occupational Health (JBp401). They prepared a Report dated 22 June 2021.

71. Optima Health reported to Sergeant Reid (JBp401-402). The Report stated:

"As per your referral Mrs Watson has been off sick since the 4/6/2021. As you are aware Mrs Watson has a long-standing medical condition that has led to her diagnosis of May Thurner Syndrome. Your referral continues to state that Caroline recently returned (to) operational duties where she carries out an AFO role at Vulcan. The shift pattern at Vulcan is 8 days continuous followed by either 7 days or 5 days of rest. A flexible working request was submitted recently to allow Caroline to limit the number of days she worked in a row, but due to the operational personnel situation at Vulcan this request was refused.

When I spoke to Mrs Watson today she related that following prolonged standing she had developed a wound and after assessment further test(s) was requested, she is waiting for the appointment to come through. She has been advised to elevate the leg and rest it. She is beginning to feel better but has been advised to have the test before any return to work ….. She is under the care of the vascular consultant …It is my opinion that due to symptoms and waiting for tests that she is not fit for work in any capacity. Her current fit note expires on 30/6/21. If she has not had the test she is unlikely to return and I would advise that she (the) management keeps in touch with her and refer her back closer to her return to work date so that appropriate supportive advice can be given".

72. In response to the question "If returning to work can PC Watson carry out her current operation AFO duties?" the Occupational Health Advisor wrote:

"I would think that she would be able to carry her duties. However, she would benefit from a reduction of the hours that she currently does to allow sufficient rest periods."

73. The claimant had been upset and disappointed at the refusal of her FWA and the failure of her employers to continue to discuss possible changes to her shift pattern. Following the refusal of the FLA and her attempt at working the full shift she felt she had no choice but to consider medical retirement. She was upset and depressed at the premature ending of her career and the failure to continue dialogue with her over possible adjustments to the shift pattern.

74. The claimant was assessed by another Occupational Health provider called "M Health Management" (JB413). They were asked to advise on whether Mrs Watson satisfied the definition of ill-health retirement and the rules of the Alpha Pension Scheme. The Consultant Occupational Health Physician wrote:

'7 *can identify no adjustments that would enable Mrs Watson to return to the duties of her substantive post" (JBp415).*

It appears likely that Mrs Watson's condition has given rise to a substantial long-term adverse effect on normal day-to-day activities. She is therefore likely to satisfy the definition of disability contained in the Equality Act. However, this is a legal determination and only an adjudicating body can provide a definitive opinion……The medical evidence indicates that Mrs Watson was previously able to manage her condition by the use of support hosiery when working in a sedentary role but when her role changed to an operational one requiring prolonged weight bearing and physical duties she developed symptoms of pain, swelling and discomfort in the lower leg which her specialist attributes to long periods of walking and standing which were beyond the control provided by the use of elastic stockings.

The specialist indicates that he cannot see any intervention of surgical treatment options which would be sufficient to allow Mrs Watson to return to the type of physical activities required by her substantive post.....In my opinion Mrs Watson has suffered a breakdown in health involving incapacity for employment. This incapacity is likely to continue until at least normal pension age."

75. The report continued: *"However, the incapacity does not prevent her from undertaking any other gainful employment. It follows from this that the HMRC criteria for severe ill-health are unlikely to be met".*

76. The claimant consulted her GP who in a letter dated 27 February 2023 (SBp44) recorded:

"Mrs Watson has a history of Iliac Thrombosis associated with May-Thurner Syndrome and has been in the care of Mr Wolfe, Vascular Surgeon, in Raigmore Hospital.

In return to work - she had approached me in May 2020 with increased anxiety and panic attacks related to attrition from a superior at work. This had an impact on her sleep as well as her concentration and she was commenced on the Setraline 50mg at the time. Returned back to work in October 2020 and suffered an exacerbation of her earlier Venous injury with levels of pain and skin changes with very prominent varicose veins which she reported as coinciding with a change of her duties at work including patrolling for long hours and carrying heavy equipment. As far as I was made aware by Mrs Watson there was no option for her at work to change her patrolling hours or the amount of equipment she might carry which led to further discomfort.

2. A quote from Mr Wolfe from his letter of 15 November 2021, "This is entirely conceivable knowing she has severe Chronic Venous Insufficiency". Mrs Watson was provided by the surgeon with MED3 statements stating Illiac injury.

Worth noting with the severity of the symptoms Mrs Watson is on long-term anticoagulant……

I was made aware by Mrs Watson, she was trying to return to duty on her reduced physical duties, g) Avoiding long hours, patrolling with heavy equipment but this apparently was not an option as far as her employers were concerned so Mrs Watson had applied for retirement on ill-health grounds since she did not find any alternative roles in her current post for her to fill, I'm sure this was not an easy decision for her to make. Especially as often in discussion as she mentioned her dedication to her work as well as to the time spent in the service. It stands to reason that this decision under the circumstances, has had a negative impact on her mental health to the extent that in September 2022 she was commenced on another course of antidepressant by my Surgery Colleague."

77. The claimant's agents instructed a medical report on the claimant's condition from a Consultant Vascular Surgeon Mr Keith Hussey (JB 428-439). Mr Hussey's report wrongly indicated that the claimant was medically retired on 22 June 2021. He gave a history of the claimant's condition and medical interventions and his opinions as follows:

"5.02. Post-thrombotic syndrome affects up to 30% of patients with a history of DVT. It is a debilitating long-term condition, which can have a significant effect on both quality of life and ability to perform work, particularly where this involves prolonged periods of standing/walking. The condition is chronic and recurring.

5.03. The medical literature is clear that the post Thrombotic Syndromes associated with the loss of productivity and often requires adaption of the work environment.

5.04. In my opinion the balance of probability is that the Claimant's symptoms (as documented in 4.12 - specifically the development of severe pain) associated with the post-thrombotic syndrome have been exacerbated by the Respondent's alleged failure to make reasonable adaptation in the working environment. This deterioration in these described symptoms resulted in the Claimant being unable to continue with active duty.

5.05. The symptoms experienced are likely to resolve in completion of a shift with elevation although this may take several days to return to base line. However, the symptoms will recur. Although this is not a limb-threatening pathology, the severity of pain can be significant/debilitating.

Furthermore, it is probable that the skin changes with a Chronic Venous Insufficiency and the post Thrombotic Syndrome would have progressed.

5.06. In my opinion if the Respondent had made adjustments to the working environment and offered flexibility it is probable that the Claimant would have continued to work beyond 4th June 2021. With appropriate support I believe that it is probable that the Claimant could have continued in the role to the proposed date of retirement from active service."

Post Retirement

78. The claimant was upset that her career with the respondent had been brought to an end prematurely as she saw it. She had hoped to work on for some time. She was convinced that she could manage her condition if given periods to recover. She was anxious and became depressed. She was prescribed anti-depressants by her GP. She lost confidence in herself.

79. Prior to her ill health retirement on the 22 April 2022 the claimant began looking for work. Caithness where she lives is isolated and there are few job opportunities. The main area of economic activity is in and around Inverness where the headquarters for the Local Authority and Police are situated. Driving daily to Inverness would be costly and the claimant's leg condition would be aggravated by the length of time sitting. The return journey to Bettyhill where she lives would be in excess of five hours. In addition house prices are low in

Caithness which makes it expensive to purchase a comparable house elsewhere in Scotland because of the differential in value.

