EMPLOYMENT TRIBUNALS

Claimant: Mrs J Dutton-Eves

Respondent: Chief Constable of Merseyside Police

HELD AT: Liverpool **ON:** 3, 4, 5, 6 & 7 December 2018
9 January 2019

BEFORE: Employment Judge Shotter

Members: Mrs F Crane
Mrs JC Fletcher

REPRESENTATION:

Claimant: Mr C Prior, Counsel
Respondent: Mr N Tinkler, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was subjected to unlawful discrimination on the grounds of her disability and her claims of unlawful discrimination numbered 2, 5 and 7 brought under Section 15 Equality Act 2010 are well founded and adjourned to a remedy hearing.

2. The claimant was not subjected to unlawful discrimination on the grounds of her disability in connection with allegations numbered 1, 3, 4, 6, and 8 which are not well-founded and are dismissed.

3. The claimant was not subject to unlawful discrimination on the grounds of her disability, and the claimant's claim that the respondent had failed to make reasonable adjustments brought under Section 20 of the Equality Act 2010 is not well-founded and is dismissed.

REASONS

1. In a claim form received on 15 December 2017 following ACAS conciliation between 20 October and 20 November 2017, the claimant, who at the time remained a police officer, brought claims of disability discrimination under sections 15 and 20 of the Equality Act 2010 ("EqA"). The details of complaint were amended and it is to the amended grounds and the agreed list of issues that the Tribunal refers to in these reasons.
2. The claimant maintains she is disabled by way of depression, thyrotoxicosis and fibromyalgia. The respondent concedes the claimant is disabled but denies the claimant's claims. Since these proceedings were issued the claimant has retired on the grounds of ill-health.

3. In addition to the eight section 15 complains set out below, the claimant also alleges the respondent failed to make reasonable adjustments contrary to Section 20 of the Equality Act. Two PCPs were relied on:

3.1 The practice of sending an automated Attendance Support Plan (ASP") on 24 July 2017 listing "days lost" due to sickness absence.

3.2 Demanding that the claimant return her force laptop on 17 and 18 August 2017.

4. It was alleged the respondent should have made two reasonable adjustments:

4.1 Not send the claimant an automated ASP listing days lost due to sickness absence. The substantial disadvantage was causing stress to the claimant and "increasing the probability of future absences."

4.2 Not requesting the return of the laptop, the substantial disadvantage being the claimant was placed under "additional, unnecessary stress and concern about her substantive role and the temporary nature of her attachment to the CDU."

5. Time limits was an issue and the claimant pleads the acts of her managers in January 2017, 9 & 17 May 2017, 24 July 2017, 17 and 18 August 2017 amounted to a continuing course of conduct extending over a period under section 123(3) EqA.

<u>Agreed issues</u>

6. The parties agreed the issues as follows:

6.1 Did R subject C to unfavourable treatment in January 2017 because of something arising in consequence of her depression (her sickness absences) by advising C against undertaking CID examination? [paras 4 and 19 Details of Complaint]

6.2 Did R subject C to unfavourable treatment in May 2017 because of something arising in consequence of her disability (her depression and/or sickness absence) by writing to C's GP without her consent? [paras 7 and 20 Details of Complaint]

6.3 If so, was it justified as a proportionate means of achieving the legitimate aim of avoiding C returning to work on a Return to Work Plan not agreed by her GP as suitable?

6.4 Did R subject C to unfavourable treatment on 17 May 2017 because of something arising in consequence of her disability (her sickness absences) by subjecting her to the Return to Work Plan? [paras 8 and 21 Details of Complaint]

6.5 If so, was it justified as a proportionate means of achieving the legitimate aim of requiring good attendance?

6.6 Did R subject C to unfavourable treatment on 24 July 2017 because of something arising in consequence of her disability (her sickness absences) by subjecting her to the Attendance Support Plan? [paras 10 and 22 Details of Complaint]

6.7 If so, was it justified as a proportionate means of achieving the legitimate aim of improving or maintaining C's attendance at work?

6.8 Did R subject C to unfavourable treatment from 24 July to 11 September 2017 because of something arising in consequence of her disability (her sickness absences) by removing her right to self-certify sickness absences? [paras 10 and 23 Details of Complaint]

6.9 If so, was it justified as a proportionate means of achieving the legitimate aim of securing good attendance?

6.10 Did R subject C to unfavourable treatment on 17 and 18 August 2017 because of something arising in consequence of her disability (her temporary attachment to CDU) by demanding the return of her Force laptop? [paras 13 and 24 Details of Complaint]

6.11 If so, was it justified as a proportionate means of achieving the legitimate aim of reallocating resources among Level 1 Investigations?

6.12 Did R subject C to unfavourable treatment because of something arising in consequence of her disability (her recent sickness absence) by retaining her in CDU? [para 25 Details of Complaint]

6.13 If so, was it justified as a proportionate means of achieving the legitimate aim of benefiting C's health?

6.14 Did R subject C to unfavourable treatment because of something arising in consequence of her disability (her depression and/or sickness absences) by including her health information on a spreadsheet available to managers? [paras 11 and 26 Details of Complaint]

6.15 Did the PCP of sending an automated Attendance Support Plan listing "days lost" due to sickness absences place C at a substantial disadvantage in comparison to persons who are not disabled? [para 28 Details of Complaint]

6.16 If so, did R fail to make a reasonable adjustment for C's disability by omitting or amending its automated Attendance Support Plan listing "days lost" due to sickness absences?

6.17 Did the PCP of demanding C return her Force laptop place C at a substantial disadvantage in comparison to persons who are not disabled? [para 29 Details of Complaint]

6.18 If so, did R fail to make a reasonable adjustment for C's disability by leaving the laptop with C?

6.19 Was there a continuing course of conduct extending over a period of time or are parts of the claim out of time?

6.20 Compensation/remedy

<u>Evidence</u>

7 The Tribunal heard evidence from the claimant on her own behalf; on behalf of the respondent it heard evidence from Sergeant Martin Leyland posted to Level 1 Investigations at St Anne's Street Police Station ("Level 1 investigations") , Sergeant Samantha Barnes, posted in the Crime Demand Unit ("CDU") at Lower Lane Police Station, Inspector Neil Kavanagh, responsible for Level 1 Investigations, Inspector Philip McManus, posted at Level 1 Investigations, and Detective Chief Inspector Rooney, grievance officer.

8 The Tribunal did not find the claimant to be an entirely credible witness, and preferred the evidence given on behalf of the respondent, particularly that of Inspector Neil Kavanagh where there was a conflict of evidence for the reasons set out below.

9 The Tribunal was referred to an agreed bundle of documents together with witness statements, written statements, written submissions, oral submissions and case law. The Tribunal has considered both the respondent's and claimant's submissions, which the Tribunal does not intend to repeat wholescale, but it has attempted to incorporate the points made by the parties within the body of this judgment with reasons, and has made the following findings of the relevant facts.

<u>Facts</u>

10 The respondent police force on 21 November 2016 moved to a new operating model for investigating crimes resulting from the budget cuts, that included Level 1 and Level 2 investigations. Level 1 investigated low level volume crime and consisted of 77 staff including police officers, sergeants and detectives. Level 2 investigated more complex and serious crimes and was made up predominately by detectives with trainees who had yet to sit the detective CID exam. It is not disputed if any trainee failed their CID exam they would be moved down to Level 1.

11 The claimant was posted to Level 1 investigations as a police officer, having commenced her service with the respondent on 7 July 2008 until ill-health retirement on 31 August 2018. The claimant had passed her sergeant exams but she did not pursue any sergeant applications and nor did she carry out any acting up roles. By 27 March 2015 the claimant had been prescribed anti-depressants for three years, and had two periods of long-term sickness absences for depression on 14 March 2015 to 17 May 2015 and 23 December 2015 to 25 January 2015. The claimant was also absent with chest infection 16 July to 21 July 2016 for which she had self-certified. There were no issues with the claimant's self-certification. Whilst it has no bearing on the facts in this case, the Tribunal noted the claimant was absent certified with depression between 3 January 2010 to 9 May 2010 and 6 July 2011 to 17 July 2011. When the claimant was transferred to Level 1 Investigations she wished to keep her medical history confidential with a view to starting "with a clean sheet."

