THE INDUSTRIAL TRIBUNALS

CASE REF: 16311/18

CLAIMANT: **John Kevin Edgar**

RESPONDENTS:
1. **Chief Constable of the Police Service of Northern Ireland**
2. **Gerry McGrath**
3. **Kerrie Greer**

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claim is dismissed.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Tiffney**

Members: **Mr A White**
Mr I Carroll

APPEARANCES:

The claimant was self-represented.

The respondent was represented by Ms N Murnaghan, Queens Counsel and by Ms N Fee, Barrister-at-Law, instructed by the Crown Solicitor's Office.

THE CLAIM

1. On 16 October 2018 the claimant presented a claim to the tribunal claiming disability discrimination against the three above named respondents on the ground of the respondents' alleged failure to make reasonable adjustments in relation to his role as a Part-Time Reserve ("PTR") Police Officer.

2. The claimant contended that he is a disabled person as defined in section 1 and schedule 1 of the Disability Discrimination Act 1995 as amended ("the DDA") by virtue of a back condition which is recurring in nature. The claimant further claimed that the first respondent acknowledged this fact from 20 October 2017 when the claimant was assessed by the first respondent's Occupational Health Advisor and that the first respondent had constructive

knowledge that the claimant was a disabled person from 22 August 2017 when the claimant first alerted his line manager of his inability to perform PTR duties due to his back condition.

3. The tribunal clarified with the claimant his reference to victimisation in paragraph 33 of his witness statement. However the claimant stated that this reference did not relate to victimisation in the legal sense but rather was purely a remark relating to his claim of a failure to make reasonable adjustments.

4. On the third day of the hearing the claimant advised the tribunal that he was no longer pursuing this claim against the second and third named respondents. Therefore the claims against the second and third named respondents are dismissed having been withdrawn by the claimant at the hearing and the claim continued against the first respondent (hereinafter referred to as "the respondent").

THE RESPONSE

5. The respondent denied that it failed in its duty to make reasonable adjustments. The respondent asserted that adjustments were made to the claimant's PTR duties which were reasonable in all of the circumstances.

6. Although in its response the respondent disputed that at all material times the claimant's back condition rendered him a disabled person for the purposes of the DDA it subsequently conceded this point and confirmed this to the tribunal at a Case Management Preliminary Hearing (CMPH) on 12 August 2020. Therefore the tribunal did not need to determine this issue in light of the respondent's concession.

7. The respondent raised a time limitation point in its response. Counsel for the respondent confirmed at the outset of the hearing that the respondent was no longer pursuing this point.

8. The respondent accepted that over the entire period of claim the duty to make reasonable adjustments was triggered. However the respondent maintained that it did not possess the requisite statutory knowledge set out in section 4A(3)(b) of the DDA; specifically knowledge of the claimant's disability until 20 October 2017 when the claimant was first assessed by the respondent's Occupational Health Advisor. At this point the respondent accepted that it acquired constructive knowledge of the claimant's disability. Therefore the respondent relied on the statutory exemption in section 4A (3) of the DDA to argue that until 20 October 2017 the respondent was exempted from complying with its duty to make adjustments as it did not possess the requisite statutory knowledge.

REASONABLE ADJUSTMENTS/SPECIAL ARRANGMENTS

9. The claimant informed the tribunal at a CMPH on 12 August 2020 that due to his back condition he may need to change his seated positon and/or take periodic breaks from the hearing to take brief walks. These adjustments were facilitated by the tribunal but were not required by the claimant.

ISSUES

10. There were a number of versions of the list of agreed issues in dispute. Due to changes in the respondent's response to these proceedings outlined above, the issues in dispute were refined significantly by the time of the hearing and were refined further at the submissions hearing. In light of this the parties confirmed to the tribunal at the outset of the hearing (and at the outset of the submissions hearing) that the issues for determination were as follows;

    1. Whether the respondent had the requisite knowledge of the claimant's disability from 22 August 2017 as contended by the claimant or from 20 October 2017 as contended by the respondent?

    2. Whether the respondent complied with its duty to make reasonable adjustments in relation to the claimant in light of the substantial disadvantage the claimant was placed in comparison with persons who are not disabled due to the respondent's application of the identified PCP, in accordance with section 4A of the DDA?

    3. If not, what is the appropriate remedy?

11. The parties agreed that the only provision, criterion and/or practice (hereinafter referred to as the "PCP") was the directive issued by the Deputy Chief Constable (DCC) Harris in circa April 2015 that the duties offered to members of the PTR be confined to three prescribed categories of operational duty with no discretion afforded to the respondent to deviate from these prescribed categories of duty. This PCP, referred to herein as "the Harris directive", is set out in more detail at paragraph 52 below. The respondent sought to introduce an additional PCP in its written submissions but withdrew this at the submissions hearing and lodged revised written submissions to reflect the withdrawal.

12. The claimant relied on a hypothetical comparator identified as being any other non-disabled PTR officer and the respondent accepted this. The respondent accepted that the claimant was placed at a substantial disadvantage by the Harris directive due to his disability. The parties agreed that the Harris directive placed the claimant at a substantial disadvantage in two respects; his ability to meet the statutory minimum of 144 hours duty per annum and his ability to earn money in his PTR role.

13. Consequently it is undisputed that subject only to this discrete knowledge issue, the singular question in relation to liability is whether the respondent complied with its duty to make reasonable adjustments.

14. The parties agreed that the relevant period of time over which this claim relates is the summer of 2017 to the date of submission of the claimant's claim on 16 October 2018. Despite this, both parties referred in their evidence, document references and submissions, to matters that post-date this period. Their relevance was clarified by the parties at the outset of the hearing and further clarified and refined at the submissions hearing. The relevant references related to the respondent's application of its Managing Staff with Disabilities policy to the claimant.

15. The respondent maintained this matter was relevant to its assertion that it did not fail in its duty to make reasonable adjustments and to the claimant's claim for ongoing financial loss.

16. The claimant was clear that he understood that alleged discrimination occurring after the date of claim should be raised via a new claim form. The claimant clarified this matter was not part of his discrimination claim but illustrated the steps that the respondent should have taken during the period of claim to engage with him about his disability, its impact on his ability to perform his PTR role and in order to properly consider reasonable adjustments.

17. Therefore whilst not specified in the agreed list of issues the tribunal was required to make findings of fact in relation to this matter but limited to the parameters identified by the parties.

MODE OF HEARING

18. All of the evidence was heard at an in-person hearing. The submissions hearing was delayed due to the Covid-19 pandemic and associated closure of the tribunal building. In view of on-going pandemic related restrictions the submissions hearing was heard at a hybrid hearing with the panel participating in the tribunal building and the parties and others wishing to attend, participating remotely via WebEx. The arrangements put in place by the Secretariat of the tribunal for this hearing to ensure compliance with the legal requirements for a public hearing were outlined to the parties at the outset of the hearing. Neither party objected to proceeding with this mode of hearing.

GLOSSARY OF TERMS

19. A lot of acronyms and policies were referred to in this case. Below is a glossary of the main acronyms and other abbreviations used in this judgment.

    PTR – Part-Time Reserve

    POPT – Police Officer – Part-Time (This is an alternative title for a PTR officer)

    RPO – Regular Police Officer

    Sgt – Sergeant

Insp – Inspector

CI – Chief Inspector

DC – District Commander

DCC – Deputy Chief Constable

ACC – Assistant Chief Constable

OHW – Occupational Health & Welfare

OHA – Occupational Health Advisor

LPT - Local Policing Team

Mapper – Crime Scene Surveyor

HRSC – Human Resource Service Centre

HR – Human Resources

"The 2004 Regulations" – The Police Service of Northern Ireland Reserve (Part-Time) Regulations 2004

"The Review Document" – Review of the Current and Future Usage of the PSNI Part-Time Reserve (PTR) aka Police Officer Part-Time (POPT)

"The Framework Document" – Policing Professional Framework (PPF)

"The PSNI Reserve document" - "Police Service of Northern Ireland Reserve (Part Time)"

"The Guidance" – Guidance on Managing Staff with Disabilities

"DAP" – Disability Adjustment Panel

NCALT - an online package of training courses provided by the National Centre for Applied Learning Technologies

School of Instruction – bi-monthly classroom based learning for PTR officers

SOURCES OF EVIDENCE

20. The witness statement procedure was used in this case. At the hearing, each witness swore or affirmed to tell the truth, adopted their witness statement as their evidence and moved immediately to cross-examination and where appropriate, brief re-examination. The claimant gave evidence on his own behalf.