80. The claimant made various enquiries for work and set out a list prepared by her (JBp43) these included contacting likely employers in her area. She was able to secure a part time post in January but as it was located a 45 minute drive from her home in Bettyhill it was not financially viable, She obtained some administrative and other work from a local farmer in April 2022 and is remunerated in kind. In November 2023 the claimant secured part time work as a Lifeguard on a zero hours contract at £10.85 per hour. The claimant enquired with Police Scotland about vacancies but had no response.

81. The claimant's children are at secondary school in Thurso and not due to finish school there until summer 2025.

82. The Vulcan facility is in the process of being closed. The reactor had been shut down some years earlier and the plant was being dismantled. There is no official shutdown date but it is likely to occur within the next three or four years. If the claimant had remained employed when the plant finally closed it would be likely that staff in her position would have been offered redundancy or a payment to assist with relocation to one of the other facilities in the central belt for example Coulport in Fife. The relocation package would be likely to be worth in excess of £2000.

Income and Pension

83. The claimant's service with the respondent was from the 31/10/05 until her retirement on ill health grounds on 22/4/2022. The claimant will reach her statutory retirement age on 11/1/2036. Her average weekly median gross salary was £558.10. Her net salary was £456.68.

84. The claimant's gross weekly pay prior to the 3 December 2021 was £751.42 with a net pay of £561.62. She then went on half pay which was £551.04 gross and £248.51 net to the date of retirement. She had completed 16 years' service and was 53 years old at the date of retirement.

85. The claimant obtained secure paid employment for 10hrs per week. In addition, the claimant is now receiving income from her lifeguard position with Highlife Highland. She earned in April £651 (gross)/£562.41(net) and in May £577.70 (gross) and £503.50 (net). If the net values are aggregated and taken over 12 months, that would give anticipated income during that period of (£88 x 26) + [(£503.50 + £562.41)/2 x 6] = £2,288 + £3197.70 = £9,116.42.

Additional Background Matters

86. Inspector Reid was not satisfied at the proposed action to be taken set out in the grievance report. He lobbied for disciplinary action to be taken against her as she had displayed "operational dishonesty" and had tried to destroy his reputation.

87. In October 2020 when the claimant was absent Inspector Reid had gone through her desk and opened a folder she had regarding her sitting in the Children's Panel. He noted that she had claimed mileage from her home to Vulcan and then to the hearing. He suggested that this was a fraud and wanted disciplinary action taken in this regard. He prepared a Witness Statement (JB404-406). inspector Reid asked for an update on the investigation in September 2021 (JBp409). No action was subsequently taken and no complaint made by Children's Hearing Scotland. The claimant had no knowledge at the time that Inspector Reid had advanced these concerns.

Witnesses

88. The claimant was generally a credible and reliable witness in the Tribunal's estimation. She gave her evidence in a calm and measured way. It was apparent that some of the events she described made her at points upset and emotional but she tried to answer questions put to her. Counsel for the claimant is correct when he observes in his submissions that the claimant had to face an aggressive and combative cross-examination which called into question her honesty and motives. We deal with this in more detail later.

89. Our view was that Superintendent Stewart was generally a truthful witness but circumspect. We were concerned as to some aspects of his evidence where he appeared not completely candid by seeking to minimise matters that were unhelpful to the respondent's position. We were surprised that given his intention was to provide oversight of the application, knowing the breakdown in the relationship with Inspector Reid and the claimant, he did not clearly set out the decision making process or delineate Inspector Reid's role in it or indeed pull him up when he intervened initially recommending rejection or when he restricted the possible shift pattern the claimant could work to one of the four shifts purportedly on the grounds of Covid infection control. He was not challenged on this latter matter nor was it explored as to whether it was justified either as a long-term bar to cross shift working or a temporary one. It was also unclear whether he had truly got to grips with the issues particularly the fact that there was a reasonable adjustment issue. He took no steps to gauge the client's views of running under or over complement of whether additional costs could and would be borne by those higher in the chain of command. It was common for the shifts to be undermanned. Unfortunately, we came to the view that he was perhaps more interested in outward appearances rather than getting to grips with the issues leaving them, as he did, mostly to Inspector Reid. Given the background which was an outstanding grievance by the claimant against Inspector Reid once the claimant became aware of his involvement at a later point and the attempts he had made to have her disciplined these matters heightened her suspicions about his antipathy towards her and made her doubt the fairness of the process in which he had such a prominent role.

90. We were sympathetic to the difficulty Sergeant Reid had given his role. It seemed to us that it put him in a very difficult position vis-a-vis his line manager Inspector Reid. He did seem to change his stance from believing that the claimant could be accommodated in some way to one of accepting that nothing could be done. In evidence he affirmed that he had been optimistic that some accommodation could have been made. That said he seems to be a competent and resourceful officer who tried to assist the claimant when on shift by

minimising periods when she had to stand and to have been initially open to trying to find a solution.

91. We would add that we did not hear from Inspector Reid who we understand had retired from the service. It is unfortunate that although what was discussed at meetings involving him and Superintendent Stewart and Sgt Reid (we understand they were Skype calls) there was no notetaker at crucial meetings such as the one which ultimately concluded that no trial of mock rosters would occur. It wasn't recorded why the process of discussing possible changes to the shift pattern did not continue after the rejection of the FWA.

92. Mr Hussey was an impressive witness who was direct and clear in giving medical evidence and providing his skilled opinion on medical matters. That medical opinion was clear in its terms and this was evidence we accepted. He may not have been aware of the full position regarding the circumstances leading up to the claimant's sick leave and retirement but that did not impact on his skilled evidence on medical matters. We accept that he made his opinion clear that in his experience many employers, including it appeared to him the respondents, seem to make insufficient efforts to keep people in the claimant's situation at work by making adjustments to their working environment and this was somewhat outside his remit as a skilled witness.

Submissions

93. Both parties lodged substantial written submissions to which they spoke at the conclusion of the case.

Claimant's Submissions

94. Mr Allison outlined the three claims being pursued. He indicated that the claimant was now saying that the protected act on which she relied was the grievance on 8 September and the bullying and harassment complaint that emerged from that. He then discussed the evidence making some key observations. He asked the Tribunal to accept the claimant's evidence which was given he said in the face of what he described as an aggressive and dismissive cross examination. In

relation to Sergeant Reid he was not neutral and advocated the respondent's position. Where there are no contemporaneous records (e.g. for the meeting on 29 March 2022) the Tribunal should be slow to accept an uncorroborated or unevidenced account. Mr Hussey understood the factual matrix to the extent required. It should be remembered that experts are skilled witnesses permitted to give opinion evidence in their field of expertise, which is their function. It was not his role to establish or determine facts.

95. Counsel then took us to the background law in relation to the FWA and to the guidance in the ACAS Code. It was noteworthy he said that the statutory code recommended using trial periods where the employer is unsure how the change will work in practice. This he submitted dovetails into the claim for reasonable adjustments. The EHRC Statutory Code (at para 6.33) explicitly identifies adjustment to hours or working patterns to allow a disabled person to overcome fatigue or other effects of their disability.

96. Mr Allison then dealt with the issue of reasonable adjustments. The claimant was an employee for these purposes. The respondents accept that they should reasonably have been aware of her potential disability status from 31 December 2020 and accordingly the duties under Section 20 were engaged.