12 Following the August 2016 absence an Occupational Health report was obtained and a risk assessment carried out. The claimant was placed on restricted duties of 5 hours per day reduced hours. The Occupational Health report dated 18 October 2016 confirmed the Equality Act 2010 ("EqA") was likely to apply. There was no reference within the report to depression or why the claimant was desk bound, had been placed on reduced hours stationed in an office from which she could gain rapid access bathroom facilities.

13 On 21 November 2016 the claimant was transferred into Level 1 Investigations with the adjustments set out in the 18 October 2016 Occupational Health report. The claimant's intention was to start work with a "clean sheet" and she chose not to inform anybody that she was disabled with depression, and nobody asked her why she was working 5 hours a day. She was line managed by Sergeant Leyland, who in turn was line managed by Inspector Kavanagh. Inspector Kavanagh had taken over line management duties, directly and indirectly, for 66 constables and 12 sergeants. No handover had been undertaken for any staff, and to manage the situation he was sent a spreadsheet form by the implementation team which he then populated with information he found out about individuals, including the claimant, referred to within these proceedings as the "EXCEL spreadsheet." The EXCEL spreadsheet was not shared with any other managers, and was kept confidential in Inspector Kavanagh's personal folder. Had the claimant known of its existence, which she did not, she could not have accessed it.

14 Sergeant Leyland was informed by another sergeant in the team who had known the claimant's previous line manager, and he became aware an occupational health report had been obtained. Sergeant Leyland had a discussion with the claimant which he followed by an email sent on 28 November 2016. He requested her consent for the release of "a copy of your last OHY report in order to complete your new risk assessment/recuperation plan." The claimant agreed and it is undisputed the Occupational Health Report dated 18 October 2016 was provided. There was exploration on cross-examination as to whether to not earlier occupational health reports had also been provided, and it was noted by the Tribunal Sergeant Leyland asked for the latest report and could not recall whether any earlier reports had been provided. The fact Sergeant Leyland had

referred to the latest report when making the request (the last report was dated 28 October 2016) the Tribunal took the view on the balance of probabilities that this was the only report provided to Sergeant Leyland, there being no evidence to the contrary.

15 Upon reading the report on or before early December 2016, Sergeant Leyland would have realised the claimant was considered by occupational health to be disabled. Sergeant Leyland also possessed knowledge that the claimant was on restricted hours and duties, and a risk assessment/recuperation plan was required. He possessed the requisite knowledge of the claimant's disability by early December 2016 at the latest. There was no evidence he shared this knowledge with Inspector Kavanagh, and the Tribunal reached the conclusion on the balance of probabilities Inspector Kavanagh was unaware the claimant was disabled and nor had he addressed his mind to this possibility until much later in the chronology and well beyond January 2017.

<u>Allegation 1 "advising the claimant against undertaking her CID examinations in January 2017."</u>

16 In January 2017 a discussion took place between the claimant and Inspector Neil Kavanagh concerning the forthcoming CID examination.

17 Inspector Kavanagh was requested by the DCI to obtain expressions of interest from those police officers who intended to sit the CID exam in January 2017, and the claimant had expressed an interest. He had a general discussion which followed a similar format with six or seven staff who expressed an interest, and the discussion went as follows; if they took the exam and failed it a number of times this could affect their career because they would be barred from taking the exam again for some time, if they moved to level 2 in order to gain the experience and failed, they would be moved down back to level 1. Inspector Kavanagh emphasised the amount of work involved in taking the exam, pointing out there were months of intensive preparation. In his oral evidence Inspector Kavanagh stated he had a general discussion about aspirations. The claimant had indicated to him that she was thinking about taking the exam sometime in the future. This evidence was not in his written statement. It is undisputed the exam was a national exam, and the Tribunal accepted that Inspector Kavanagh did not provide recommendations, references or appraisals. Apart from an express denial, the written statement of Inspector Kavanagh did not go into the minutia of details given by him on cross-examination. In his written statement he described having a general discussion about career aspirations, the time frame, the officers experience of sitting the exam and readiness to move from level 1 to level 2 investigations.

18 In her written evidence the claimant described how Inspector Kavanagh told her not to apply for the CID examination. She wrote" I believed at the time and still believe Inspector Kavanagh would not support me doing it because of my depression and sickness absence record." In the claimant's grievance (referred to below) she wrote "I also believe therefore Inspector Kavanagh advised me not to apply for the CID exam, but he did support my colleagues with the process." In her oral evidence the claimant confirmed she was not advised but told, then

contradicted herself and confirmed she had been advised that Inspector Kavanagh would not support her application. She expanded on her evidence confirming that Inspector Kavanagh had brought up the fact she had long periods of sickness absence due to depression, the role, long hours and extra hours, if "I went to CID I'd be expected to go to crime scenes and I'd be no use to CID…I could see his view point I wanted to aim for it."

19 Taking into account the conflicts in the evidence, on the balance of probabilities the Tribunal concluded the claimant's version was not credible and did not reflect the reality. She had not intentionally told untruths in her evidence having formed a view (based on what Inspector Kavanagh had told her about the demands of the job) that CID would not want her given her disabilities and the adjustments set in place i.e. desk bound near a toilet working 5-hours a day. The Tribunal was satisfied on the balance of probabilities, Inspector Kavanagh did not discuss the claimant's disability with her and the claimant had exaggerated her evidence in this regard. Inspector Kavanagh had reiterated all of the information given to the other police officers who expressed an interest in sitting the CID national exam. In reaching this decision the Tribunal considered the changes in the written and oral evidence, and the fact that the claimant did not mention the alleged discrimination until she raised the grievance dated 20 September 2017 some 9 months after the alleged incident, after Inspector Kavanagh had left the department, and the claimant had returned to work in the Crime Demand Unit ("CDU") department as a reasonable adjustment.

20 In conclusion, the alleged discrimination did not take place as alleged. It is notable there was no attempt thereafter by the claimant to discuss the CID exam with any other manager, particularly Sergeant Barnes from the CDU with whom she got on well, and Sergeant Leyland (line manager level 1 Investigations department) who exclusively managed the claimant's welfare at her request and the Tribunal took the view the claimant had decided not to apply against a background of ill-health and family responsibilities. The claimant's decision was not connected to Inspector Kavanagh in any way.

21 On the 13 February 2017 the claimant's consultant produced a report setting out 11 medical conditions including mild thyroid toxicosis, diabetes insipidus, depression, diarrhoea, previously report liver biochemistry abnormality, history of palpitations, possible sleep apnoea syndrome, previously 0900 cortisol, persistent lethargy and tiredness and sub-optimal vitamin D. Investigations were to be carried out. A copy of the report was not provided to the respondent.

22 On 14 February 2017 the claimant self-certified her absence; there was no issue with the claimant self-certifying as far as the respondent was concerned.

23 The claimant was absent due to sickness from 20 February 2017 to 5 March 2017. The MED3 confirmed she was suffering from a viral illness. By February 2017 the claimant had hit the respondent's absence trigger as she had been absent for more than an average of 8-days over year over the last 3 years. Sergeant Leyland received an automatic notification on the respondent's computer system Origin, and he was tasked with preparing an Attendance Support Plan ("ASP") under paragraph 6.3.4 on the Attendance Management

Policy (“AMP”). The AMP provided “where the individual has met the attendance triggers, and attendance support plan is mandatory and must be discussed with the individual at the RTWI (return to work interview). The line manager must inform, explain, and develop with the individual an ASP at the RTWI. Clause 3.4 provided the “line manger must complete a record of the RTWI on the individual’s Origin record.” Sergeant Leyland did not complete the ASP because the claimant was not returning to work and remained off sick.

24 The claimant remained absent and the 6 March 2017 MED3 referred to thyrotoxicosis, a further MED3 was issued from 31 March 2017 to 28 April 2017 citing the same condition. The Med3 dated 27 April to 7 June 2017 referred to thyrotoxicosis, and for the first time, fibromyalgia undergoing further investigation. It confirmed the claimant was going on holiday from 25 May 2017.