21. On behalf of the respondent, the following witnesses gave evidence: - Mr G McGrath – CI with responsibility for Community Engagement in the Policing District of Ards and North Down; Ms K Greer – retired Sgt based in the Operational Planning Office of the respondent's Lisburn Station; Ms L Corbett – CI responsible for South Area and Ms L McCurdy – HR Partner.

22. Also on behalf of the respondent, evidence was given by way of written statement only from the following witnesses:- Ms L M Henry, HR Partner, Staff Office grade; Ms C McCormack, HR Strategic Lead, Grade 7; Mr M Hamilton, ACC.

23. Due to health reasons Ms Henry was unable to attend the hearing to give oral evidence. Ms Henry's evidence related solely to the process applied to review the claimant's annual hours of duty in the year 2017/18. With the agreement of the claimant the respondent arranged for Ms McCurdy, Ms Henry's line manager, to be cross examined on the process outlined in Ms Henry's statement. The tribunal accepted the evidence of Ms Henry only to the extent it was corroborated by the documentation and, the evidence of Ms McCurdy and to the extent necessary to determine the issues in dispute.

24. The claimant informed the tribunal that he was not challenging the evidence of Ms McCormack or ACC Hamilton and therefore would not be cross examining them. Therefore the respondent did not call them and their evidence in their witness statements was accepted by the tribunal.

25. The tribunal was presented with an agreed hearing bundle of 871 pages. The respondent provided an additional letter from its OHW department which by agreement, was included in the hearing bundle. The tribunal had regard only to those documents within the bundle to which it was referred during the hearing by the parties, and/or their representatives and the witnesses.

26. The tribunal also considered the written and oral submissions of the parties. The written submissions are appended to this judgment.

RELEVANT LAW

Relevant legal provisions

27. The DDA deals with discrimination on grounds of disability. The definition of disability and disabled person are set out at Section 1 and Schedule 1 of the DDA. Section 1(1) of the DDA provides;

> *"Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities."*

Section 1(2) of the DDA in so far as is relevant, provides;

"*In this Act… "disabled person" means a person who has a disability."*

Schedule 1 of the DDA contains supplementing clarification of the components of the definition of disability in Section 1. Of relevance to this claim is Paragraph 2 which deals with "long-term effects" and provides (at sub-paragraphs 1 & 2);

> *"(1) The effect of an impairment is a long-term effect if –*
> *(a) it has lasted at least 12 months;*
> *(b) the period for which it lasts is likely to be at least 12 months; or*
> *(c) it is likely to last for the rest of the life of the person affected.*
>
> *(2) Where an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if it is likely to recur."*

Normal day-to-day activities are detailed in Paragraph 4 of Schedule 1 and include mobility and ability to lift, carry or otherwise move everyday objects.

28. The employer's duty to make reasonable adjustments is set out at Section 4A of the DDA and states, insofar as is relevant to these proceedings:
"4A – (1) Where –

> *(a) a provision, criterion or practice applied by or on behalf of an employer, … places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect."*

29. Section 18B (1) of the DDA sets out a number of factors to be taken into account when determining whether an adjustment is reasonable. In so far as is relevant to these proceedings these factors are:

(a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

(b) the extent to which it is practicable for him to take the step;

(c) the financial and other costs which would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of his activities;

(d) the extent of his financial and other resources;

(e) the availability to him of financial or other assistance with respect to taking the step; and

(f) the nature of his activities and the size of his undertaking.

Section 18B (2) provides examples of steps which an employer may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments. Often an employer may be required to take a combination of steps.

30. The requirement for knowledge on the part of the employer is set out in section 4A (3) of the DDA and in so far as is relevant provides;

> "*Nothing in this section imposes any duty on an employer in relation to a disabled person if the employer does not know, and could not reasonably be expected to know -…*
>
> > *(b) in any case, that the person has a disability and is likely to be affected in the way mentioned in subsection (1)."*

31. In terms of the burden of proof, section 17(A)(1) of the DDA states that where a disabled person proves facts from which a tribunal could conclude in the absence of an adequate explanation that the respondent had acted in a way which is unlawful under this Part, the tribunal shall uphold the complaint unless the respondent proves that he did not so act.

Disability Code of Practice

32. The Equality Commission for Northern Ireland Disability Code of Practice Employment and Occupation stipulates that an employer should consult with the disabled person at appropriate stages about what his requirements are. It is also noted within the Code that if there are no reasonable adjustments which would enable the disabled employee to continue in his/her current role, the employer must give consideration as to whether there are suitable alternative jobs to which he or she could be redeployed (**section 8.16 page 143**).

Relevant principles of law

33. The parties referred the tribunal to relevant provisions of the DDA. The claimant referred to the following authorities;

Royal Bank of Scotland v Ashton ICH 632;

McElveen v The Police Service of Northern Ireland 4109/17 and Lamb v The Garrard Academy EAT/00432/18.

The respondent referred to the above mentioned authorities and also to the following;

Goodwin v Patent Office [1999] ICR 302;

Leonard (appellant) v Southern Derbyshire Chamber of Commerce (respondents) [2001] IRLR 19;

J v DL&A Piper UK LLP [2010] ICR 1052;

Environment Agency v Rowan [2008] ICR 218;

Newcastle-upon-Tyne Hospitals NHS Foundation Trust v Bagley UKEAT/0417/11/RN;

Smith v Churchills Stairlifts Plc [2006] ICR 524;

Nottingham City Transport Ltd v Harvey UKEAT/003/12;

Chief Constable of South Yorkshire Police (appellant) v Jelic (respondent) [2010] IRLR 744;

Tarbuck (appellant) v Sainsbury's Supermarkets Ltd (respondents) [2006] IRLR 644;

Hart v Chief Constable of Derbyshire UKEAT/0403/07/ZT;

Chief Constable of Lincolnshire v Weaver UKEAT/0622/07/DM;

Wade v Sheffield Hallam University (2013) UKEAT/0194/12;

Jennings v Barts and the London NHS Trust UKEAT/0056/12/DM;

The Department of Work and Pensions v Miss V Hall UKEAT/0012/05/DA;

Miss H Wilcox v Birmingham Cab Services Limited UKEAT/0293/10/DM;

Donelien (appellant) v Liberata UK Ltd (respondent) [2018] IRLR 353;

Project Management Institute (appellant) v Latif (respondent) [2007] IRLR 579;

Nelson (Stephen William) and Newry and Mourne District Council [2009] NICA 24;

Hextal v Tesco Stores Ltd (Leicester) (case no 190214/2007) (references in Harvey on Industrial Relations and Employment Law HIREL at para [1047]);

Sarwar v West Midlands Fire and Rescue Service (Birmingham) (C No 1304522/06) (referred in Harvey on Industrial Relations and Employment Law at para [1048])***;***

Ms Hilary Melville v Santander UK PLC (Liverpool) (Case No 2403284/2018) (20 December 2019);

McIntyre v Driving Standards Agency Ltd (East London) (Case No 3200462/2010) (referred to in Harvey on Industrial Relations and Employment Law at paras [1052] and [1354]).

34. The claimant also referred to extracts from the Equality Commission for Northern Ireland Disability Code of Practice Employment and Occupation.

35. The tribunal considered all of these, particularly those authorities opened to the tribunal by the parties during the submissions hearing. The tribunal found a number of these cases of particular relevance to this case and they are cited herein.