97. The claimant relies upon s.20(3). The issue is whether a provision, criterion or practice applied by the respondent put the claimant at a substantial disadvantage compared with individuals who are not disabled. The PCP was the requirement for her to work a specific shift pattern, being the shift pattern detailed in her flexible working request (which involved 8 consecutive shifts). There is no requirement for a direct comparator because there is no requirement for a "like-for-like" comparison with a disabled person ***[Archibald v. Fife Council*** [2004] ICR 954], Instead, what is required is a general comparative exercise which will normally include a class orgroup of non-disabled comparators which, in many cases, will clearly discernible from the PCP being applied by the employer ***[Fareham College Corporation v. Walters*** [2009] IRLR 991]. In terms of substantial disadvantage, section 212(1) of the 2010 Act defines this as "more than minor or trivial". This is clearly a low bar. Nevertheless, the Tribunal must clearly identify the nature and extent of the disadvantage

suffered. This requires the tribunal to make explicit findings in fact on these issues [see ***Environment Agency v. Rowan*** [2008] IRLR 20]. There must be a causal connection between the PCP and substantial disadvantage identified. "The substantial disadvantage must arise out of the PCP ***[Nottingham City Transport Ltd v. Harvey*** UKEAT/0032/12].

98. It was submitted that steps for the purposes of s.20 covers any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP ***[Griffiths v. Secretary of State for Work and Pensions*** [2016] IRLR 216]. It was not necessary for the Tribunal to be satisfied that the proposed adjustment would have been completely effective or remove the substantial disadvantage in its entirety ***[Noor v. Foreign Office*** [2011] UKEAT/0470/10]. If made, would have removed the disadvantage in its entirety.

99. As to reasonableness his position was that an adjustment will be reasonable if there is a prospect (which need not even be a good or real prospect) that doing would prevent the claimant from being at the relevant disadvantage ***[Leeds Teaching Hospitals NHS Trust v. Foster*** *[2010]* UKEAT/0552/10]. However, reasonableness still requires consideration of the whole circumstances, including whether it imposes a disproportionate burden on the employer. The factors which were previously listed in s.18B of the Disability Discrimination Act 1995 are not explicitly listed in the 2010 Act, but do appear in the EHRC code.

100. Counsel then turned to consider the claim for victimisation under section 27 of the 2010 Act. A protected act is any of the 4 steps listed within s.27(2). Section 27(2)(d) relates to alleging a contravention of the Act (whether expressly or other. This engaged when a claimant makes a protected act. No comparator is required. There is also no specific timescale within which a detriment must occur. It was not necessary to make explicit reference to the statute or the requirements of any particular claim, but *"there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the Act applies"* [per Mr Justice Langstaff in ***Durrani*** *v.* ***London Borough of Ealing*** UKEAT/0454/2012, at para 22]. The reference to 'potentially' is instructive: the complaint need not be meritorious or well-founded. Provided it is (i) not made

in bad faith and (ii) in principle could amount to a contravention of the Act, it is capable of being a protected act within s.27(2)(d).

101. In relation to the burden of proof in respect the Equality Act 2010 claims in these proceedings it is he said governed by section 136(2) and (3) of the 2010 Act. He made reference to ***Igen Ltd v. Wong*** [2005] ICR 932, ***Hewage v. Grampian Health Board*** 2013 S.C. (U.K.S.C.) 54 and ***Royal Mail Group Ltd v. Efobi*** [2021] UKSC 33. Specifically in relation to reasonable adjustments he submitted that the claimant must, in terms of s.136(2), establish facts sufficient from which the tribunal could in principle conclude there had been a breach of the duty. That does not require the claimant to provide the detailed adjustment just sufficient notice to the employer to understand the broad nature of the adjustment.

102. In this case he suggested it was clear that the PCP was the requirement to work the specific shift pattern called the Vulcan' shift pattern. The claimant was, following her redeployment, contractually obliged to work the shift pattern detailed within her flexible working application. The contractual position is sufficient to establish the PCP and neither the fact of a phased return nor it being within the claimant's gift to try to take other steps not to work that (e.g. by asking for redeployment) is relevant to that question: see the decision of the EAT in ***Davies v. EE Ltd*** [2022] EAT 191 [see para 23 and 24 in particular] which is fatal to any such arguments. By extension, the suggestion by the respondent's agent that the claimant could have simply gone off sick as an alternative and so no duty arises cannot be correct in law. Applying ***Davies***, the claimant was under a contractual duty to perform her duties. The statutory duty, is as the EAT described in ***Salford NHS Trust v. Smith*** UKEAT/0507/10 (at para 47) as being *"....primarily concerned with enabling the disabled person to remain in or return to work with the employer".*

103. In relation to the adjustment under consideration, the respondents appears intent on arguing that the PCP is limited only to the flexible working request that the claimant made. That was in Counsel's submission misconceived. The FWA implicitly required consideration of alternatives to the specific request. That is made clear by the ACAS Code "Responding to a flexible working request" at part 3, page 5. Secondly, what is required is that

the respondent has notice of the broad adjustment, not a specific adjustment. Thirdly, this ignores the purpose of the statutory provision, which is to alleviate substantial disadvantage suffered by disabled persons where reasonably possible. That purpose can only be achieved where (as here) the respondent considers a range of alternatives. Fourthly, to the extent a complaint of fair notice, the respondent here had already considered alternatives. No adjustment is being suggested outwith the confines of what they themselves considered contemporaneously. The respondents themselves led evidence of those alternatives. As was noted in ***Project Management Institute v. Latif***, sometimes the specific adjustment will only be identified at Tribunal. That is not quite the case here as the respondents were aware that the claimant would accept any of the proposals.

104. The assertions by the claimant at paragraphs 3 and 4 of page 3 of her grievance of 8 September 2020 (page 102 of the joint bundle) was a protected act in terms of s.27(2)(d). The reference to being "punished for being married", read in context of those two paragraphs, makes it reasonably clear that the claimant was complaining of being treated differently on grounds of her marital status. That is capable in principle of being a contravention of s.13 on the basis of the protected characteristic in s.8 of the 2010 Act. It does not matter whether that perception was right or wrong and the Tribunal need not scrutinise the merits of it. It is sufficient that the Tribunal notes it would meet the broad requirements of s.13 at its highest, and that it was not made in bad faith or knowing it was false. The claimant's account of Chief Inspector Niven's reaction to that allegation is supportive of the above (but not essential to the Tribunal accepting this analysis). The refusal to permit the claimant to have her work hours adjusted (whether in the way she proposed or in the way Craig Reid proposed) was a detriment In relation to causation, the claimant had demonstrated a *prima facie* case for the protected act having a more than trivial influence on the detriment. This centres on Vincent Reid's involvement, animus, and motivation. The Tribunal should ignore the merits or otherwise of the underlying complaint and apply the burden of proof to the *prima facie* case made by the claimant.

105. Mr Allison then turned to remedy and the proper approach of us to take. The purpose of compensation is "as *best as money can do it, …. put [the Claimant]*

*into the position she would have been in but for the unlawful conduct" [**Ministry of Defence v. Cannock and ors*** 1994 ICR 918 EAT]. She would be entitled to compensation for injury to feelings, past and future loss of earnings, pension loss and interest.