25 Sergeant Leyland had regular contact with the claimant during this period, he discussed the MED3 certificates with her, and during this process was informed there existed many additional medical conditions being investigated including an underactive thyroid and heart palpitations, Chrones disease and inflamed liver. A home visit took place at St Anne’s police station at the claimant’s request because she did not want police officers coming to her home, and she also had telephone contact.

26 In the meeting held on 4 April 2017 the claimant stated that she suffered from anxiety, and had previously suffered from stress whilst in the investigations role. Sergeant Leyland’s note on the Origin system reflected the claimant having informed him that “if she was [not] medically forced to go off sick then she would probably have gone off with stress. She states that she suffers anxiety and has had previously suffered from stress whilst in the investigations role…her stress levels were very high the week she went off sick…and cannot commit to coming back when this current sick note expires on 24 April…her stress would increase if she returned to investigations…I offered Jemma the option of a potential redeployment to a less stressful role that would assist her condition. The possibility of a recuperation plan was discussed.” The note records the claimant was unhappy with the suggestion; instead she sought a decrease in her work load. Sergeant Leyland made it clear there would be no decrease. The claimant also refused to complete a stress questionnaire, and was not interested in any support the respondent or Police Federation could provide her.

27 A further Oracle entry dated 18 March 2017 written by another police officer reflected the difficulties he/she was having arranging a home visit as the claimant’s child was unwell. It recorded the claimant was also suffering from “Khron’s type symptoms” and proposed to the claimant a stress questionnaire should be completed by her. Sergeant Leyland’s Oracle entry for 27 February recorded the claimant had a viral infection and believed she would be fit for work by 6 March. The 7 March entry recorded the claimant had a diagnosis of Thyrotoxicosis and had a sick note to 31 March 2017.

Referral to Occupational Health May 2017

28 Sergeant Leyland referred the claimant to occupational health on 9 May 2017 and he set out the claimant's medical history including depression. A proposed RTW Plan was attached to assist the claimant when she returned to work. The RTW Plan had not been discussed or agreed with the claimant; Sergeant Leyland's intention was for Occupational Health to comment on it first, and then he would discuss it with the claimant. By an email dated 17 May 2017 Occupational Health were requested to provide a report dealing with the claimant's full capability with a view to potential medical redeployment.

29 Occupational Health assessed the claimant confirming she had last performed full operational duties end of 2015 and was not fit for work with no adjustments suggested. A number of health issues including ongoing psychological ill-health were listed. There was a reference to an ongoing investigation into the hormone issue and fibromyalgia. The Tribunal took the view that the Occupational Health Report made the RTW Plan irrelevant as the claimant was not returning to work in the foreseeable future. The claimant was aware of its contents, the conclusion and the fact there was to be a further review in four weeks, which took the claimant beyond the date set out in the RTW Plan.

The RTW Plan

30 The RTW Plan was based on a proforma used in relation to every police officer. The claimant complains of the tone of the RTW Plan in a belief that she should have been invited and not told to carry out a number of obligations; and agreement should have been reached. The Tribunal has read the RTW Plan in detail, and is of the view that it is overall a supportive document expressed in a no-nonsense fashion which brooks no argument. For example, at paragraph 1 it provides the claimant "is expected" to keep all medical and OHU appointments and she would be released during duty hours in order for her to do so. Paragraph 2 referred to the expiry of the current FIT note on 7 June 2017 and continued "You will return to work on 10/6/2017." Paragraph 3 set out the following "You will discuss the contents of this return to work plan with your GP and feedback any reasonable adjustments required…this will be considered for inclusion within your RTW & recuperative programme," and by this the claimant should have realised that the RTW Plan was to be discussed and agreed in respect of any reasonable adjustments she required.

31 The claimant was told that "You will take personal responsibility to maximise your own well-being including appropriate use and maintenance of Personal (Stress) Risk Assessment" and "You will complete the attached Stress Questionnaire to identify the causes of your stress and I will look to put control measures in place to assist you to manage this stress and reassure you regarding any concerns you may have." Provision was made for a phased return with the hours set out for a three-week period, review meetings held weekly and reference was made to the claimant's office that would be professionally cleaned "on a regular basis."

Allegation 2 "Sgt Leyland writing to the claimant's GP in May 2017 and sending a 'Return to Work Plan' ("RTW plan")."

32 Sergeant Leyland sent the RTW Plan to the claimant's GP for guidance and "other recommendations they could make to assist your return" without the claimant's consent or her prior knowledge. Surprisingly, a copy of the GP letter was not retained, although Sergeant Leyland did inform the claimant on 17 May 2017 of what he had done. The claimant immediately instructed her GP not to respond, Sergeant Leyland did not get a response and did not press for one as in the past he had made similar requests in relation to other police officers, and had experience of the GP not complying with them. The claimant raised no complaint either to Sereant Leyland or any other manager at the time until her grievance some 4-months had passed. The Tribunal is critical of Sergeant Leyland's actions given the requirement for consent and confidentiality. It accepted the claimant was unhappy because she wished to keep occupational health and her GP separate; however, it is undisputed occupational health had access to the claimant's medical records, albeit with the claimant's consent. Apart from this, the claimant did not give any evidence that she had been caused a detriment other than her unhappiness at Sergeant Leyland's actions at the time.

Allegation 3 On 17 May 2017 Sgt Leyland emailed the claimant with the RTW Plan

33 On 17 May 2017 Sergeant Leyland emailed the claimant with the OHU referral and RTW Plan "sent to your GP to review. I was going to sit down and go through the RTW Plan on our next meeting but have a read through it. When I get the recommendation from OHU I can update the RTW Plan if need be. If you wish to discuss anything…"

34 The claimant alleges she was "subjected" to the return to work plan, and this was the unfavourable treatment relied upon. The claimant was not "subjected" to the plan and so the Tribunal found for the reasons set out below.

35 The claimant took umbrage with being told what to do in the RTW Plan. On cross-examination the claimant explained her main complaint was the tone set by the use of "you will" throughout, she should have been invited and not told, and the return to work date inserted on 10 June 2017 she found threatening. The Tribunal accepted the claimant's feelings expressed at the liability hearing were genuine, however, objectively they had no basis in reality. It was clear from 17 May 2017 email the RTW Plan was in draft and up for discussion. The claimant did not take up the offer to discuss it, and she raise no complaint at the time. The claimant knew exactly what occupational health had said in the report on 17 May, she was not fit for work and Sergeant Leyland's intention was to change the RTW Plan in accordance with the advice of occupational health. Had the claimant considered the information before her objectively, she would have realised (a) there was no threat in relation to a return to work on a specific date, and (b) her line manger wanted to discuss and would have adjusted the RTW plan in accordance the Occupational Health recommendation and any views the claimant expressed. The Tribunal concluded there had no detriment to the claimant, and its view was reinforced by the fact that the claimant had no

objections to the recuperation plan set out in the same format but without the return to work date.

36 In an email to occupational health sent 5 June 2017 Sergeant Leyland sought advice on the claimant's absence and her reporting to him that "the nurse from the OHU stated that I am not fit for work until my medical examinations have been completed." Sergeant Leyland complained to Occupational Health about the nurse expressing his concern which "if true, does not give Gemma any incentive to RTW…I have tried my utmost to get Gemma back into work in some degree and have been extremely flexible in my RTW Plan for her. This is obviously not working and there is no clear time period of when her medical examinations will conclude and as such no known future RTW..." Reference was made to the claimant having "been fit enough to detain a suspect" when sick and she had just returned from a holiday "airports, plane travel/transfers are not the comfiest of places, however she is not fit enough to sit in a police officer building somewhere in the force completing any sort of suitable role with relevant assisted restrictions…Can I ask that a long-term solution be considered with Gemma regarding coming back to work."