36. The uniqueness and breadth of the duty to make reasonable adjustments was highlighted in the pivotal case of ***Archibald v Fyfe Council [2004] ICR 954***. In this case Baroness Hale highlighted that the duty requires a degree of "positive action" from employers to alleviate the effects of the PCP and can require the employer to treat a disabled person more favourably than it would treat others with the aim of enabling a disabled person to secure or remain in employment.

37. If the duty arises which is accepted in this case, the tribunal will then determine whether the proposed adjustment is reasonable to prevent the PCP or feature placing the claimant at that substantial disadvantage in comparison with persons who are not disabled. In ***Smith v Churchill Stairlifts PLC [2006] ICR 524***, the Court of Appeal confirmed that the test of reasonableness is an objective one and it is ultimately the Employment Tribunal's view of what is reasonable that matters.

38. *In* ***Royal Bank of Scotland v Ashton [2011] ICR 632***, the Appeal Tribunal stressed that when considering the reasonableness of an adjustment the focus must be on the practical result of the measures that can be taken. Langstaff J stated (**at paragraphs 12 & 13**);

> *"The provisions concerning what reasonable adjustments could be carried out by the employer in s.18B of the DDA show clearly that the steps which are required of an employer are practical steps. They are intended to help the disabled person concerned to overcome the adverse effects of the relevant disabilities, at least to the greatest extent possible, so that he or she may fulfil a useful role as an employee. We accept that … the focus of the provisions as to an adjustment requires a Tribunal to have a view of the potential effect of the adjustment contended for. The approach is an objective one. It follows … that it is irrelevant to the questions whether there has been or whether there could be a reasonable adjustment or not what an employer may or may not have thought in the process of coming to a decision as to whatever adjustments might or might not be made. It does not matter what process the employer may have adopted to reach that conclusion. What does matter is the practical effect of the measures concerned". (*Tribunal's emphasis*)*

39. The practicability of a proposed step is closely connected to the effectiveness of the step. The easier it is for an employer to take a step and/or the more effective the step in ameliorating the substantial disadvantage, the more likely it will be considered to be a reasonable step.

40. The size and nature of the employer and its financial and other resources and the extent to which any proposed adjustment may disrupt its activities are closely interconnected factors. Constraints on public financing can be relevant to the assessment of reasonableness as well as the needs of the users of the public service provided. In ***Chief Constable of Lincolnshire Police v Weaver EAT 0622/07*** the EAT held the tribunal was wrong to only consider the proposed adjustment from the employee's perspective. It found that it should have examined all the circumstances, including the wider operational objectives of the police force when measuring the reasonableness of the adjustments sought.

41. In ***Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664***, Elias J stated:-

> *"It will always be good practice for the employer to consult and it will potentially jeopardise the employer's legal position if he does not do so- because the employer cannot use the lack of knowledge that would have resulted from consultation as a shield to defend a complaint that he had not made reasonable adjustments – there is no separate and distinct duty of this kind."*

42. In the ***Tarbuck*** case the EAT determined that it was not a reasonable adjustment for the employer to create a post which was not otherwise necessary, simply to create a job for a disabled person.

43. With regards to the issue of knowledge, ***Wilcox v Birmingham CAB Services Ltd [2010] UKEAT/0293,*** Underhill J expressed the view that an employer will not be liable for a failure to make reasonable adjustments unless it has actual or constructive knowledge <u>of both</u> (1) that the employee is disabled; and (2) that he/she is disadvantaged by the disability in the way set out in section 4A (1) of the DDA. The EAT also held that the question of knowledge is a question of fact for the tribunal to determine.

44. The employer should take reasonable steps to acquire knowledge of an employee's disability and the Court of Appeal in ***<u>Gallop v Newport City Council [2013] EWCA Civ 1583</u>*** made it clear that the required knowledge is of the facts of the employee's disability. The employer does not need to know that as a matter of law, those facts meet the legal definition of disability as defined in the DDA.

45. The burden of proof in relation to the duty to make reasonable adjustments was considered in the case of ***<u>Project Management Institute v Latif [2007] IRLR 579</u>*** in which Elias concluded (at paragraphs 54 & 55) that:-

"*the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably have been inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty but it provides no basis from which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made.*

We do not suggest that in every case the claimant would have to provide the detailed adjustment that would need to be made before the burden would shift. It would, however, be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not."

RELEVANT FINDINGS OF FACT

46. Based on the sources of evidence outlined at paragraphs 20-26 above, the tribunal found the relevant facts proven on the balance of probabilities. This judgment records only those findings of fact necessary for determination of the issues and does not record the competing evidence unless there was a dispute. Save as where indicated, the facts set out herein were not in dispute.

47. The claimant is engaged by the respondent as a PTR Police Officer based in a specified District and LPT and has carried out this role since 1 March 1990. The claimant is also employed by the respondent as a full time civilian police staff member in the role of a Mapper, in its Mapping Section. The latter is a 9-5, Monday-Friday role with an on call requirement. By implication the claimant's availability to perform PTR duty was primarily confined to evenings and at weekends.

<u>The PTR Role</u>

48. The role of a PTR is a statutory role currently governed by the 2004 Regulations. These regulations encompass the appointment, training and terms and conditions of service of PTR officers. In common with other Police Officers, members of the PTR do not have contracts of employment, they are office holders. In contrast civilian police staff are employees, employed by the respondent under contracts of employment.

49. The objective behind the creation of the PTR was to have a body of officers available to support and contribute to the security function of the respondent. Their duties require them to support RPOs on patrol duties. By implication their role is a demand led, public facing, active role. Indicative of their support function is the fact that they are detailed for duty alongside and under the supervision of a RPO.

50. There are significant statutory and operational differences between the PTR cohort and other types of Police Officer, notably RPOs which is the main type

of Police Officer and the category of relevance to this claim. Key distinctions between the two cohorts are as follows:

- The working arrangement of a PTR officer is "open ended and casual". They are engaged on an as and when required basis, whereas RPOs serve on the basis of a shift system and unlike PTRs, enjoy overtime, sickness pay and a defined system of graduated promotion.

- The duties of a PTR officer are limited in nature to the security function and the scope of their role is limited to support of RPOs in that function. The duties and responsibilities of a RPO are much broader in nature and scope.

- The training of PTR officers reflects their function. Because that function is narrow in scope, their training regime is likewise focused and limited. Consequently PTRs do not possess the range of skills or abilities of RPOs, whose training is much more extensive in scope and length.

- The degree of control exercised by the respondent over PTR officers e.g. in relation to their private lives and outside business interests, is more limited in scope than that exercised over RPOs.

- PTRs do not have the same broad geographical mobility commitments to the respondent and tend to serve within close proximity to their home address.

The Harris Directive (The PCP)

51. Following settlement of litigation taken by a group of PTR officers the respondent carried out a review of its utilisation of this cohort. The review highlighted anomalies in how some of the respondent's DC's were utilising members of the PTR. A primary concern was the practice of deploying PTR officers to duties which fell outside the remit of their statutory role and the duties they were trained to carry out.

52. The review took place when budgetary pressures and constraints on the respondent's service were significant and led the respondent to revise the parameters of deployment of PTR officers to ensure their deployment was consistent with their supportive function of RPOs in patrol duties, to improve alignment of resources to demand and to protect the Chief Constable from further litigation. In order to meet this objective, DCC Harris issued a directive to the respondent's DC's, by email on 9 March 2015. This directive is the PCP relied on in this case. At this time PTR officers were referred to as POPT. The key extract from this email is set out herein as it details the core aspects of the PCP (mentioned in paragraph 11 above):

> *"It is necessary to clarify the roles which POPT colleagues will be asked to undertake. The duties which they will be detailed to undertake*

will be:-

- *In support of surge activity and the management of major incidents.*

- *Duty at parades and public events which require a policing input*

- *In support of policing the night time economy (for example late evening and early morning duty on Friday, Saturday and Sunday evenings)."*

The email goes on to direct that;

> *"Going forward the duties of a POPT **will be** confined to those roles which I have outlined above (highlighted for clarity). In order to protect the Chief Constable from further litigation there can be **no** discretion in regard to this."*

53. Following this, Carmel McCormick, Grade 7 HR Strategic Lead, undertook a full review of the PTR role, including their usage and terms and conditions, consulting with the Department of Justice regarding the intent and meaning of the 2004 Regulations. Following this the Review document was created by Ms McCormick in which she endorsed the restriction of PTR duties to the three core areas of duty outlined in the directive of DCC Harris and often referred to as "Surge, Events and Nightlife". In order to perform duty a PTR officer must be armed and wearing a gun belt and full protective body armour (HOBA). A PTR role profile was developed to reflect this and formed part of a new Framework document (PPF) which alongside the PSNI Reserve document outlined the roles, responsibilities, rights and governance of PTR officers.