106. We were referred to the most up to date Schedule of Loss in the Supplementary Bundle. This was prepared in February 2023 and there are changes that arise for example following Dr Pollock's supplementary report. The claimant's losses are capable of flowing from the claim for victimisation, the claim for failure to make reasonable adjustments, or both. That is because the unlawful act in both claims is the same: the refusal to grant (whether as sought or under modification) the claimant's flexible working request. Whether viewed as a failure to make reasonable adjustments, an act of victimisation, or both, the financial consequences that flow are the same as the claimant could not return to work in the absence of an adjustment to her working pattern. The only material difference if both (rather than one) of those two claims succeed is likely to be to injury to feelings. The claimant accepts, where compensation is being awarded for both heads of claim, the Tribunal should be cognisant against 'double-counting'.

107. The Tribunal may have to consider grossing and in that event the Tribunal should make judgement in respect of remedy subject to same and allow parties a fixed period of time to either agree the grossed up figures, failing to make their respective proposals in respect of same. In reality, the respondent is likely to have ready access to the information required to carry out that exercise.

108. Finally on the issue of the decommissioning of Vulcan, the evidence bears out the claimant would be offered redeployment at that point, together with financial assistance to relocate. The key difference about the claimant's willingness/ability to accept redeployment in 2025 or later (as opposed to previously) is that her children will have concluded secondary school by then. She identified their schooling as the principal barrier to that point. The suggestion she might not get flexible working or reduced hours if redeployed ignores the fact that the offending PCP is a shift pattern unique to Vulcan 52. The claimant seeks compensation only, in terms of s.801(1)(b). The claimant seeks an award of 8 weeks gross wages, which is the maximum permissible. It is understood that the maximum weekly amount as at the date of raising this claim was £544, which is less than the claimant's gross weekly wage. The total award is £4,352. The claimant submits that is just and equitable in the whole

circumstances. This does not affect the claimant's entitlement under the other heads of claim. Likewise, the amounts awarded under the other heads should have no bearing on the amount of this award because they serve discrete purposes.

109. The claimant seeks compensation for injury to feelings of £19,750, which is the median of the middle band which applies based upon the date on which this claim was raised. This is an aggregated award for both the failure to make reasonable adjustments and the victimisation. The claimant relies upon the factors listed at page 48 of the supplementary bundle which are incorporated herein for the sake of brevity. The claimant's evidence makes clear that the impact of the conduct is still ongoing. Whilst it has not caused psychiatric injury, it is pervasive and has affected the claimant's mental health.

110. In regards to past losses the claimant's lost salary until her ill health retirement was 20 weeks at £313.11, being £6,262.20. The weekly figure of £313.11 is correct, because it is the difference between the net weekly pay she received prior to the unlawful acts and the sum she received in the period 3/12/21 to ill-health retirement. In any event, the claimant was not crossed on her figures and no vouching to contradict her figures appears to have been produced. Nevertheless, if the respondent wishes to produce vouching now, the claimant is content to be pragmatic and consider same.

111. It was submitted that the claimant's ill-health retirement pension does not fall to be deducted. The respondent's submissions to that effect are wrong in law, ignoring the binding decision of the House of Lords in ***Parry v. Clever*** [1970] A.C.1 to the effect that accelerated ill-health retirement payments received pre-statutory retirement age are non-deductable. A proportion of the lump sum insofar as attributable to the period post-retirement age is deductable (following the subsequent decision in ***Longden v. British Coal Corporation*** [1998] A.C. 652] but that falls to be offset against pension loss. The foregoing losses were caused by either (or both) of the failure to make reasonable adjustments and/or the act of victimisation.

112. The claimant seeks future loss to retirement age. This falls in 2 respects. Firstly, she seeks her full loss of earnings for a period of 6 months. That is a reasonable period for her to expect to be given to

secure employment at the rate she then seeks to deduct thereafter. Although the claimant is not entitled to compensation for the effect of the Tribunal process on her, she is also not entitled to be penalised for the fact she is unable to start to properly and fully move on until the case is resolved.

113. It was submitted that the claimant has made reasonable efforts to secure alternative employment. She has, as a matter of fact, not yet secured alternative employment. The Tribunal has to assess, as best as it can, how long that might take. There is no evidence to suggest that the claimant is likely to secure employment at a reasonable level in a shorter period than 6 months. The total of this loss of earnings is £561.62 x 26 weeks, being £14,602.12. The claimant accepts that she has now secured paid employment for 10hrs per week. Vouching is produced herewith which shows the pay she receives for same (£11 per hour; £110 per week gross; £88 per week net). Further, the claimant is now receiving income from her lifeguard position Highlife Highland). Vouching for the last 2 calendar months wasproduced. She earned in April £651 (gross)/£562.41(net) and in May £577.70(gross) and £503.50(net). If the net values are aggregated and taken over 12 months, that would give anticipated income during that period of (£88 x 26) + [(£503.50 + £562.41)/2 x 6] = £2,288 + £3197.70 = £9,116.42.

114. From the 27th week following the final date of this hearing, the claimant proposed that the Tribunal deduct a sum from her weekly wages equivalent to the anticipated salary she would receive based upon the gross and net median salary for females working full time, based upon the ONS's statistics. This is footnoted on page 47 of the supplementary bundle and vouching is proposed at pages 49-53. There is no evidence that she would, or could, earn more than that UK average. Indeed, the paucity of jobs; her rural location; the travel restrictions that arise; and her age all militate against that.

115. Both of these sums are on the basis that the claimant would have worked 40hrs, which was the basis of Craig Reid's proposals. That is because that was the most likely proposal to have been granted (and struck the best balance between the competing needs of the claimant as against the business). If the

reasonable adjustment were the claimant's proposal, then the anticipated net earnings would have to be on the basis of 36hrs.

116. The burden of proving a failure to mitigate losses rests upon the respondent. A helpful summary of the approach can be found in HHJ Eady QC's decision in **Singh v. Glass Express Midlands Limited** UKEAT/0071/18 (relying upon Langstaff P's decision in **Cooper Contracting Ltd v. Lindsey** UKEAT/0184/15.

117. The respondent in Counsel's submission has not come close to proving a failure to mitigate. In reality, they have made no real effortto do so. The limit of it was the claimant being challenged in the abstract about not doing enough, but without any colour or context. Not a single job advert for a role suitable for the claimant that was available that she did not apply for was produced. Unevidenced claims were made, for example, that she could get a job with the SPA but there was no evidence of any actual vacancies at all, far less ones suitable to the claimant. The Tribunal must have regard to the particular circumstances relative to (i) her geographical location (ii) her narrow fields of experience; (iii) the limitations of jobs that can be done fully or mostly remotely; and (iv) the types of jobs she cannot do.

118. The pension loss claimed on page 48 of the supplementary bundle anticipated an adjustment being made for the proportion of lump sum attributable to the period after retirement age (following the decision in ***Longden***). The adjusted figure is the one in Dr Pollock's updated report at page 61 of the supplementary bundle. The correct figure is £253,600 based upon 40hrs (note, breaks are paid) [page 65, point 7]. If the Tribunal concludes the claimant would have worked the 36hrs proposed in her FWA, then the correct figure is the one in Dr Pollock's subsequent email at page 82: £230,530.

119. The suggestion that pension loss should be offset was misconceived. Firstly, the Tribunal has no basis in the evidence to assume that the claimant will secure a public-sector role with a similar pension. Those are, logically, a much smaller proportion of the roles generally. The claimant gave uncontested evidence that there are no such jobs in her area and the nearest local authority offices are in Inverness, which is impracticable (before even getting to vacancies and suitability). There is no authority that supports the Tribunal applying a percentage deduction to pension loss. Like other pecuniary loss, the Tribunal has, on balance of probability, to pick a likely end date to the loss.