37 Sergeant Leyland's email reflected his frustration with Occupational Health, he found it difficult to accept there could not be a role for the claimant within the respondent providing reasonable adjustments could be set in place, and the undisputed evidence before the Tribunal was that the claimant wanted to return to work as much as Sergeant Leyland wanted her to return, albeit she did not want the same workload she had experienced at Level 1 Investigations. Dr Roy was not happy with Sergeant Leyland's criticism of one of his nurses and took the view that given the claimant's complex medical conditions, it was a "plausible scenario" and he interpreted Sergeant Leyland's criticism as being aimed at the claimant, when it was in fact aimed solely at Occupational Health and their inability to resolve the reasonable adjustment point. As matters transpired there was a role for the claimant instigated by the respondent and not Occupational Health, and Sergeant Leyland was correct in his analysis.

38 On the 15 June 2017 Inspector Kavanagh's responsibility for level 1 Investigations transferred to Inspector McManus as he was moving to another department. Voluminous documents were sent to Inspector McManus including the EXCEL spreadsheet, which was never used again and not updated. Inspector McManus accepts he may have placed the EXCEL spreadsheet on the sergeant file available to all the constables and sergeants. The Tribunal was satisfied on the evidence before it the EXCEL spreadsheet had been placed on the sergeant file by Inspector McManus without him realising the full implication of the information recorded on the document, including references to the claimant's disability and medical condition.

15 June 2018 meeting in Starbucks

39 The claimant agreed to meet Inspector Kavanagh and Inspector McManus on 15 June 2017. She was accompanied by her partner. Inspector McManus asked if the claimant would move to the Crime Demand Unit ("CDU") for a period of recuperation on her return to work, with a view to returning to investigations. In

accordance with the claimant's oral evidence and that given by Inspector McManus, in the words of the claimant, once she was "back to full duties and felt well and able to return to investigations, it was up to me to specify" when she the time came for her to return to Level 1 Investigations. The claimant accepted that the discussion and offer was supportive to her as she wanted to return to work, corroborating Sergeant Leyland's evidence that both he and the claimant sought a return to work during this period.

40 Despite Occupational Health's earlier advice, in a report dated 29 June 2017 Occupational Health confirmed that although the claimant was not "100% fit" Occupational Health "fully supported" her move to CDU on 10 July 2017. A number of adjustments were proposed and it was the view of Occupational Health "the move…will be of benefit to her health," and the start date of recuperative duties 10 July 2017 with no end date for the claimant's return to Level 1 Investigations. The claimant accepted the report and consented to the release.

41 Sergeant Leyland produced the recuperation plan, the claimant was provided with a copy on her return to work at the CDU on 10 July 2017 and the claimant did not object to it; she accepted the plan which reflected the adjustments discussed with Occupational Health. It is noted the claimant turned up at CDU without an allocated line manager, however, Sergeant Barnes took the claimant under her wing until the line management issue was resolved after some time with the claimant being line managed by three sergeants, including Sergeant Barnes. As far as Origin was concerned only Sergeant Leyland had access rights, and it was on his basis that he sent her various documents in the belief it was still his responsibility for him to do so, even though claimant was working in another department for an uncertain period of time.

42 In an email sent 17 July 2017 Sergeant Barnes email her line manager requesting the claimant's return to work documents.

<u>24 July 2017 Attendance Support Plan ("ASP")</u>

43 In an email sent 24 July 2017 Sergeant Leyland sent to Sergeant Barnes following in respect of the claimant's "current ASP/Recuperation Plan. You will need to amend some of the recuperation plan to tailor it to your department prior to serving it on Gemma. (You may find some strange things on this plan…basically Jemma has previously highlighted that she needs to be near toilets and that is why she cannot drive police cars! Also, she blames part of her sickness on un-hygienic police stations, working stations and colleagues coming in with colds and passing on germs!" He confirmed the claimant had previously refused to fill in a stress questionnaire and that "I have also removed Jemma's right to self-certify her sickness until her ASP has been completed. This was agreed by the PIU who was monitoring her sickness." Sergeant Leyland gave his opinion on the claimant's work which he found to be "poor" and that she was "lazy and moan(s) a lot when given simple tasks to complete. She previously highlighted her wishes to work from home on her laptop but I refused the OHU to allow that…as she needs one to one intrusive supervision to get her to work." The oral evidence of Sergeant Leyland was personally he got on well with the

claimant, but her work was poor and the Tribunal took the view that his comments were genuinely held and the reference in the 24 July 2017 was from line manager to line manager.

Allegation 4 “subjecting” the claimant an Attendance Support Plan on 24 July 2017

44 On 24 July 2017 Origin sent to the claimant “Via an automated email from Origin HR system” the ASP “created for you” that had been inputted onto Origin by Sergeant Leyland. The email confirmed “the ASP has been generated as a result of you activating the force standard trigger points for management action in respect of unacceptable levels of sickness. In summary 150 working days off in 3 years averaging 50 working days lost per year.” The days lost and the illness attributed to them were listed. In oral evidence on cross-examination the claimant accepted the days lost set out in the plan was a matter of record, she was aware of them, and not upset by the fact that they were listed. It was the tone of the ASP that upset her.

Allegation 5 Removing the claimant’s right to self-certify her sickness absence from 24 July 2017 to 11 September 2017.

45 At paragraph 8 the ASP provided “Please note that your right to self-certify your sickness has been removed for the duration of this ASP. It is stressed that any future report of sickness will require a GP/doctor’s note and this is to [be] supplied to you line managers on the day of the sickness unless otherwise justified.” The ASP was to last for 6-months, and the reference to what would amount to “otherwise justified” was never clarified or expanded. The Tribunal found objectively, with exception of paragraph 8, the ASP was a supportive document aimed at keeping the claimant in work and “help you generate and maintain an acceptable level of attendance.”

46 In oral evidence but not in her Grounds of Complaint, the claimant also criticised paragraph 6 which she perceived to be a threat given the reference to “any further incidents of sick leave or non-compliance in this support programme may result in formal proceedings, this will be in the form of UPP” a reference to the respondent’s formal attendance management procedure. The reference did not take the claimant by surprise, and the Tribunal took the view it was entirely appropriate to put the claimant on notice of what could happen if her attendance did not improve. It is notable that the claimant despite the fact she was a police constable, did not like to be told or reminded of matters she did not want to reflect on. However, had the respondent failed to put the claimant on notice in accordance with its policies and procedures, it could be criticised for not explaining the position clearly to her. The ASP was very clear in its effect.

47 The Tribunal took the view Sergeant Leyland can be criticised for the removal of the right to self-certify, and objectively, it has resulted in a detriment. The claimant was concerned whether she would could obtain a GP appointment on the first day of illness, for example, if she was suffering from a cold, as an early diagnosis of cold or flu did not require a GP certificate. The claimant took the view it was a punishment as she had never had problems with self-certification in the past and so the Tribunal found. The claimant had been absent on a number

of occasions with a long-term sickness when a sick note was provided. In short, the claimant took the view it put a lot of pressure on her as she was concerned that she could be facing disciplinary if the sick note was not produced in circumstances where the GP may refuse to provide one even if the claimant could successfully arrange an early appointment to visit the GP surgery.

48 On 11 September 2017 Sergeant Rawcliffe reinstated the right to self-certify and in her grievance Inspector Gail Rooney found it should not have been in the ASP.

<u>Allegation 7 including the claimant's health information on a spreadsheet which is accessible by line and other managers (and colleagues) accessed by the claimant on 26 July 2017.</u>

49 On the 26 July 2017 the claimant found on a level 1 shared team drive under the tab "sergeant" an EXCEL spreadsheet containing the name of approximately 60 members of staff, including personal information about health. There are no dates for the input of the information which referred to the claimant undergoing investigations for various illnesses and adopting a baby. It recorded she had in the past been prescribed medication for depression and was "off sick at present." This was information inputted by Inspector Kavanagh who was aware at some stage that the claimant suffered depression, but the exact date of his knowledge is unknown. There is no satisfactory evidence before the Tribunal that Inspector Kavanagh was aware the claimant was disabled on or before the meeting held on 5 January 2017, and it accepted on the balance of probabilities Inspector Kavanagh's evidence that the EXCEL spreadsheet was used by him as a working document, and he could not say when the information had been inserted other than on some date before the handover in June 2017, following which Inspector McManus unknowingly placed the EXCEL spreadsheet on the system and it became accessible to other police officers, including the claimant, because it was not password protected.