The duties of the PTR

54. Aside from training and court attendance, PTR duties are only offered in the three core areas of duty prescribed in the Harris Directive, in response to operational demand. Duty for PTR officers is identified and offered by the respondent's Operational Planning division and each duty is commenced by a briefing given by a Section Sergeant. Operational Planning contact PTR officers to offer duty. A PTR officer is at liberty to accept or refuse any duty offered subject only to their statutory obligation (Regulation 16 of the 2004 Regulations) to complete a minimum of 144 hours of duty per annum. Generally meeting this quota translates to working PTR duty at the rate of 12 hours per month but this pattern can vary in response to fluctuations in operational demand which can be impacted by many factors, e.g. planned events, surge activity and peaks in the night time economy. PTR officers declare their personal availability to perform duty and are paid for each duty performed. Like the claimant, many PTR officers have full-time roles and tend only to be available at weekends and evenings.

55. Whilst the claimant insisted that it was up to the employer to identify alternative duties or roles, in cross examination he said that there were other suitable roles/duties that he had historically performed that fell outside of the Harris Directive. The claimant accepted that he did perform duty in these roles after the introduction of the Harris Directive. The claimant specifically referred to performing duty in the Station Duty Officer (SDO) role, now referred to as the Station Enquiry Assistant. Whilst it was the respondent's case that this was not a PTR duty, the tribunal finds it more likely than not that the claimant did carry out duty in this role before the Harris Directive. This is because one of the core reasons behind the PCP was to eradicate such practices and CI Corbett accepted on cross-examination that the claimant may have historically performed this role. Strict adherence to the Harris Directive meant that this duty and other duties or roles that PTR officers may have historically performed were no longer available from March 2015 as they were exclusively performed by either RPOs, civilian police staff or had been outsourced to outside agencies. The SDO role was civilianised and contracted out to an agency in March 2018 with ad hoc cover provided by RPO's on rare occasions when the agency cannot cover this duty.

56. There was a dispute between the parties as to whether RPO's had been assigned SDO duties by way of an adjustment to their duties post-March 2018. The claimant asserted that they had and that he could have carried out this role with minimal training. The respondent did not accept this; nor did the tribunal. This is because no evidence was presented by the claimant to support this assertion and it contradicts the evidence of CI Corbett that a RPO would only be placed in a civilian role on a very ad hoc basis.

57. Additionally, in order to perform other roles which fell outside the remit of the Harris Directive, a PTR officer would require training. This posed difficulties for the respondent due to limitations and pressures on its training budget and/or accessibility issues with regards to trainers and courses. Some of the roles were usually performed on week days, which therefore limited the scope to offer duty to PTR officers. CI Corbett gave a number of examples in her witness statement, of roles which pre-March 2015 PTRs may have been deployed for light duties, to verify these points and gave further evidence in response to questions by the tribunal. Some of the roles required training in NICHE (an electronic record keeping system operated with the respondent). PTR officers do not use NICHE to perform their operational duties and are not fully trained in NICHE. NICHE training is not provided on a rolling basis or on an individual basis and is given to RPOs during their foundation training at the Garnerville training college. NICHE training would only be provided outside of this context if there was a real organisational need. No evidence was presented to the tribunal to be able to draw a definitive conclusion on the precise cost or amount of training required for each example provided by CI Corbett but the respondent's contentions regarding limitations on access to training and associated budgetary constraints were not challenged by the claimant and are accepted by the tribunal.

Annual review of PTR duty hours

58. The PSNI Reserve document sets out a procedure for reviewing the annual hours of duty worked by PTR officers in the financial year which runs from 1 April to 31 March. The rationale behind the review of duty hours is to ensure that in light of diminishing resources, the availability of PTRs for duty is adequate to supplement RPOs at times of peak demand for their security function.

59. The annual review is carried out by the respondent's HRSC. The process expressly provides for a number of exemptions from the requirement to meet the 144 statutory minimum threshold, one of which is that the PTR officer is disabled and thus the DDA is applicable. If, following HRSC review, none of the prescribed exemptions are applicable, then a standardised letter from the DC (via HRSC), is issued to the PTR officer, inviting an explanation of why they have failed to meet the requisite level of hours. The response is considered by the DC and an appeal panel. If the appeal is not upheld a process, is outlined which could ultimately lead to the termination of the PTR's appointment.

Guidance on Managing Staff with Disabilities

60. The respondent's Guidance outlines the actions the respondent is required to take to comply with its statutory duty to make reasonable adjustments. The policy expressly applies to all police officers and police staff and outlines the relevant factors to consider when determining whether adjustments are reasonable and the process for managing staff with a disability. In doing so the line manager may seek input from a range of sources which may include the individual, the individual's GP, Occupational Health & Welfare (OHW), Health and Safety Personnel and HR Managers.

61. With regards to adjustments, if they are deemed to be long term (more than 12 weeks) the Guidance prescribes a search for suitable alternative roles, if it is not possible to adjust the individual's own role. It envisages that the search will initially be local but if this is not possible;

> "*the area/district or department, will refer the case to the HR strategic Lead who will in conjunction with Appointments and Posting ensure a service wide trawl, to identify a suitable post, is undertaken*."

62. During cross examination counsel for the respondent invited the claimant to accept that a service wide search was more applicable to RPOs and civilian police staff as there was greater scope to redeploy staff from these groups. The claimant did not accept this; nor does the tribunal, as no such distinction is made within the Guidance. However the claimant accepted that the respondent had much greater scope to redeploy a RPO to an office based post than a PTR. The tribunal finds that this was the case given the key distinctions between the two cohorts set out at paragraph 50.

63. Thereafter, the identified adjustment is implemented or the matter is referred to a central DDA panel (also referred to as the DAP). This panel comprises of a number of prescribed individuals from key areas such as OHW, Health and Safety, Legal, HR and Resourcing. The panel considers what reasonable adjustments can be made, or, if no reasonable adjustments can be made, consider approving termination of the appointment or employment of the individual.

64. This guidance document was not applied by the respondent to the claimant over the period of claim.

Events over the Period of Claim Relevant to the Issues in Dispute

65. On 22 August 2017 the claimant emailed his Line Manager, Sgt Blackmore to inform him of the current severity of his back injury and related ongoing medical issues. This was the first occasion that the claimant informed the respondent that his back condition rendered him unable to carry out PTR duty. The claimant relies on this email as imparting sufficient information to respondent so that it had constructive knowledge of his disability. Therefore the full text of the email is set out below;

> *"Darren*
>
> *I have a prolapsed disc in my lower spine and for the last year, have been having bother with it. For the past 5 or 6 weeks this pain has increased to the point where I can barely walk. I have had an MRI and a Consultant Orthopaedic Surgeon has referred me to the NHS Pain Clinic for spine injections which I am told alleviates almost all pain. I have no idea how long this appointment may take.*
>
> *At present I am on light duties in Mapping Section but I know that I would not be permitted to do POPT duty or training. Because of the way our hours are scrutinised, I am hoping that you can give me a referral to OHW so that our own authorities can concur with my inability to perform duty until I receive treatment.*
>
> *For the record, if there were any duties or hours that I could work that I could physically do, then I would be more than happy to do this as it will help me make my minimum annual hours. …"*

Within the body of the email, the claimant reported that he suffered from a physical ailment which substantially interfered with his ability to carry out day to day activities. However the tribunal finds that insufficient information is imparted about the longevity or likely longevity of the substantial interference. The claimant noted he had "*bother*" with his back "*for the last year*" but tempered this observation with the remark that "*for the past 5 or 6 weeks*" his mobility has been seriously impaired.