On the respondent/s own analysis that there is only a 25% chance of obtaining a public sector job (which ignores the geographical and age variations), that is less likely that her not doing so. It follows that the Tribunal is bound to conclude she is not going to do so before retirement age.

120. Secondly, in terms of private sector pensions, the analysis has no basis in the evidence. The respondent led no evidence about this. No questions were put to the claimant about it. No vouching was produced. The respondent's representative is not entitled to give evidence on these matters. In any event, this ignores that such pensions are voluntary and can be opted out of. Whether someone opts in or out is a question of discretion. Again, the claimant would have had an entitlement to comment on that. Relevant considerations would include (i) the amount the claimant earned and (ii) the fact she had an IHR entitlement (despite the fact that does not fall to be deducted.

Respondent's Submissions

121. As a prelude to the legal submissions the respondent's agent pointed to the fact that the claimant had departed from her pled case and no longer maintained a number of positions she had spoken to in evidence particularly she had retreated from many of the grounds advanced on the Section 80G claim.

FWA/Section 80G claim

122. The respondent's position was that they had fulfilled all their duties under the Section. The claim was now limited to the application not being dealt with in a reasonable manner. The claim now related to an alleged failure to provide an alternative/discuss alternatives and failing to give her an opportunity to appeal. The respondents suggested that the claimant had been unwilling to accept or discuss alternatives. Dr Gibson took the Tribunal to the evidence of the FWA process and the discussion of the mock rosters and the comment of Inspector Reid *"Please discuss the 2 mock roster with PC Watson to keep her informed of what options are being looked at."* The alleged failure to allow the claimant

to appeal was without merit. The claimant had read the policy and pleading ignorance of the policy was not credible. The claimant had not given evidence in chief that her position was that inspector Reid's involvement made the process unreasonable in some way rather she had given evidence about possible detriment arising from a protected act and this prejudiced the respondents who might have called other evidence. The Tribunal was invited to dismiss the claim.

PCP

123. The respondent's agent then addressed the PCP of requiring the claimant to work the shift pattern. The respondent's position was that they had never required the claimant to work the full shift pattern (if it was detrimental to her health) pointing to various accommodations made for her while the FWA was being determined. Their position was that the claimant should have gone off sick.

124. The respondent suggested that the evidence of Sgt Reid was that the claimant felt discomfort after every shift and that even with providing her with opportunities to sit down she would not have managed to work even the reduced shift pattern she wanted in the FWA. They pointed to the claimant not discussing working a different shift pattern with their Occupational Health advisers in December 2020 and trying to establish a business with friends around the same time.

125. It was argued that the Tribunal should not consider any other adjustments to the claimant's duties other than what was set out in the FWA. He referred to Paragraph 22 of the paper apart which read that the refusal of the FLA amounted to a failure to make reasonable adjustments. He pointed to the claimant's acceptance that alternatives had been discussed with Sgt Reid. In any event the respondent's position was that there were no reasonable adjustments which could have been made because of an inability to reorganise the work between colleagues. Dr Gibson then examined the detailed evidence around this matter. His submission was that the claimant was "setting up" the respondents to refuse her FWA. He cautioned putting too much weight on Mr

Hussey's evidence there were no "deteriorating symptoms". He also got the date of the ill health retirement wrong and his views on adjustments were vague.

Protected Act

126. The respondent's agent submitted that the claimant's evidence contradicted her pleadings that the complaint made on 3 June was the protected act. There was nothing said to the respondents to alert them to possible discrimination. The evidence that Mr Niven had described the situation the claimant was in (not getting days off when her husband was off) as discrimination was a "retrospective embellishment". The protected characteristic that was used by the claimant was not her disability. The situation the claimant found herself in is not capable of being described as discrimination and in any event the furthest she goes is to say it may be. She knew that the reason she was not getting these days off was wholly down to staffing. There was only the claimant and her husband doing administrative work.

127. The evidence did not support the next step which would be that even if there was a protected act the claimant was victimised by being subjected to a detriment namely the refusal of the FWA. Chief Superintendent Stewart indicating that it might have been better for Inspector Reid not to have been involved in decision making was simply an acknowledgement that given the grievance the claimant had lodged against him if he had not played a part he could not be accused of victimising her.

Remedy

128. Dr Gibson then turned to remedy. In relation to the claim for reasonable adjustments this was the major component in the claim. The claimant went off sick on 3 June 2021 and shortly after this applied for ill health retirement. She claimed for wages through the exacerbation of her condition caused by working the full shifts. To succeed the claimant would have to show that the refusal of the FWA was a discriminatory act. The exacerbation of her condition was

caused by her own actions. She could have gone off sick. If it hadn't been for this exacerbation of her condition she might not have been given ill health retirement and been dismissed though a capability process. In addition, her own medical evidence shows that with rest her condition resolves quickly. The respondents submit that there should be no compensation for the period from 3 November 2021 until 22 April 2022.

129. The solicitor then turned to past loss which should be limited to 26 weeks giving the claimant time to obtain suitable employment. Future loss of earnings should not be awarded for the following reasons.

130. The claimant has a reasonable duty to mitigate her loss. She did not do so. He referred the Tribunal to the case of ***Ministry of Justice v. Cannock and Others*** ICR 918 EAT which emphasised the need for a claimant to continue to look for work in the sphere in which she was most qualified namely that of being a Police Officer. She failed to follow up or pursue this possible avenue. Dr Gibson also referred to the case of ***Hibiscus Housing Association v. McIntosh*** EAT 0534/08 which was authority for the proposition that it was not reasonable for a dismissed employee to immediately lower their sights and immediately take lower paid work. In the respondents view the claimant has made no effort to obtain an equivalent position. The claimant has not applied for any administrative work which can now be done remotely. The claimant's daughter finishes school in 2025 and there is no reason why she should not relocate to find work. Pension loss should be compensatory and not a windfall.

Discussion and Decision

FWA Application

131. The claimant made her application on the 17 January 2021 using a form supplied by the MDP's HR department. It was made in conformity with Section 80F(2) of the Employment Rights Act 1996 and the Flexible Working Regulations 2014. She sought a reduced working pattern with fewer days and hours. From working 88 hours over 17 days she asked to work for three days per week which would mean she worked 36 hours.

132. The employee's right to make an application is in Section 80F which is in the following terms:

u80F Statutory right to request contract variation

(1) A qualifying employee may apply to his employer for a change in his terms and conditions of employment if—

(a) the change relates to—

(1) the hours he is required to work,

(ii) the times when he is required to work,

(Hi) where, as between his home and a place of business of his employer, he is required to work, or

(iv) such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations, ...

(b).... ....

(2) An application under this section must-

fa) state that it is such an application,

(b) specify the change applied for and the date on which it is proposed the change should become effective, and

(c) explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with, ...

(d)... ....

(3) . . . .

(4) If an employee has made an application under this section, he may not make a further application under this section to the same employer before the end of the period of twelve months beginning with the date on which the previous application was made"

133. The employer required to deal with the application in a reasonable manner and the section provides grounds for the refusal of the application:

"(1) An employer to whom an application under section 80F is made-

fa) shall deal with the application in a reasonable manner,

(aa) shall notify the employee of the decision on the application within the decision period, and

(b) shall only refuse the application because he considers that one or more of the following grounds applies—

(i) the burden of additional costs,

(ii) detrimental effect on ability to meet customer demand,

(iii) inability to re-organise work among existing staff,
(iv)inability to recruit additional staff,
(v) detrimental impact on quality,
(vi) detrimental impact on performance,
(vii) insufficiency of work during the periods the employee proposes to work, (viii) planned structural changes, and
(ix) such other grounds as the Secretary of State may specify by regulations.