50 The claimant emailed the respondent on 26 July 2017 describing it as "not password protected…and is available for all staff to see who have access to level 1 team drive…it shows highly sensitive information…my health conditions, the medication I take and information about my life." The claimant was alarmed and upset and requested an investigation. The respondent confirmed in an email sent 26 July 2017 the EXCEL spreadsheet had been hidden, the claimant was made aware that the information was no longer accessible and that has remained the case since. Between the 15 June 2017 handover by Inspector Kavanagh to Inspector McManus, and 26 July 2017, a period of some 6-weeks, there is no way of knowing who had accessed the claimant's personal information, and the claimant was understandably upset bearing in mind her intention to keep her disability private.

51 In an email sent to the claimant on 31 July 2017 by Sergeant Barnes she was informed "you will be staying in our section." In an email to Sergeant Leyland sent 7 August 2017 the claimant wrote "you have taken my right to self-certify away apart form a chest infection of 4 days, all my absences have been long term" requesting the reason. She also asked whether her move to CDU had been

made permanent or "is still temporary and I can resume Level 1 when I am back on full duties?"

52 On 8 August 2017 Sergeant Leyland responded that the "self-certification…has been removed in order to help your Supervision and the Organisation to hopefully receive early diagnosis of the sickness to which we can then look at making the necessary arrangements, assistance…to limit the time off work…and hopefully reduce any risk of future unsatisfactory performance procedures due to poor sickness record." He clarified that the ASP should be regularly reviewed, could be amended and nothing had been heard from the claimant's GP. Finally, he confirmed his understanding that it was a temporary position, asking the claimant what her preference would be. The Tribunal finds by 8 August 2017 at the latest, the claimant was aware that she was not to be retained in CDU, which was a temporary position. However, she understandably became further confused after Sergeant Leyland's email of 17 August 2017.

53 The claimant involved the Police Federation to represent her, and on 15 August 2017 the claimant's representative emailed Sergeant Leyland about the self-certification clause in the ASP pointing out the claimant was "suffering from a long-term condition and short-term periods of absence are not significant…HR have told me the Force is not keen on utilising a removal of self cert…I can say it puts additional pressure on individual officers, is not always achievable (have you tried getting a short notice appointment with your GP) and it incurs a cost…this measure should not be seen as supportive and indeed may cause additional pressure on someone who suffers from the disabilities depression, a thyroid condition and fibromyalgia."

<u>Allegation 6 sending emails to the claimant demanding the return of her laptop on 17 and 18 August 2017</u>

54 On 17 August 2017 Sergeant Leyland emailed the claimant's Police Federation representative at 9.38 confirming "As far as I'm aware" the claimant had been "permanently re-deployed to the CDU…As such she should now have a new line manager who will take over the responsibility of the ASP. I do not have any line management access on the DMS to review the current ASP, however, if I would, I would make representations to keep the removal of the self cert contained within the ASP as a supportive measure, however this is now not my decision. "At 9.48 Sergeant Leyland emailed Inspector Plunket in the CDU "urgently" requiring the claimant's laptop for redeployment within level 1 investigations, and a further request was made on the 18 August 2017. The claimant agreed and a representative from IT informed her it needed to be return to the Investigations department who had just been issued 250 new laptops.

55 In oral evidence Sergeant Leyland stated Detective Constable Inspector Webster had informed him the claimant was to be based permanently in CDU, and this was unconnected with his request for a laptop. The request for the laptop came from Sergeant Leyland following a quarterly reminder from IT concerning a laptop audit and those that were not being used were to be returned. Sergeant Leyland had a new officer who needed a laptop and there were 250 new laptops for the whole division consisting of over 800 officers. It is not disputed the claimant had

no need for the laptop and was not using it. She had last used the laptop on 14 February 2017, 6-months prior and did not require it in CDU. The claimant's main concern was that a laptop would need to be reconfigured when she returned to Level 1 Investigations. The claimant had no right to retain a laptop she was not using, it was not unusual for laptops to be reconfigured and so the Tribunal found.

Allegation 8 the retention of the claimant in CDU where she is inputting data in circumstances where she has returned to full-time hours.

56 On the 29 August 2017 the claimant was working full time and found fit for full duties in her current role in CDU by Occupational Health. The end of date of recuperative duties at the CDU was "unknown". Occupational Health confirmed her medical condition fell under the provisions of the Equality Act and required reasonable adjustments. There was no reference to the claimant being well enough to return to Level 1 Investigations, and it appears the claimant did not seek or query whether this was a possibility. The evidence before the Tribunal was that the claimant was happy working in CDU, and waiting to adopt a second baby. The claimant agreed with the health report and consented to its release. At that point the claimant was not saying to Occupational Health she felt well enough to return to Level 1 Investigations and the Tribunal concluded there was no unfavourable treatment of the claimant who was happy with the status quo working in CDU, and had no intention of requesting a return to her substantive post in Level 1 Investigations.

57 At 16.34 the claimant representative requested whether she had been permanently posted to CDU, to which the response was the claimant was "not posted to the CDU…we are merely assisting the resumption to her role following a period of sickness…We do not have a vacancy for Jemma to be posted into CDU…our aim has always been to support Jemma as much as we can to recover from her health issues and provide an environment and workload that would facilitate her moving back to investigations to perform her budgeted role there. This has not changed."

58 By the 6 September 2017 had the claimant been in any doubt, she was aware from a chief inspector that she had not been posted to CDU and could return to Level 1 Investigations. The claimant was aware it was for her to request the return, and she failed to make that request. Accordingly, she was not caused any detriment as alleged.

59 On the 11 September 2017 Sergeant Rawcliffe reinstated the claimant's right to self-certify and any detriment caused to the claimant crystallised on this date. As ACAS Early Conciliation took place between 20 October to 20 November 2017 there are no jurisdictional time limit issues.

60 The claimant raised a grievance on the 20 September 2017. A number of the issues she had raised had been resolved, namely, the withdrawal of her right to self-certification had been reinstated, the EXCEL spreadsheet had been removed from the team drive and it had been confirmed she was temporary in CDU and her budgeted role remained in Level 1 Investigations. In short, the grievance

related to the EXCEL spreadsheet, removal of certified sick absence (the claimant did not mention the fact self-certification had been reinstated), posting and career development, sick leave amended to disability related, acknowledgment that she was a disabled employee and an apology request from Sergeant Leyland.

61 On 28 September 2017 the claimant was absent from work with depression. She never returned to work.

Grievance outcome

62 Detective Chief Inspector Rooney dealt with the claimant's grievance, and found in favour of the claimant on the following matters; in relation to the EXCEL spreadsheet she found "there was inadequate protection around the sensitive data to prevent persons who had no legitimate reasons to view the folder from doing so" and there had been "at least one data breach." It confirmed the EXCEL spreadsheet had immediately been placed in a secure location only accessible by second line management. A number of recommendations were made. With regard to the claimant's posting that part of the grievance could not be resolved but recommendations were made about the future. Turning to the attendance support plan, the claimant's self-certification was reinstated despite it having been reinstated in September, a fact the claimant had failed to mention.

63 Detective Chief Inspector Rooney took the view that the removal of self-certification "has been widely used as a supervisory tool and is an option in Force absence/sickness management policy. However, it must be used proportionately and is best directed at officers with numerous short-term periods of sickness rather than longer term certificated illness. Jemma's case is unique in that although her recent periods of sickness are long term, each individual sick note prescribed a different condition or exploratory procedure. This is clearly something that would require further supervisory scrutiny and I believe Sergeant Leyland has acted in the best interests of the force. However, I would acknowledge that the removal of self-certification was not appropriate…" and recommendations were made.