66. The claimant emailed Sgt Blackmore on 11 September 2017 to follow up on the OHW referral. Whilst noting that his levels of pain were such that "*normal*

duty is impossible" the claimant repeated his offer to "*perform any other "light" duty while this condition persists*". The claimant asked to come in to perform classroom based training and reiterated that his motivation for raising these matters was, "*to try and protect myself against action taken at the end of the financial year if I don't get to 144 hours."*

67. Sgt Blackmore replied on 12 September 2017 endorsing the claimant's attendance at classroom based training to keep up his hours and undertook to expedite the recent referral. Over the period of claim, the claimant was offered mandatory training and Schools of Instruction by the respondent. This was despite the claimant being unfit to carry out any PTR operational duties with no indication when he would resume fitness. The claimant performed this duty subject to his availability and fitness to do so.

68. On 12 September 2017, the claimant had to be taken home from work in his Mapping role after his back went into spasm and took the rest of the week off work. The claimant accepted that his request for other light duties in his PTR role was not an immediate request given that he was not fit for the duties of his civilian role.

69. Following receipt of a spinal cord injection on 4 October 2017, the claimant took two weeks off work from his Mapping role and was not in a position to carry out any work in his PTR role over this period. Approximately three to four weeks after the injection the claimant's pain and symptoms increased.

70. On 20 October 2017 the claimant attended OHW and was assessed by Ms B Irwin, OHA. Arising out of this review the claimant was placed on restricted duties (referred to by the parties as duty adjustments). Ms Irwin determined that the claimant could not wear HOBA or a gun belt and could not arrest and restrain. These are core aspects of PTR duty, (see paragraph 53). Therefore the respondent could not safely deploy the claimant for active PTR duty in any of the three core areas falling within the Harris directive, or in any public facing policing role. The duty adjustments remained in place over the period of claim and were still in place as at the date of hearing.

71. The claimant fully accepted and the tribunal so finds that at all material times the duty adjustments were appropriate and that due to these restrictions, at no point over the period of claim was he fit to perform any operational duties or any public facing role. By implication the claimant was only fit for office based duties/roles.

72. B Irwin updated Sgt Blackmore on 20.10.2017 and reported that as the claimant was under specialist investigation and treatment for an ongoing back condition, a period of adjustments was required. On the same date OHW updated the claimant's SAP record. This is an electronic record of personal data about a staff member which provides a digital interface through which line management can communicate with OHW. Each staff member can see their personal SAP record and so can their immediate line management. Other staff have different levels of access to the SAP records of an individual depending on their role and their relationship to the staff member concerned.

The tribunal were referred to two SAP screenshots with the sub-heading "*Duty Adjustments*" and a beginning date of 20.10.17. On both SAP records "*Yes*" is entered beside respective references to "*DDA*" and "*DDA is likely to apply*". There was a dispute between the parties as to when those entries were made by OHW and what they meant. The tribunal finds that both entries clearly meant it was the view of Ms Irwin that DDA was likely to apply. The fact the respondent accepts that it had constructive knowledge of the claimant's disability from 20.10.17 supports this conclusion.

73. The claimant was reviewed by OHW at approximately 3 month intervals thereafter, on 3 January 2018, 22 March 2018 and 5 June 2018. On each occasion, the duty restrictions were reviewed and deemed to be appropriate but subject to review after 3 months. The tribunal finds these reviews to be timely and appropriate. Over this period Sgt Blackmore kept himself regularly updated on the claimant's condition and associated duty restrictions via direct communications with OHW. The claimant was due to be reviewed by OHW in October 2018, but this review did not take place as the claimant went on sick leave in his Mapping role on 11 October 2018.

74. The claimant attended the Police Treatment Centre and received physiotherapy treatment from 22 January to 2 February 2018.

75. On 13 March 2018 the claimant received another nerve root injection.

76. On 12 March 2018 the claimant emailed Sgt Blackmore's line manager, Insp Francey acknowledging that he would be able to come in for duty to complete NCALT courses and trawl his emails. In his reply to this email Insp Francey indicated to the claimant that he would ask Operational Planning to balance the requirement for fully operational officers against allowing the claimant to come in for duty to carry out these administrative tasks.

77. There followed a series of emails between Insp Francey, the claimant, Sgt Greer and others about the claimant's request. Part of Sgt Greer's role was to allocate duty to PTR officers or supervise this allocation. The pertinent part of Sgt Greer's reply to Inspector Francey's email reads:

> *"Kevin will not be getting hours for Admin. He can however attend the Schools of Instruction and Mandatory Training if he is fit enough…".*

78. The claimant took issue with this response from Sgt Greer. However the tribunal could find no rational basis to justify the claimant's dissatisfaction with this response. Aside from offering the claimant training duty, Sgt Greer could only offer the claimant operational duties within the three prescribed categories of the Harris directive. She had no scope to derogate from this. The claimant was not fit to perform these duties and openly conceded this in his communications with the respondent when mooting the possibility of being offered "light" or "admin" duty. No such duties existed and Sgt Greer's response simply reflected this fact.

79. The “admin” comment by Sgt Greer referred to the admin duties the claimant had in mind. These were completion of refresher NCALT courses and reading emails. The claimant conceded that detailing him to perform these tasks as PTR duty would be an adjustment. The following agreed facts are relevant to the question of the reasonableness of this proposed adjustment;

i. Checking emails or completing NCALT training are administrative tasks performed by PTR officers as an adjunct to operational duties.

ii. A PTR officer has a personal responsibility to keep up to date with NCALT training and doing so would not exceed a few hours per annum.

iii. Unlike mandatory training (i.e. weapon training, personal safety and First Aid) it is not necessary for a PTR officer to be up to date with NCALT training to be able to perform operational duty.

iv. The vast majority of emails received by the claimant in his PTR role were time sensitive and have no relevance to him personally or professionally, especially as he was not performing operational duty. There would also be a degree of overlap with emails he would receive in his civilian role.

v. Whilst not on active duty emails of significance to the claimant would pertain to security issues or training deficits. As the claimant continued to be offered and availed of mandatory training and Schools of Instruction, the latter was not a significant issue and the former related to more generic security issues.

vi. If the claimant’s personal security was placed at risk, the claimant would be personally advised of that.

vii. There was nothing to prevent the claimant coming into work to review his emails in his own time if he felt there was an imperative to check his email for generic security matters that may have been relevant to him.

80. On 22 March 2018 the claimant emailed Insp Francey to update him on his condition, noting that ultimately surgery may be required and reiterated his willingness to carry out other types of duty not restricted by OHW.

81. On 5 May 2018 the claimant received a letter from Superintendent Kee dated 25 April 2018. The purpose of the letter was to ascertain why the claimant’s hours of duty in the financial year 2017/18 fell short of the statutory minimum. In reply the claimant pointed out that DDA was applicable. In a letter of reply on 25 July 2018 Superintendent Kee informed the claimant that he was satisfied that the claimant’s failure to complete the requisite hours of duty was outside of his control. The claimant accepted and the tribunal finds that acceptance of the mitigation was a reasonable adjustment. As at the date of hearing, the claimant has not received a similar letter at the close of each proceeding financial year, despite not being able to meet the statutory minimum in each preceding year.

82. The claimant was aggrieved that he received a letter questioning his hours. The tribunal finds that the claimant was entitled to feel aggrieved as the procedure outlined in Appendix C of the PSNI Reserve document clearly states that before deciding whether to send a letter of this nature, HR should ascertain if DDA applicable. The clear references in the claimant's SAP record to the applicability of the DDA should have alerted Ms Henry to this fact (paragraph 72). The claimant should have been exempted from the review process at this point. The respondent accepted at the submissions hearing that this letter was sent to the claimant in error. The claimant accepted that this procedural error did not amount to a reasonable adjustment failure and the tribunal agrees. The error did not affect the outcome of the review.