(1A) If an employer allows an employee to appeal a decision to reject an application, the reference in subsection (1)(aa) to the decision on the application is a reference to—

(a) the decision on the appeal, or
(b) if more than one appeal is allowed, the decision on the final appeal"

134. There was no dispute that the claimant had made an effective application under the statutory regime. She believed that the granting of the FLA would be positive for the business as her work week would be the busiest part of the week, it would allow other officers flexibility and cut down on the high volume of overtime being worked by officers. The respondent was under a duty to deal with the claimant's request in a reasonable manner. The Act does not define what this means but it is clear that the statutory regime is meant to be a relatively simple and speedy process.

135. The sole ground relied upon is the involvement of inspector Reid who at the time when the FWA was being considered had an outstanding bullying and harassment grievance against him by the claimant. Mr Allison's proposition that in certain circumstances it might not be reasonable for an employer to deal with an application by allowing someone an involvement in the process, particularly in decision making, who was antipathetic towards the employee concerned. In support of this position the claimant points to the evidence uncovered at a much later date that seems to show Inspector Reid was actively trying to have the claimant disciplined over a number of matters including the bullying and harassment grievance, which had been rejected.

136. One of the background issues in the present case was exactly who made the decision to refuse the FWA. The lack of clarity over the matter seemed to us to reflect the confusion that seemed to arise

over the roles of the three main participants namely Superintendent Stewart, Inspector Reid and Sergeant Reid. This was not made easier because of the clear chain of command. Sergeant Reid was put in an unenviable position in some ways as although he "signed off [5] the refusal he had no real autonomy to grant it given the involvement of the two more senior officers.

137. The Tribunal was a little surprised at how the process was to be approached given the claimant had an extant grievance against Inspector Reid. It was recognised, to an extent, by Chief Inspector Stewart that the claimant was bound to entertain suspicions about his involvement. The respective roles of these parties were not clearly set out at the beginning despite Superintendent Stewart recognising that it would be impossible not to involve Inspector Reid in the process as the senior officer at Vulcan and the line manager of Sergeant Reid. The claimant argued that information she had subsequently discovered supported her suspicions that Inspector Reid was not impartial.

138. Knowing these sensitivities it would perhaps have been better for Inspector Reid to have been allowed appropriate input but kept more at arms-length and for the claimant to be made aware of this. However, we fully accept that he could not be kept out of the process of giving appropriate information and opinion but as we saw from the papers at a couple of points he stepped in, perhaps prematurely, to suggest rejection of the proposal even going so far as drafting a refusal letter. Overall, however the written evidence suggests that there was nothing to alert Chief Superintendent Stewart that he was not acting professionally. We accept that in hindsight some clearer delineation of roles with Chief Superintendent Stewart making it dear that he was the true decision maker and not Sergeant Reid who was Inspector Reid's subordinate might have reassured the claimant that Inspector Reid would not be able to work behind the scenes to ensure her application was unsuccessful.

139. We did not hear from inspector Reid and we do not want to go into the rights and wrongs of the claimant's grievance or whether it was justified although we spent some considerable time on this matter in evidence. The claimant was questioned at some length about these matters. Our only observation is that the claimant's grievance spoke to a breakdown in the relationship she had with

him. We are not convinced the claimant was best served by the advice apparently given by HR that her difficulties could be described as bullying and harassment and she should lodge a grievance under that policy. Instead of management trying to repair the relationship the lodging of the grievance seems to have led to a polarisation and the complete breakdown in that relationship.

140. It is the handling of the FWA that we need to focus on. We only have the written evidence of Inspector Reid's interactions with the two others in relation to the FWA and apart from one issue we address later which gave us concern there appears to be no clear overt attempt made by him to subvert the process or for us to infer he does. His communications seem professional. We understood that Chief Superintendent Stewart was conscious of the breakdown in the relationship and had become involved to ensure the process was fair. Although we are later critical of some aspects of that process those do not specifically relate to Inspector Reid's involvement except in the failure to consider cross team working. For example we were surprised that the altered rota was not given a trial period and that various investigations were not made into the cost and practicability of offering the claimant reduced hours but we deal with those matters under the claim for a failure to make reasonable adjustments.

141. The employer must deal with the request reasonably. This requires a fair procedure to be followed overall. The ACAS Code puts an emphasis on discussing and considering the request and dealing with it promptly (although the three month period for giving a decision can be extended). There is no doubt that in this case the claimant was given considerable (and repeated) input into the process and a consideration was given to the request.

142. In our view although we have some reservations and concerns about the way the FWA was dealt with as the involvement of Inspector Reid, is only ground advanced, that is not sufficient in our view to render the handling of the FWA and its ultimate rejection unreasonable and accordingly we find the claim was not well founded.

Reasonable Adjustments

143. An employer is under a duty to make reasonable adjustments (s.39(5) of the 2010 Act). Police Constables such as the claimant are treated as an employee for this purpose. The respondent accepted that the claimant was disabled within the meaning of s.6 of the Equality Act 2010 and had that status since 31 December 2020. A duty to make reasonable adjustments accordingly arose under s.20 of the 2010 Act.

144. It was also apparent that the PCP that applied to the claimant, namely to be fit enough to work the "Vulcan Rota'', a specific shift pattern applied to her and given her disability put her at a substantial disadvantage compared with individuals who were not disabled. A PCP is widely defined but in this case it was apparent that the claimant was expected to be fit enough to work this physically taxing rota.

145. We accepted Mr Allison's submission that there was no requirement for a "like-for-like" comparison with a disabled person *(**Archibald v. Fife Council*** [2004] ICR 954). Instead, what is required is a general comparative exercise which will normally include a class or group of non-disabled comparators which, in many cases, will clearly be discernable from the PCP being applied by the employer ***[Fareham College Corporation v. Walters*** [2009] IRLR 991]. The comparison group here would be the constables without any disability who were able to work the 'standard' 8 day on shift rota.

146. We did not struggle in identifying the substantial disadvantage. Section 212(1) of the 2010 Act defines this as "more than minor or trivial". We found that the claimant was physically unable to carry out eight days of 12 hour shifts in a row as she was required to. We noted that steps for the purposes of s.20 covers any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP ***(Griffiths v. Secretary of State for Work and Pensions*** [2016] IRLR 216).

147. It is not necessary for the Tribunal to be satisfied that the proposed adjustment would have been completely effective or remove the substantial disadvantage in its entirety ***[Noor v. Foreign Office*** [2011] UKEAT/0470/10].

148. As to reasonableness, an adjustment will be reasonable if there is a prospect which need not even be a good or real prospect that making it would prevent the claimant from being at the relevant disadvantage ***(Leeds Teaching Hospitals NHS Trust v. Foster*** [2010] UKEAT/0552/10).

149. However, reasonableness still requires consideration by us of the whole circumstances, including whether it imposes a disproportionate burden on the employer. The factors which were previously listed in s.18B of the Disability Discrimination Act 1995 are not explicitly listed in the 2010 Act, but do appear in the EHRC code. Those factors include the practicability of the adjustment, the employer's resources, the financial costs and the extent to which the adjustment would have ameliorated the disadvantage. The test is an objective one and depends on the circumstances. Disappointingly we heard no detailed evidence in relation to the respondent's financial resources or budget other that they were not infinite or perhaps "stretched".