64 The claimant retired on the grounds of ill health from the respondent with effect from 1 September 2018.

Law

Disability discrimination arising from disability

65 Section 15(1) of the EqA provides-

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

(a) A treats B less favourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

66 Paragraph 5.6 of the Equality and Human Rights Commission: Equality Act 2010 Code of Practice provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

67 The law is agreed between the parties, and Mr Tinkler's analysis is set out below.

68 Mr Tinkler submitted in order for the claimant to succeed in her claims under s.15, the following must be made out:

1.1 there must be unfavourable treatment;

1.2 there must be something that arises in consequence of C's disability;

1.3 the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability;

1.4 the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim

69 Unfavourable treatment is not the same as detriment. The test is whether a reasonable worker would consider that the treatment is unfavourable. An unjustified sense of grievance will not suffice, and this is particularly relevant to some of the claims made by Mrs Dutton-Eves. Useful guidance on the proper approach to a claim under s.15 was provided by Mrs Justice Simler in <u>Pnaiser v NHS England and anor</u> [2016] IRLR, EAT:

a) "A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…"

d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

e) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

70 With regard to the objective justification test, when assessing proportionality, the Tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer (see Hensman v Ministry of Defence UKEAT/0067/14/DM).

Disability discrimination – failure to make reasonable adjustments

71 The duty to make reasonable adjustments is set out in S 20 of the Equality Act 2010 ("EqA"). Section 20(3) sets out the first requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21(1) provides that a failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments. Schedule 8 of the EqA 2010 applies where there is a duty to make reasonable adjustments in the context of 'work' and the Statutory Code of Practice on Employment is to be read alongside the EqA. The Code states that a PCP should be construed widely so as to include, for example, informal policies, rules, practices, arrangements, criteria, conditions and so on.

72 In the EAT decision in the well-known case Secretary of State for Work and Pensions (Job Centre Plus) v Higgins [2013] UKEAT/0579/12 it was held at paragraphs 29 and 31 of the HHJ David Richardson's judgment that the Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage.

Burden of proof

73 Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

74 In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that he did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondents and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

Time limits

75 (1) [Subject to [sections 140A and 140B] proceedings] on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.
(2)..

(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Conclusion – applying the law to the facts

Did the respondent treat the claimant less favourably because of something arising in consequence of her disability?

Issue 1 (allegation 1)

76 The Tribunal has followed the numbering of the list of issues agreed between the parties, and refers to the numbered allegations set out above.

77 With reference to the first issue, namely, did the Respondent subject the Claimant to unfavourable treatment in January 2017 because of something arising in consequence of her depression (her sickness absences) by advising Claimant against undertaking CID examination, the Tribunal found these words had not been said, the claimant was not treated less favourably for the reasons set out above and this allegation was not well-founded and is dismissed.

78 In the alternative, had the Tribunal found the words had been used as alleged by the claimant, it would have gone on to find the complaint out of time as the cause of action arose on some date in January 2017 and proceedings issued following ACAS early conciliation on 15 December 2017, some 12-months later. There were no further allegations of discrimination against Inspector Kavanagh, who had no management responsibilities over the claimant after 15 June 2017. There was no continuing act, and no reason why the claimant could not have issued proceedings for discrimination within the statutory time limit. She has given no cogent good reason for failing to do so, and balancing the interests of the parties and prejudice caused by the delay (especially with reference to Inspector Kavanagh) it is not just and equitable to extend the time limit.

Issues 2 & 3 (allegation 2)

79 With reference to the second issue, namely, did the Respondent subject the Claimant to unfavourable treatment in May 2017 because of something arising in consequence of her disability (her depression and/or sickness absence) by writing to Claimant's GP without her consent, the Tribunal found that it did. Sergeant Leyland sent the claimant's GP a copy of the RTW Plan in order that recommendations could be made by the GP and informed the claimant of his actions after the event, and the reason why contact was made with the GP was the claimant's disability. Sergeant Leyland sought advice from the claimant's GP concerning what reasonable adjustments should be offered to the claimant, who was absent as a result of her disability.

80 In closing submissions Mr Tinkler argued that the claimant cannot establish that the failure to obtain her consent before sending the RTW plan was because of her absence, and there was a need to distinguish between context and the actual cause of less favourable treatment. Mr Prior submitted all the respondent needed to do was obtain the claimant's consent, as it did for occupational health records. Contrary to Mr Tinkler's submissions, the Tribunal took the view that the fact that Sergeant Leyland did not believe he needed the claimant's consent to send the RTW plan to her GP as he had sent RTW Plans to other GP's in the past, missed the point. The claimant's consent should have been obtained; it was not and the contact was made because of the claimant's absence and the need for reasonable adjustments to get her back into work. It was not proportionate for the communication to have been made without consent having regard to the need for confidentiality and taking into account all that was needed for Sergeant Leyland to have approached the claimant for her consent, or alternatively, made a request to Occupational Health.

81 The claimant liked to keep matters separate between work and personal and was upset that Sergeant Leyland had approached her GP without consent and this is the unfavourable treatment she relies upon. The fact the respondent GP did not respond to the request is not the issue. The Tribunal accepts the claimant was genuinely upset, however, once she instructed her GP not to respond that was the end of the matter. The detriment caused to the claimant was minimal and limited in time to 17 May 2017

82 With reference to the third issue, namely, if so, was the respondent justified as a proportionate means of achieving the legitimate aim of avoiding the Claimant returning to work on a Return to Work Plan not agreed by her GP as suitable, the Tribunal found it was not. Sergeant Leyland hoped rather than expected the GP to respond; his experience was that GP's did not respond and a lack of GP's response would not prevent the RTW Plan from being agreed. Agreement needed to be sought from the claimant coupled with the guidance of Occupational Health. It was not a proportionate means of achieving a legitimate aim given the breach of confidentiality and failure to obtain the claimant's consent. The unfavourable treatment did arise from the consequence of the claimant's disability and the sickness absence. In short, had the claimant not been absent off sick Sergeant Leyland would not have contacted the GP.

<u>Issues 4 & 5 (allegation 3)</u>

83 With reference to the fourth issue, namely, did the respondent subject the claimant to unfavourable treatment on 17 May 2017 because of something arising in consequence of her disability (her sickness absences) by subjecting her to the Return to Work Plan ("RTW"), the Tribunal found that it did not. As indicated above, the claimant was not subjected to the RTW Plan, which had been overtaken by Occupational Health's advice. Based on an objective and common sense reading of the RTW plan the Tribunal found it to have been supportive and entirely appropriate in the circumstances given the claimant's long-term absences and multiple medical complaints. Despite the claimant's

objections to being managed, sickness absence requires management, on occasion robust management, and the claimant was in danger of formal procedures being followed and eventual dismissal. The respondent could have been criticised had it not put in place a RTW Plan. As found by the Tribunal above, the claimant was aware Occupational Health were not supporting a return to work on the 10 June 2017, she was aware that the date in the RTW Plan was not effective and thus there was no detriment. Mr Prior submitted the RTW Plan was disproportionate, a series of “mandatory requirements, commands” not “objectively supportive” and did not have the claimant’s agreement. The Tribunal did not agree, preferring Mr Tinkler’s submission that considered objectively, the RTW Plan was perfectly proper and did not amount to unfavourably treatment. The wording set out was generated from a standard template and included reasonable adjustments specific to the claimant’s needs. Mr Prior in oral submissions asked whether any reasonable person would think the sentences used in the RTW Plan, with specific reference to “you will return to work” amounted to unfair treatment, and on the balance of probabilities given the factual matrix the Tribunal concluded a reasonable person would not have thought this.

84 It was conceded by Mr Prior during oral submissions that the fact there was no attempt to agree the RTW Plan with the claimant was not a claim before the Tribunal but context only.

85 With reference to the fifth issue, namely, if so, was it justified as a proportionate means of achieving the legitimate aim of requiring good attendance, there is no requirement for the Tribunal to consider this issue given its finding above. However, in the alternative, had it found the claimant had been subjected to unfavourable treatment as alleged it would have gone on to find the respondent had justified it. A RTW Plan is a proportionate means of achieving a legitimate aim, that being improving and maintaining the claimant’s attendance at work bearing in mind the consequences to an organisation, no matter how large, of sickness absences. It is notable that contrary to Mr Prior’s submissions, the RTW Plan was up for discussion and Sergeant Leyland made it clear to the claimant it was to be discussed “on our next meeting” or at any other time.