83. On 22 May 2018 the claimant spoke to CI McGrath by telephone regarding his repeated requests to be allowed to perform duty. CI McGrath reiterated that the claimant could only be offered duties which fell within the specified categories in DCC Harris' directive and confirmed that he was not in a position to offer the claimant any additional hours on top of his scheduled training hours which could be performed whilst the duty restrictions were in place. CI McGrath confirmed this in writing, by email on 5 June 2018.

84. On 5 June 2018, following review of the claimant, OHW noted that the claimant continued to experience troublesome symptoms and had a number of specialist appointments over the coming weeks with a view to possible surgery.

85. Following one such appointment, the claimant updated B Irwin OHA, by email on 30 June 2018 to report that his symptoms and pain had increased to the point where his difficulty in day-to-day living was escalating and he had to rely increasingly on assistance from family and friends for the simplest of tasks. The claimant informed B Irwin that surgery was a possibility as his condition was slowly regressing. The claimant noted; "*shooting sciatica pain is beginning to return and I am afraid that I might end up unable to work either job at all*".

86. The claimant sought confirmation from B Irwin that he was officially recognised under the DDA in order that his case could go to panel. It is uncontested that the claimant is referring to the DAP held under the respondent's Guidance policy. This is the first mention of this policy and its potential application to the claimant in any of the contemporaneous documents opened to the tribunal.

87. The claimant updated CI McGrath by email on the same date and reiterated his willingness to consider *"any role or duty that complies with my OHW restrictions".* In reply, on 12 July 2018, CI McGrath reiterated that whilst the claimant should continue to complete mandatory training there were no other duties to offer to him.

88. CI McGrath acknowledged in cross examination that he was aware of the respondent's Guidance and that in or around the time of this communication

he was aware of the likely applicability of the DDA to the claimant's case and the need to consider reasonable adjustments. CI McGrath also accepted that the respondent did not apply the Guidance to the claimant in a timely fashion. The tribunal wholeheartedly agrees. Given the indication by OHW of the likely applicability of the DDA in October 2017 and the provisions of the respondent's guidance, particularly the trigger point for consideration of alternative roles (paragraph 61) the tribunal finds that the respondent should have applied the guidance in January 2018 when the duration of the claimant's duty adjustments moved to long-term. The respondent's failure to do so, even after the claimant's express request (paragraph 86) is inexcusable.

89. The Harris directive and the duty restrictions imposed on the claimant made the scope for reasonable adjustments within the PTR role very narrow. Notwithstanding this, CI McGrath's evidence was that around this time he considered whether any alternative duties could be offered to the claimant including whether the administrative duties connected to the PTR role could justify offering the claimant administrative duty. CI McGrath asserted that he discussed this with Sgt's Greer and Blackmore on a number of occasions. The claimant disputed this and the respondent provided no documentary corroboration. On balance the tribunal finds that CI McGrath did consider alternative duties at this juncture. The tribunal found CI McGrath to be a very credible witness who openly acknowledged the dilatory application of the respondent's Guidance and his personal appreciation of the potential application of the DDA to the claimant's case at this time. Whilst it is contrary to good practice to not record these considerations, it was consistent with the respondent's informal approach to this matter at this time. Also the evidence of Sgt Greer supported CI McGrath's account. However the strict and restrictive nature of the Harris directive and the extensive duty restrictions imposed on the claimant are such that the tribunal is unclear what alternative duties could be considered and is satisfied that any such consideration was by implication fleeting in nature. Additionally the tribunal finds that the severity of the claimant's symptoms and the claimant's associated expressed concerns about his ability to work in either role made it very unlikely that the claimant would have been able to perform alternative duties for any sustained period had any been identified.

90. On 18 September 2018 following a medical specialist appointment, discectomy surgery was identified as appropriate treatment for the claimant's back condition. At this point, by the claimant's own account, his condition was degenerating on a daily basis and he was concerned that soon he would not be able to work in either his full-time or part-time roles.

91. On 27 September 2018 the claimant lodged a grievance. The crux of the claimant's grievance was that despite repeated requests, he had not been permitted to perform alternative duties or roles in keeping with OHW duty restrictions and this amounted to a repeated failure to make reasonable adjustments. Aside from "light" duties the claimant did not identify any alternative duties or roles over the period of claim, nor did the respondent.

92. The grievance contains the first reference by the claimant, in correspondence opened to the tribunal, to the negative effect that his inability to perform operational PTR duty was having on his earnings potential. Despite the claimant contending in his witness statement that the aim behind his requests for light duty was twofold; to protect his appointment and to improve his earnings, the contemporaneous correspondence and severity of the claimant's symptoms do not support this. The requests were clearly made with the statutory minimum hour's requirement in mind; a fact the claimant accepted on cross examination. Given the ultimate consequence of not meeting the requirement is termination of appointment, this is not surprising.

93. The claimant went on sick leave in his full-time Mapping role on 11 October 2018 due to the planned back surgery.

Relevant Events that Postdate the Period of Claim

94. The claimant accepted that his grievance could not be progressed over the period October 2018 to March 2019. During this period the claimant underwent two back surgeries and was not fit for any PTR duties.

The DAP Process

95. Three DAP hearings have taken place regarding the claimant. The first DAP took place on 12 March 2020 and was attended by the claimant. Prior to the DAP and as part of the process for identifying and considering any alternative duties or roles, an "Assessment for Reasonable Adjustment" form was completed jointly by the claimant and his line manager, Sgt Blackmore. One suggestion was put forward namely that the claimant retain his current PTR role but be assigned the alternative duty of Station Diary Car Appointments (SDCA).

96. There was a dispute as to whether the suggestion put forward was that the claimant perform the full duties of the SDCA or an aspect of the role. The respondent maintained it was the former whereas the claimant maintained that he and Sgt Blackmore had only suggested he perform part of the role; namely that he update the Duty Sgt with regards to appointments and type up associated statements. The tribunal finds that the suggestion was that the claimant perform the full role. This is because the form completed by Sgt Blackmore and the claimant clearly stated the limited aspect identified by the claimant could be performed as an interim step "*until the officer was trained in niche*". The clear implication being that after this training the claimant would perform the full duties of the role.

97. The suitability of the SDCA role was considered at the DAP. However it was rejected on two core grounds. The first was that it was not deemed to be a suitable PTR role due to the fact that the SDCA role was carried out by a RPO who is fully trained in NICHE and is required to take investigations from start to finish. The claimant accepted that he was not qualified to do this and there were accessibility and costs issues associated with the requisite NICHE training (paragraph 57). It was the respondent's unchallenged position that to

be fully trained in carrying out investigations and fully compliant in NICHE, the claimant would have to undergo the same training provided to a RPO in Garnerville and that this would be prohibitively expensive. The second ground for rejection was that offering duty to perform this role would fall outside of the Harris Directive.

98. At the two subsequent DAPs other adjustments were considered with a view to allowing the claimant to carry out some operational PTR duty but were ruled out due to OHW maintaining the original duty adjustments. Apart from the SDCA role, the scope of which the claimant misunderstood and the SDO role, the claimant with the benefit of hindsight was unable to identify any specific suitable alternative role or duty that he could perform. Some two to three years on, following a respondent's adherence to its Guidance and associated engagement with the claimant, no suitable alternative duties or roles have been identified.

CONTENTIONS OF THE PARTIES

99. The claimant sought alternative duties as a reasonable adjustment. No alternative duties were offered to the claimant by the respondent. The claimant contends that this amounts to a failure to make reasonable adjustments. The claimant also contends that the respondent failed in its duty to make reasonable adjustments by failing to apply its Guidance over the period of claim and by failing to engage with him about his disability and its impact on his ability to work as a PTR officer. The claimant asserted that had the respondent done so, it may have identified alternative duties.