150. The respondents argued that the PCP was never in operation and that the claimant was never "required" to work the Vulcan shift pattern. In the written submissions the solicitor writes: *"The Claimant was not required to work the variable shift pattern. It was requested that she did so. She was contractually obliged to do so but not contractually obliged to do so in circumstances which would knowingly be detrimental to her heath".* This seems to be an attempt to put the onus on the claimant in some way not to work the contractual shift pattern expected of her thus avoiding the respondent's obligation to consider reasonable adjustments to her work pattern. She could have chosen not to work it but if she was unable to do so, and no FWA or adjustment was in place to allow her to derogate from her obligation to work the Vulcan shift pattern she would ultimately have faced dismissal or III health retirement. The circumstances here is that working the shift pattern was a contractual requirement except when temporary accommodations were made.

151. We would observe that we were surprised that there was a lack of any statistics produced or referred to by the employer analysing where the overtime or sickness absences arose, what, if any, the busiest periods were, why so much overtime was being worked by the core staff and when shifts were understaffed giving the details of when, in what

circumstances and for what periods they were understaffed. It was symptomatic of this seemingly casual approach that some staff in the claimant's team were asked if they were interested in job sharing or part time working through Sgt Reid having an informal chat with them. It might have been more fruitful if all the AFO's had been emailed and spoken to confidentially, for example by the HR department, and asked to express an interest or have further discussions. As it was, no records were generated of what was said and the exercise restricted to a handful of AFO's on one shift.

152. We also did not accept that the claimant's condition would have necessarily led to a breakdown in her health in any event even if the FWA or some similar arrangement had been put in place. She had successfully managed her condition for some years. We do accept it would have been arduous for her. We do not agree that this FWA request was in some way odd or undermines the claimant. If she had been successful in changing her shift to three days per week as she hoped her condition we accept that it could have been managed by her to allow her to continue working. It was noteworthy that the claimant had always kept very fit and taken part in strenuous exercise despite her condition. It was suggested that her proposed venture to provide some paddleboard training to tourists with a group of friends showed that there was something untoward going on. We found nothing in these suggestions. Periodically taking some people paddleboarding for a few hours mostly during the short summer season in Caithness is wholly different from having to work 12 hour shifts for eight days in a row.

153. Perhaps in retrospect the claimant would have been wise to ask advice from Occupational Health to support her FWA but the warnings as to the possible impact these long shifts would have on her condition was clearly made by her and is not inconsistent with the Occupational Heath advice or the more detailed medical evidence we have heard. That evidence shows that the claimant is physically fit but after a full 12 hour shift her leg needs recovery time or after a few days it will swell and become painful.

154. We simply do not accept the proposition that any future aggravation of her condition could not have been managed by her or be so serious as to stop her

working. The claimant's evidence and that of Mr Hussey shows that the short-term aggravation of her condition depends on what tasks she carries out over a particular timespan factoring in the need for recovery time. Mr Hussey was clear that the condition only becomes aggravated on a temporary basis. We concluded that if a shift pattern allowed for such recovery time the claimant in all probability would have continued in employment.

155. We found it significant that Sgt Reid was initially optimistic that an accommodation of some sort could be found for the claimant and that there should be a trial period. We were not convinced by his evidence why the trial period did not take place (demonstrating the practicality and allowing any additional costs to be measured).

156. The Tribunal was surprised that in approaching the FWA those involved although aware that there was also a duty to consider reasonable adjustments did not seem to bear this concurrent duty in mind. It seemed to us that the approach was to focus at what the claimant wanted in the FWA and as soon as the FWA was refused those involved seemed to regard this as also dealing with any request for reasonable adjustments. It appears to us that the focus should change from what the employee is asking for to what the employer provide by way T adjustments to ameliorate the effects of the claimant's condition and that this was lost sight of.

157. In this regard it was disappointing to note that there was no discussion with the respondent's clients about the staffing. It was accepted that the shifts often worked under compliment and the site was in the process of being run down with the reactor having been shut down some years earlier. It might appear from this that working under compliment has been accepted to an extent but we cannot say as the discussion did not take place.

158. Much emphasis was put on the possible costs of allowing the claimant to work part time and making up the balance of her shift. No wider consideration seems to have been given to whether or not she could be deployed to bring a short team up to compliment for at least three days at a time or if in the case of holiday relief to cut down some of the period a DD Officer would need to spend at Vulcan. If for example a week had to be covered for leave or sickness the claimant could

potentially cover three days at the beginning or end of the period releasing the DD Officer to their home station. It was also accepted that the core local staff already worked considerable periods of overtime. Indeed one of the arguments used to refuse the application was the possible negative effect on these officers "life/work balance" in working even more to cover periods that the claimant did not work. It seemed to us that a very narrow approach was taken and one that did not look at the wider staffing picture. We were also surprised that given that remote working is now so common and practicable there was no effort made to contact other stations to ascertain if the claimant could work remotely on administrative matters.

159. The Tribunal came to the conclusion that on the balance of probabilities it would have been reasonable for the respondents to adjust the claimant's working pattern to one of her working 36 hours over a three day period similar to her FWA request. We accept that this would be likely to involve some flexibility on the claimant's part with her having to work with different teams or shifts or not on her preferred working days but given the importance the claimant attached to her career, salary and pension we were convinced she would have accepted such a situation rather than have to retire so early.

Victimisation

160. Section 27 of the EA is in the following terms:

"27 Victimisation

(1)A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do. a protected act

(2) Each of the following is a protected act-

fa) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

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

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule"

161. To engage the section there must be a protected act. A protected act is any of the 4 steps listed within s.27(2). To be a protected act it is not necessary for the party seeking to invoke the act to make explicit reference to the statute or the requirements of any particular claim, but *"there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the Act applies"* (per Mr Justice Langstaff in ***Durrani v. London Borough of Ealing*** UKEAT/0454/2012, para 22). We agree with the claimant's Counsel that the reference to the word "potentially" is important indicating that the complaint need not ultimately be well-founded but provided the complaint is (i) not made in bad faith and (ii) in principle could amount to a contravention of the Act then it is capable of being a protected act within s.27(2)(d).

162. Where there is dispute as to whether something amounts to a protected act, both the terms of the alleged protected act and its context require to be critically examined. For example, the way in which the recipient responds to the alleged protected act may be relevant to considering its interpretation. Thus, in ***Njeko v. AIG Asset Management (Europe) Limited*** 2204324/2020, the ET found that the terms of the recipient manager's immediate response to a black employee's complaints of bias and being treated unfavourably, despite her not making an express allegation of race discrimination, nor using the word 'race' at all, supported the conclusion that the claimant was making a complaint of unlawful race discrimination [see para 179 to 181]. Notwithstanding that, the test is ultimately an objective one to be applied to the overall circumstances (and, so, the respondent's understanding is not determinative).

163. In relation to the meaning of detriment we were referred to the case of ***Shamoon v. Chief Constable of the RUC*** [2003] ICR 337 and ***MOD v. Jerimiah*** [1980]

ICR 13, It is an objective test focussed on the perception of the reasonable worker in all the (subject) circumstances of the case. Detriment is treatment which a reasonable worker *would or might* regard as being to their disadvantage.

164. We accepted that the claimant was not in bad faith then making the allegations contained at paragraphs 3 and 5 of her grievance. However, even after considering the authorities cited to us we had difficulty in accepting that she had in fact made a protected act. Her position was encapsulated in the sentence *"..it seems we are being punished for being married'.* If she had been thinking more objectively she must have realised that the issue in getting time off at the same time as her husband was that she worked in the same small department as he did. The fact that they were married was entirely coincidental. The same issue would arise if they were not married but in a relationship.

165. The detriment claimed was that Inspector Reid worked behind the scenes to scupper the FWA claim. While we were concerned about some aspects of his involvement the decision to refuse the FWA was not taken by him (although he had important input) but effectively by Superintendent Stewart. We did not believe that the burden of proof governed by section 136(2) and (3) of the 2010 Act assisted the claimant, even if she had made a protected act, there was insufficient evidence of hirn causing a detriment to engage the section.

Remedy

166. We turned to consider the issue of remedy and the Schedule of Loss lodged by the claimant (p46/48). This was prepared in February prior to the submission of the most recent report on pension loss by Dr Pollock. There was no dispute in principle that the claimant's losses were capable of flowing from the failure to make reasonable adjustments. The claimant was unable to return to her post without adjustments in place. We accepted Mr Allison's submission that the issue of remedy would need to be considered in the light of the evidence we heard that the claimant had obtained some part time work.

167. In addition, grossing up would apply. Accordingly, we will set out our findings and conclusions. Matters such as grossing could be agreed or matters to be considered by us at a short hearing for those purposes.

168. We did consider whether or not the claimant's ill health retirement pension should be offset as Dr Gibson suggested. We accept that we are bound by the case of **Parry v Clever [1970] A.C.1** which make the receipt of accelerated ill-health retirement payments received pre-the statutory retirement age non-deductable but that a proportion of the lump sum insofar as attributable to the period post-retirement age is deductable **(Longden -v- British Coal Corporation [1998] A.C. 652)** The working out of thee calculations can be addressed at the remedy hearing.

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Injury to feelings

169. We considered carefully the appropriate sum that the claimant should be awarded for injury to feelings in relation to the failure to make reasonable adjustments. We reminded ourselves that this now related to the sole question of this failure. We had to put aside the impact the other difficulties that the claimant experienced at this time particularly in her relationship with Inspector Reid. We took account of the period over which the discriminatory behavior occurred really from the submission of the FWA and the flagging up of the difficulties caused by a return to the Vulcan shift pattern until her early retirement in April 2022. The claimant was upset, distressed and depressed at the loss of her career and the failure to accommodate her condition. We concluded that this was a serious matter but looking at the situation broadly an award at the lower end of the middle scale (which started at £9100) of Twelve Thousand Pounds (£12,000) would be appropriate.

169. We then turned to past and future wage loss. The past wage loss until the date of early retirement to the conclusion of the hearing was a period of 62 weeks £34820.44 (62 x £561.62). The claimant also seeks wage loss during the period she was absent until her ill health retirement. This appears to us to be an appropriate claim. The respondent's solicitor opposed this arguing that in effect the claimant had injured herself. We did not accept this. She would not have tried to work the shift unless she was desperate to try and keep her career

and to demonstrate to the respondent's managers she could not work the Vulcan shift pattern. She would be entitled to £6262.20 for the 20 week period involved. The claimant seeks future wage loss for six months. This amounts to £14602.12 (3561.62 X 26 weeks). The claimant also seeks future loss of wages on the basis that she is unlikely to earn a comparable salary. These figures require calculation and adjustment and we discuss the period of future loss below.

Pension Loss

170. We had to consider the issue of pension loss. To do so we had to consider what would have probably happened if the claimant's work patten or something similar had been successfully adjusted. Dr Gibson' position was that her leg condition militated against a lengthy career and that at some point the condition would become incompatible with the strenuous duties of an AFO. The respondent did not lead any medical evidence on this issue. We accepted the evidence of Mr Hussey that the condition if properly managed could allow the claimant to work into her late 60's. This indeed was her position. This was one aspect of her evidence that we found a little difficult to uncritically accept. We accept that it was possible but given the efforts the claimant had to make to seep fit enough to carry" out the AFO role and to manage her condition we were sceptical that she would continue until normal retirement age. It may have been her position at some point in the past when she was secure in an administrative role that she would work until that point but this was before she had to return to AFO duties and before her husband took early retirement.

171. There were other background factors which militated against the claimant continuing to work at least in Caithness. One that was raised was the fact that Vulcan is due to close at some point in the not too distant future. The evidence on this matter was somewhat speculative but sufficient for us to say that the site is on borrowed time having been expected to close earlier. It seems unlikely to stay open much beyond 2024/2025. The reactor having been shut down some years earlier. It was in this context there was discussion about the claimant being offered a relocation package. No formal policy or guarantee is

in place but it is dear that the hope would be to relocate some staff and some might take redundancy. We accept that £2000 was an appropriate estimate for such a relocation package and a sum to this value in legal fees and relocation expenses would be likely to be paid.

172. We considered whether the claimant would have been likely to move to the central belt and start work at a new station on the closure of the site. We heard no evidence about the opportunities elsewhere or of perhaps a return to administrative work. We also heard that the claimant's children will finish secondary school in 2025. We accepted, looking at the claimant that it was likely at that point that the claimant and her husband would relocate to the central belt to be closer to relatives in the Dumfries area.

172. There is no obvious point at which the claimant would retire either for medical reasons or because of personal circumstances. We took account of various factors. We accepted Mr Hussey's evidence that with proper management the claimant's condition could possibly be managed to retirement age. While we did not accept the submission made by the respondent's solicitor that her condition would inevitably break down to the extent of forcing her retirement. We can see from the evidence that when she tried the full shift she developed a wound which led to her not working until her ill health retirement. There was the ever present danger that if she did too much physically this might recur.

173. We accept that the claimant would probably be physically capable of continuing to work on adjusted hours but given the strenuous nature of the role and the requirement to meet certain levels of fitness our view was that it would take some considerable efforts on her part to continue to do so particularly as she aged. Her children by the time she reached 60 would have left College or University, her husband will have been retired for some years, and she would have accrued 24 years pensionable service and be entitled to a significant pension. We accept that there is an element of speculation in our decision but we concluded that it the claimant would be unlikely to work beyond 60, a period of 7 years after her early retirement on health grounds.

174. We then turned to the likelihood of the claimant obtaining similarly paid work with a pension comparable to the Civil Service pension she was in. The Tribunal is aware that such pension provision is much sought after and increasingly rare except in the public sector. The background to recruitment is that the public sector as with other employers increasingly relies on part time or agency workers and that their financial position is difficult. We do not wholly discount Dr Gibson's suggestion that the claimant is reasonably well placed to move into such work but given that the public sector is not awash with such opportunities the chances of obtaining such work is not high. We will however reduce the loss by 25% to take account of the chances the claimant might have to obtain a similar pension in new employment.

175. The chances of the claimant getting relatively well paid employment at some future date are higher than her chance of obtaining a comparable pension and we put this at 50%. As we noted above the Schedule of Loss requires to be adjusted in the light of these matters and we arrange a remedy hearing for this purpose.

Employment Judge: J M Hendry
Date of Judgment: 22 November 2023
Entered in register: 23 November 2023
and copied to parties