Issue 6 & 7 (allegation 4)

86 With reference to the sixth and seventh issue, namely, did Respondent subject the Claimant to unfavourable treatment on 24 July 2017 because of something arising in consequence of her disability (her sickness absences) by subjecting her to the Attendance Support Plan, the Tribunal repeats its observations above. The claimant was not subjected to unfavourable treatment. The ASP was supportive, except for the removal of the right to self-certify sickness absence, the remaining ASP provision, and was objectively justifiable as a proportionate means of improving and maintaining the claimant’s attendance at work.

Issue 8 & 9 (allegation 5)

87 With reference to the eighth issue, namely, did the Respondent subject the Claimant to unfavourable treatment from 24 July to 11 September 2017 because of something arising in consequence of her disability (her sickness absences) by removing her right to self-certify sickness absences, the Tribunal found on the balance of probabilities it was unfavourable treatment and it did arise in consequences of her sickness absence.

88 Mr Tinkler submitted the ASP "plainly" provided the claimant with the right not to provide a GP note where she had justification not to do so, and the words "unless otherwise justified" were relied upon as a basis by which the claimant was informed she would not need to provide a GP note if she could justify the position. This was never clarified to the claimant and the words "otherwise justified" were not defined or expanded upon. On a common sense reading of the ASP at paragraph 8 the claimant's right to self-certify was removed for 6-months. For the purpose of the detriment caused to the claimant the right to a review becomes relevant only when self-certification is re-instated by Sergeant Rawcliffe on 11 September 2017.

89 Mr Prior submitted Sergeant Leyland had the claimant's sickness absences in mind when he removed her right to self-certify, and the Tribunal agreed. Despite Sergeant Leyland's attempt at justifying his actions by references to improving attendance, early diagnosis and communication, the Tribunal accepted the removal of the right to self-certify sickness absence was neither appropriate or a proportionate means of achieving the legitimate aim. It is difficult for the Tribunal to comprehend how the right to self-certify would improve or maintain the Claimant's attendance at work given the fact that most of her absences were long-term.

90 Detective Chief Inspector Rooney's decision on the claimant's grievance encapsulates how the removal of the right to self-certify should be used proportionately and was "best directed at officers with numerous short-term periods of sickness rather than longer term certificated illness." The claimant falls into the latter category and it was found the removal of self-certification was not appropriate in the claimant's case, and so the Tribunal also found. Mr Tinkler submitted the claimant and her representative had not identified that the removal of the right had caused any difficulty, which was correct as the claimant did not attempt to self-certify during the relevant period. The Tribunal accepted the removal of the right to self-certify amounted to unfavourable treatment, it was a cause for worry to the claimant against a background of various health conditions including depression that had resulted in absences in the past.

91 With reference to the ninth issue, namely, if so, was it justified as a proportionate means of achieving the legitimate aim of securing good attendance, the Tribunal found it was not given the claimant's medical history relating to self-certification when there had not been any issues in the past. The Tribunal agreed with Mr Prior that the claimant had a good attendance when fit and there was no suggestion of her going off sick when really being fit

for duty. The claimant's long-term illness or fluctuating/changing/evolving illnesses did not justify the removal of her right to self-certify, and the fact that the removal was time barred and subject to review was but one consideration when looking at justification. The Tribunal accepted Mr Tinkler's submission that the wider package of measures did effectively support the claimant because of the claimant returned to work and her attendance improved; however, this does not undermine the fact that the right to self-certify was not objectively justified.

Issue 10 & 11 (allegation 6)

92 With reference to the tenth issue, namely, did the Respondent subject the Claimant to unfavourable treatment on 17 and 18 August 2017 because of something arising in consequence of her disability (her temporary attachment to CDU) by demanding the return of her Force laptop, the Tribunal found that it had not. It accepted the laptop was needed for operational reasons, the claimant did not use it and did not need it. The Tribunal found there was no detriment, given the fact the claimant's evidence was she did not use the laptop.

93 In the alternative, had the claimant established unfavourable treatment (which she did not) the Tribunal would have found with reference to the eleventh issue, the return of the laptop was justified as a proportionate means of achieving the legitimate aim of reallocating resources among Level 1 Investigations. Had the Tribunal found it was unfavourably treatment (which it did not) it would have gone to find it was justified and a proportionate means of achieving a legitimate aim in these days of austerity when the Force is struggling to provide laptops to all of its officers. The claimant's point that it would require reconfiguration is not a detriment on the basis that reconfiguration could had taken place had she returned to Investigations. Mr Prior's submissions to the effect that the respondent produced no documentary evidence to show the truth of Inspector McManus' explanation coupled with Sergeant Leyland's belief that the claimant had been permanently redeployed to CDU, was considered by the Tribunal. The problem for the claimant is that she is unable to show, on the balance of probabilities, that the requirement to return the laptop amounted to unfavourable treatment and even if she succeeded, there was no satisfactory evidence the treatment was because of something arising from her disability. The claimant did not need the laptop, another officer in Investigations did and that was the end of the matter.

Issues 12 & 13 (allegation 8)

94 With reference to the twelfth issue, namely, did the Respondent subject the Claimant to unfavourable treatment because of something arising in consequence of her disability (her recent sickness absence) by retaining her in CDU, the Tribunal found as matter of fact it was confirmed to the claimant it working at CDU was temporary and the claimant never requested to return to Level 1 Investigations despite her awareness that it was down to her to make the request, as confirmed in oral evidence and contemporaneous documents.

95 Mr Prior submitted the respondent retained the claimant past 29 August 2017 when she began working full-time hours, it did not benefit her health and she had no timescale for returning to level 1 Investigations. It is correct there was no time scale, however, the claimant was aware that she could request a return to Level 1 Investigations at any time and she never made such a request. It cannot be said that the claimant was "retained" in CDU against her will and the evidence before the Tribunal was that it suited the claimant to remain working there, had it not she would have requested a return to her substantive post.

96 With reference to the thirteenth issue, namely, if so, was it justified as a proportionate means of achieving the legitimate aim of benefiting the claimant's health, the Tribunal found that it was given the fact the claimant had progressed to working full-time with no sickness absences whilst based in CDU. There is no suggestion by the claimant or Occupational Health that she was ready to return to Level 1 Investigations, and the claimant remaining in CDU was achieving the legitimate aim of benefitting her health. The Tribunal's view was reinforced by the events which followed soon after, including the claimant's sickness absence and her retirement on the grounds of ill-health, which requires a debilitating medical condition preventing an officer from undertaking her substantive role.

Issue 14 (allegation 7)

97 With reference to the fourteenth issue, namely, did the Respondent subject the Claimant to unfavourable treatment because of something arising in consequence of her disability (her depression and/or sickness absences) by including her health information on a spreadsheet available to managers, the Tribunal found the claimant was subjected to unfavourable treatment given the claimant's personal and medical information was available to level 1 officers, and the Tribunal concluded there was no justification for this. The claimant was aware of the breach that was rectified in a few hours, and she had no knowledge how long the information had been available on the EXCEL spreadsheet. The Tribunal found it was available after the 15 June 2017 until 26 July 2017, the date the claimant discovered the information, and it was put right immediately. The claimant had no idea how many people had accessed it during the period, if any.

98 Mr Prior submitted the health information arose as a result of the claimant's disability and it did not matter that other information was on the spreadsheet; the Tribunal agreed. Mr Tinkler submitted the claimant cannot establish the spreadsheet was not protected because of something arising from her disability. He argued there was a distinction between the context of the alleged treatment and the cause of the alleged treatment, and failing to password protect the EXCEL spreadsheet was not related to the claimant's disability. The Tribunal on balance held Inspector Kavanagh had recorded the claimant's health information on EXCEL and when he failed to ensure it was password protected this created a difficulty for the claimant, and disadvantaged her on the basis that personal health information relating to her

disability became available to many people. Therefore, she was disadvantaged because of something arising in consequence of her disability. In short, the claimant's disability had a consequence for her that led to that disability becoming public via the EXCEL spreadsheet when she was entitled (and indeed wished for) the matter to remain confidential. Inspector Kavanagh did not take sufficient care, despite his knowledge of the claimant's disability, to ensure her medical health condition was kept confidential, and Inspector McManus in turn, did not take care by viewing the information before placing it in the sergeants file. Their motives for these failures are not relevant; however, their actions point to a disregard for the security of confidential information relating to health and disability.