100. The respondent denied that it failed in its duty to make reasonable adjustments maintaining that all reasonable adjustments that could be made were made. The respondent asserted that offering the claimant alternative duties was not reasonable in all of the relevant circumstances. The respondent accepts that it did not apply its Guidance over the period of claim but contends this omission was not a breach of its duty to make reasonable adjustments. The respondent argued the claimant's focus on process and alleged procedural failings is wholly misconceived. As no further reasonable adjustment, including an alternative role, was identified following the respondent's application of its policy to the claimant, the respondent argued that by no reasonable consideration could the tribunal conclude that other reasonable adjustments could have been identified/made had this policy been applied over the period of claim.

DECISION

101. The tribunal applied the relevant law to the facts found in order to reach the following conclusions.

<u>Knowledge</u>

102. The issue of knowledge is a limited question is this case. The only dispute regarding knowledge is when the respondent acquired constructive

knowledge of the claimant's disability. The respondent made no argument that it was not aware or could not reasonably have been aware of the impact of the Harris directive on the claimant due to his disability. In any event the tribunal concludes that the significant disadvantage caused to the claimant was patently obvious to the respondent due to the nature of the PTR duties and the fact the claimant was unable to perform any operational duty due to his back condition. The two substantial disadvantages naturally flowed from this situation and were self-evident.

103. The respondent accepted and the tribunal so finds that at all material times the claimant's back condition was a disability, rendering him a disabled person for the purposes of the DDA. The respondent also accepted that from 20 October 2017 the respondent had constructive knowledge of the claimant's disability. The claimant asserted that constructive knowledge was acquired on 22 August 2017 by virtue of the information he imparted to Sgt Blackmore in his email (set out in paragraph 65).

104. Bearing in mind the statutory definition of disability and applying the guidance of the Court of Appeal in ***Gallop*** to the information contained in the claimant's email of 22 August 2017, the tribunal considers that the respondent could not reasonably have known the adverse effect of the claimant's back condition was long-term or was likely to last 12 months (paragraph 65). Therefore the tribunal concludes that the email did not impart sufficient information so that the respondent had actual or constructive knowledge of the claimant's disability.

105. Whilst the adverse effects of the claimant's disability persisted thereafter, the tribunal concludes that it was not until the respondent was in receipt of OHW's assessment on 20 October 2017 that it acquired constructive knowledge of the claimant's disability and could no longer rely on the knowledge exemption to dis-apply its statutory duty to make reasonable adjustments.

106. Even if the tribunal is wrong, given the reported severity of the claimant's condition and the physical nature of PTR duties, the tribunal queries what reasonable adjustments could or should have been implemented by the respondent pending further investigation and advice from OHW or indeed could have been made given the claimant's admission that his request for other duty at that point was not an immediate request given the severity of his symptoms (paragraph 68).

<u>Whether the respondent complied with its duty to make reasonable adjustments?</u>

107. The remaining question is whether reasonable adjustments were made. Linked to this question is whether the claimant has proven facts from which it could be inferred, absent an explanation that the duty has been breached.

108. In accordance with ***Latif***, it is for the claimant to identify in broad terms the nature of the adjustment that would ameliorate the substantial disadvantage in order that the respondent can properly engage with the question as to whether the adjustment is reasonable. At the very latest this should be done

by the time of the tribunal hearing, otherwise the claimant has not presented facts from which the tribunal could reasonably infer that, absent an explanation by the employer, the duty has been breached.

109. Over the period of claim the claimant sought alternative duties or an alternative role. Whilst the claimant did not identify any specific alternative duty or role, on the facts the claimant specifically suggested "*light*" administrative duties. This was the height of what he suggested.

110. At the hearing, the claimant referred to the SDO duty he had historically performed and to a specific element of the SDCA role involving the taking of statements from members of the public in the police station by appointment (paragraphs 55, 95 & 96).

111. The respondent's Guidance expressly envisages a search for alternative roles if adjustments to an existing role are ruled out (paragraph 61). Furthermore Insp Francey's initial reply to the claimant's request for admin duty (paragraph 76) and CI McGrath's consideration of the viability of this option (paragraph 89) are facts from which the tribunal concludes that light duty was on the face of it an apparently reasonable adjustment. Therefore the tribunal concludes that this suggestion alone was sufficient to shift the burden of proof to the respondent.

112. The tribunal also finds that the specific suggestions made by the claimant at the hearing were also on the face of it, apparently reasonable and sufficient to shift the burden of proof. One suggestion was a duty previously performed by the claimant and the other formed part of an alternative role suggested to a DAP panel by the claimant's line manager which the DAP panel went on to consider.

113. The tribunal was conscious that the test of reasonableness is an objective multifactorial test. The tribunal gave due consideration to the factors set out in section 18B of the DDA and has referred to factors listed therein which the tribunal considers of particular relevance to the adjustments (either made or sought) and the relevant circumstances peculiar to this case which provide the context within which the question of reasonableness must be considered.

114. The tribunal was also conscious of the claimant's contentions as to why the respondent failed to comply with its duty (paragraph 99).

115. The tribunal finds that the respondent took a number of steps that complied with its duty to make reasonable adjustments as follows;

    i. Absolving the claimant from the requirement to complete 144 hours duty per annum. This eliminated the substantial disadvantage caused by the Harris directive of primary concern to the claimant over the period of claim (paragraph 92). It was the most important disadvantage given the ultimate consequence of a failure to meet the statutory minimum hours threshold is termination of appointment (paragraph 59).

ii. Permitting the claimant to carry out as much training duty (mandatory and Schools of Instruction) as possible (paragraphs 67, 83 & 87). This had the effect of mitigating the claimant's loss of earnings as much as possible given the duty restrictions in place.

iii. Securing timely support and advice from OHW on a regular basis and following that advice ensured that claimant could perform his role to the fullest extent possible in light of his disability and its impact on him (paragraph 73). The tribunal considers these actions to be consistent with and contributed to the respondent's fulfilment of its duty to make reasonable adjustments.

116. The tribunal considers these to be reasonable steps which had the practical effect of allowing the claimant to remain in his role and perform as much duty as possible.

117. The remaining question therefore is whether the fact that the claimant was not offered alternative duties or an alternative role by the respondent over the period of claim amounted to a failure in its duty to make reasonable adjustments.

118. Throughout the period of claim the claimant repeatedly sought to be offered other duties described on occasion as "light" or "administrative" duties (paragraphs 66, 76, 80 & 87). However it is not disputed that no such duty existed for PTR Officers. With the exception of training and court attendance, PTR Officers are only rostered for operational duty (paragraph 54).

119. Prior to lodgement of his grievance, the claimant's expressed motivation for seeking lighter duties arose out of his concern regarding his anticipated inability to meet the statutory 144 hour minimum and what that might mean for the continuation of his appointment. However this disadvantage was eliminated by virtue of the respondent's correspondence of 25 July 2018 (paragraph 81).

120. Turning to the second disadvantage of financial loss, the tribunal is satisfied on an objective assessment of all of the relevant facts that offering the claimant administrative duties would not have been a reasonable adjustment for the following principal reasons;

i. Owing to the findings of fact at paragraph 79, rostering the claimant to complete any lapsed NCALT training and/or to check his emails would provide no operational benefit to the respondent and minimal benefit to the claimant as he was not performing operational duty. Therefore had the respondent been minded to offer the claimant any admin duty it would have made no sense to offer the claimant any more than one, possibly two hours per month. Such an adjustment would not have been effective as it would not prevent or substantially reduce the negative impact that the Harris directive had on the claimant's ability to earn in his PTR role due to his disability.

ii. Additionally this adjustment was not practicable for the respondent to make as it would add to the respondent's budget for PTR cover but provide no meaningful contribution to the respondent's operations. The only motivation for this adjustment would be to provide paid duty for the claimant. The EAT in ***Tarbuck*** determined an adjustment of this nature was not a reasonable adjustment.

iii. The above point ties into the financial costs, resource considerations and the nature of the respondent's activities. Although the respondent is a large entity with significant resources, it is a public body with significant demands on those resources (e.g. see paragraphs 52, 57 & 58). It is tasked with carrying out very important public duties but its activities are financed by public funding. That public funding is not limitless and it will invariably be subject to competing demands to meet its core objectives, one of which is its security function. PTR officers are recruited to help the respondent fulfil this function. The tribunal considers that it cannot be consistent with that aim to expend public money so the claimant can carry out administrative tasks that provide no operational benefit to the respondent and by implication, the public. Not only would this have a financial cost for the respondent, it would negatively impact on the respondent's ability to effectively use public funds to meet its important objectives and in turn undermine public confidence in its ability to do so.