99 With reference to the final part of issue 14 as amended, the unfavourable treatment was not justified as a proportionate means of achieving a legitimate aim. It was submitted the aim was to effectively manage staff. The Tribunal took the view that whilst Inspector Kavanagh cannot be criticised for holding the information on an EXCEL spreadsheet, it would have been a straightforward matter for him to have password protected it prior to the handover, or at the very least, inform Inspector McManus of its content and the need for confidentiality to be retained. It would have been a straightforward matter for Inspector McManus to have password protected all documents transferred to him by Inspector McManus before releasing them for wider viewing on the intranet, and check to establish whether the information was confidential or not.

Issues 15 & 16: failure to make reasonable adjustments number 1

100 A key feature of disability discrimination law is duty to make reasonable adjustments. Section 20 EqA sets out the general scope of the duty and Schedule 8 sets out specific provisions regarding the duty and is dealt with in the Equality and Human Rights Commission's Statutory Code of Practice on Employment ("EHRC"). General guidance on the approach to be taken by Tribunals in reasonable adjustments claims was given in the well-known case of Environment Agency –v- Rowan cited above, and in H M Prison Service –v- Johnson [2007] IRLR 951 Justice Underhill stated that a Tribunal must identify with some particularity what "step" it is that the employer is said to have failed to take in relation to the disabled employee.

101 The Tribunal was satisfied the respondent was under a duty to make reasonable adjustments given the claimant's inability to meet the requirements of her substantive role in Level 1 Investigations, and it met that duty by transferring the claimant to the CDU in addition to a number of other adjustments as set out above. With reference to the fifteenth issue, namely, did the PCP of sending an automated Attendance Support Plan listing "days lost" due to sickness absences place the Claimant at a substantial disadvantage in comparison to persons who are not disabled, the Tribunal found the claimant was not caused disadvantage. The claimant conceded on cross-examination this was information known to her, and nothing new.

102 Mr Prior submitted the ASP was a management action and the "days lost" did not convert to disability related sickness, which could be but were not discounted owing to it being automated. The Tribunal did not accept this was the claimant's pleaded case as set out in paragraph 27 onwards of the Details of Complaint. The claimant's complaint relates to the respondent's practice of sending the ASP on 24 July 2017 listing lost days due to sickness which caused her stress, the reasonable adjustment being sought was not to send the ASP listing sickness absence days. The claimant's claim is not whether the respondent should have discounted any of the sickness absence due to disability, and there has been no application to amend the pleadings.

103 Mr Tinkler submitted the ASP listing days lost due to sickness was not a practice and not automated as it is drafted by a line-manger when the trigger point set out in Origin is reached. The Tribunal concluded a practice existed that included a degree of automation and this was sufficient for the PCP to be established. In accordance with the EAT decision in Nottingham City Transport Limited –v- Harvey UK/EAT/0032/12 "provision, criterion or practice" (the "PCP") must have something of the element about repetition about it". The Tribunal Code of Practice provides that the phrase "provision, criterion or practice" should be construed widely so as to include any formal or informal policies, rules, practices, arrangement, criteria, conditions, pre-requisites, qualifications or provisions – para 4.5. The Tribunal found the 24 July 2017 ASP did amount to a PCP, as it was the respondent's practice and policy to send to an employee details of their absence dates. The claimant was aware of the dates and it is difficult to see how she could have been caused a disadvantage when the ASP was sent to her.

104 The onus is upon the claimant to identify the nature of the adjustment that would ameliorate the substantial disadvantage, a burden which the claimant has failed to meet and thus the burden of proof has not shifted to the respondent to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make for the reasons set out below. Had the claimant discharged the burden of proving the PCP at issue had caused her a substantial disadvantage in comparison of persons who were not disabled, the Tribunal in the alternative, would have gone on to find it was not reasonable for the respondent not to send her confirmation of the absence dates. The PCP reflected good management practice in managing and supporting an employee who had "smashed" in the words of Mr Tinkler, the trigger point. It is always possible for management to get the dates wrong, and listing them given an employee the opportunity to review and agree them. There was no satisfactory evidence before the Tribunal that the reasonable adjustment proposed by the claimant i.e. not sending her the absence dates, would be effective to avoid any disadvantage.

Issue 17 & 18: failure to make reasonable adjustments number 2

105 With reference to the seventeenth issue, namely, did the PCP of demanding the Claimant return her Force laptop place the Claimant at a substantial disadvantage in comparison to persons who are not disabled, the

Tribunal found that there existed a PCP whereby laptops that were not in use by an individual officer were reallocated to another officer. The claimant alleges she was caused a substantial disadvantage because it put her under unnecessary stress and concern about her substantive post. The Tribunal did not find this evidence credible with reference to the factual matrix, primarily the fact that she had not used the laptop since 14 February 2017 and was not expected to use it whilst based at CDU, she had not requested a return to Level 1 Investigations after 29 August 2017 when she started to work full-time hours, had given the respondent no indication when she wanted to return to her substantive role, and by this date she was informed in no uncertain terms she had not been posted permanently in CDU, the respondent's intention being for her to remain working there as a reasonable adjustment until her health had recovered sufficiently to move back into her substantive role. The claimant did not need access to a laptop for this to happen and the Tribunal did not accept the Respondent had failed to make a reasonable adjustment for the Claimant's disability by leaving the laptop with her. It found the claimant was not put at a substantial disadvantage given the fact she not need to laptop. As submitted by Mr Tinkler, it was "wholly unsustainable" for a laptop which the claimant did not use or intend to use to be retained by her as a reasonable adjustment, and the respondent could not reasonably be expected to know that the request would have put the claimant at a substantial disadvantage, especially given the fact that once the claimant returned to Level 1 Investigations (which she never did) that was the relevant time for the provision of a laptop to be made.

Issue 19

106 With reference to the nineteenth issue, namely, was there a continuing course of conduct extending over a period or are parts of the claim out of time the Tribunal found there was a continuing act between the actions of Sergeant Leyland on 17 May 2017 and 24 July to 11 September 2017. In a leading case Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530, CA, the question was whether that was an act extending over a period, as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed. Tribunals should look at the substance of the complaints in question — as opposed to the existence of a policy or regime — and determine whether they can be said to be part of one continuing act by the employer. 'One relevant but not conclusive factor is whether the same or different individuals were involved in those incidents'. The Tribunal took the view that the removal of the claimant's right to self-certify was in itself a continuing act that continued until 11 September 2017 review, and it was not a one-off act with continuing consequences. Removing the right to self-certify was a process in the armoury of the respondent when dealing with an officer who had a number of short-term sickness absences. Once the process had been initiated by Sergeant Leyland the claimant was subjected to the continuing act of obtaining a MED3 immediately she was absent from work for any illness, including her disability.

107 With reference to allegation 14, the cause of action arose between 15 June 2017 until 26 July 2017, the claimant's date of knowledge being the later date. The claim form was received on 15 December 2017 following ACAS conciliation between 20 October and 20 November 2017, and it follows that allegations numbered 2, 5 and 7 were not out of time, and the Tribunal had the jurisdiction to consider them. As set out above, the first allegation was found to be out of time (although it did not take place as alleged by the claimant), all other successful claims being in time.

108 In conclusion, the claimant was subjected to unlawful discrimination on the grounds of her disability and her claims of unlawful discrimination numbered 2, 5 and 7 brought under Section 15 Equality Act 2010 are well founded and adjourned to a remedy hearing. The claimant was not subjected to unlawful discrimination on the grounds of her disability in connection with allegations numbered 1, 3, 4, 6, and 8 which are not well-founded and are dismissed. The claimant was not subject to unlawful discrimination on the grounds of her disability, and the claimant's claim that the respondent had failed to make reasonable adjustments brought under Section 20 of the Equality Act 2010 is not well-founded and is dismissed.

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Employment Judge Shotter

14 January 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

25 January 2019

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FOR THE SECRETARY OF THE TRIBUNALS