121. The tribunal is satisfied that the claimant's expectation that he be allowed to perform administrative duty, on closer examination was not in fact reasonable as it would not have materially improved the claimant's hours of duty or earnings. This was particularly so after the claimant was exempted from completing the statutory minimum annual hours.

122. The remaining consideration is whether it was a reasonable adjustment to offer the claimant alternative duty that fell outside of the Harris directive or redeploy the claimant to a different role. Due to the duty restrictions any such alternative needed to be office based (paragraphs 70 & 71).

123. The tribunal identified the following additional relevant circumstances of central importance to the question of reasonableness in this case;

i. The unique nature of the PTR cohort, particularly its specific function, supportive role and focused training, much of which has a statutory basis, (paragraphs 48-50). These facets restrict the transferability of the PTR officer to alternative roles within the respondent, notably to roles carried out by RPO's or office based roles (paragraph 62). The length and breadth of RPO training is much more extensive, reflecting the different and broader range of duties carried out by this cohort. Closing such significant training deficits has a financial cost and can raise other resource issues such as accessibility (paragraph 57). Whilst the respondent is a large public body the tribunal is satisfied that like other public bodies it is under significant resource pressures; resources for training are no exception.

ii. Other duties or roles historically performed by PTR officers were no longer available and/or there were significant training deficits. CI Corbett gave a number of examples of these in her witness statement to verify these points and her evidence about this was largely unchallenged by the claimant (paragraphs 55 - 57).

iii. The claimant's availability to perform alternative duties or role, or attend retraining necessary to perform same would mainly be confined to weekends and evenings (paragraph 47). Furthermore the availability requirement on a PTR officer equates to 12 hours per month (paragraph 54). This limited availability restricts availability for re-training, narrows the search for alternative duties or roles and depletes the respondent's potential to extract value for money from an investment in training.

iv. Over the period of claim the claimant's back condition and associated symptoms were recurring, requiring ongoing medical assessment and significant medical and therapeutic interventions. His disability was periodically having an adverse impact on the claimant's ability to work in his full time office based role and cope with everyday tasks (paragraphs 65, 68, 69, 74, 75, 80, 84, 85, 90 & 93). This casts serious doubt over whether the offer of any alternative duty or role would have been effective in eliminating or reducing the claimant's earnings deficit in any significant or sustained way. The fact that loss of earnings was not the claimant's primary concern over the period of claim suggests that the claimant recognised this (paragraph 92).

124. Whilst respondent's Guidance does not expressly exclude the possibility of transferring a PTR officer to an alternative role, in light of the above, the tribunal believes that in reality the feasibility of this option is likely to be narrow in scope and in the claimant's particular circumstances not practicable or reasonable.

125. The only potentially suitable alternative role identified since the claimant has been subject to duty restriction was the SDCA role (paragraphs 95 - 97). The claimant misunderstood what was being suggested and openly acknowledged that he did not have the requisite skills to carry out investigations which was central element of this role. The tribunal finds it reasonable for the respondent to rule this option out, particularly given the significant training costs and the claimant's limited availability to perform this role due to his full time role.

126. With regard to other duties historically performed by PTR officers that the claimant may have been able to carry out, aside from the practical impediments to offering such roles, (paragraphs 55 - 57) the reasonableness of doing so must be viewed in the context of the Harris directive. The very practice of deploying PTR officers to duties which fell outside of their statutorily defined role was something the Harris directive sought to eradicate.

127. The nature of the Harris Directive and the respondent's strict adherence to its terms, meant that the scope for identification of alternative duties in the claimant's particular circumstances were arguably non-existent. There were compelling operational and strategic reasons behind the Directive (paragraphs 51 – 52) which the claimant did not challenge (paragraph 24). Significantly that the Harris Directive was not fundamentally altering the PTR role but rather was confirming the limited but important function of the PTR cohort and sought to ensure that PTR officers were properly deployed to fulfil that function. The tribunal considered these reasons very important to the measurement of the reasonableness of alternative duties/roles in this case. Moreover the Harris Directive was endorsed by Carmel McCormick following her review of the PTR role (paragraph 53), an endorsement which again the claimant did not challenge (paragraph 24).

128. Derogation from the Harris Directive would run contrary to the organisational aims of the respondent. Whilst there may be circumstances in which it could be deemed reasonable to do so, the tribunal concludes that it would not have been reasonable to do so in the particular circumstances of this case, for the reasons outlined herein.

129. Turning to the claimant's procedural argument and his point that the lack of consultation may have delayed or hindered the identification of alternative duties or roles. There was a significant and inexplicable delay in applying the respondent's Guidance even after the claimant expressly requested application of the policy via OHW (paragraphs 86 & 88). The respondent's approach to addressing the issue of adjustments with the claimant lacked cohesion, timeliness and initiative. Whilst it is good practice and consistent with the Equality Commission guidance to consult regularly with an employee, the case of ***Tarbuck*** emphasises there is no distinct duty to consult. Similarly the case of ***Ashton*** underscores that the reasonable adjustment provisions are concerned with practical outcomes rather than procedures and mental thought processes. Whilst deficits in the respondent's application of its Guidance and consultation with the claimant could have jeopardised its ability to show that it did not breach its duty to make reasonable adjustments, on the facts, these failures had no such impact (paragraphs 95-98). Therefore these procedural failings, whilst open to criticism, did not in the tribunal's view, delay or impede the identification of further reasonable adjustments.

130. There was consultation over the period of claim between the claimant and the respondent. The claimant was regularly reviewed by OHW which in turn was in regular communication with Sgt Blackmore and the claimant's wider management via SAP (paragraphs 72 & 73). There were also communications between the claimant's line management and Operational Planning and the claimant was in regular communication by email and telephone with his line management (paragraphs 65-67, 76, 77, 80, 83 & 87). Whilst the consultation did not meet the formal requirements of the Guidance, the tribunal is satisfied that it was consistent with its aims.

SUMMARY

131. Returning to the issues for determination;

1. Whether the respondent had the requisite knowledge of the claimant's disability from 22 August 2017 as contended by the claimant or from 20 October 2017 as contended by the respondent?

The respondent had the requisite statutory knowledge from 20 October 2017. From that point the respondent could not rely on the statutory exemption to absolve itself from its duty to make reasonable adjustments.

2. Whether the respondent complied with its duty to make reasonable adjustments in relation to the claimant in light of the substantial disadvantage the claimant was placed in comparison with persons who are not disabled due to the respondent's application of the identified PCP, in accordance with section 4A of the DDA?

132. The claimant suggested a number of specific adjustments by way of alternative duties or roles so as to enable the respondent to engage with the question of whether it was reasonable to make such adjustments and thus reversed the burden of proof.

133. The tribunal finds that the respondent complied with its duty to make reasonable adjustments.

134. The key word in the section 4 duty is "reasonable". The tribunal's assessment of compliance with that duty must bear this in mind. By definition it implies there will be competing factors. Therefore fulfilment of the duty will often require some "give and take" on the part of the employer and employee. It is not a standard of perfection and should not be viewed as such. Bearing this in mind and the particular circumstances of this case the tribunal finds that all reasonable steps that could be taken were taken. The respondent did not fail in its duty to make reasonable adjustments by not offering the claimant administrative duty, or any other duty or role falling outside of the scope of the Harris directive.

135. Therefore the claimant's claim is dismissed.

Employment Judge:

Date and place of hearing: 2-4 November 2020 and 22 April 2021, Belfast.

This judgment was entered in the register and issued to the parties on: