# EMPLOYMENT TRIBUNALS

**Claimant:** Ms S Owens

**Respondent:** The Chief Constable of North Yorkshire Police

**Heard at:** Newcastle (by CVP) **On:** 4, 5, 6, 7 and 8 October 2021
Deliberations: 23 and 24 March 2022

**Before:** Employment Judge S Loy
Mr M Brain
Mr J Adams

**REPRESENTATION:**

**Claimant:** Mr Crammond of Counsel
**Respondent:** Ms Mellor of Counsel

# RESERVED JUDGMENT

The judgment of the Employment Tribunal is as follows:

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

# REASONS

## Introduction

1. By a claim form presented on 25 November 2020, the claimant complains of disability discrimination, specifically discrimination arising in consequence of her disability, a failure by the respondent to make reasonable adjustments and harassment related to disability.

2. The respondent denied all liability to the claimant.

## The Issues

3. The issues were identified at a preliminary hearing on 22 February 2021 before Employment Judge Green. The issues so identified are set out in the written record

of that preliminary hearing (bundle pages 76-79). The issues appear to have been refined during the course of that preliminary hearing as shown at paragraph 47 of the preliminary hearing summary (bundle page 78). Employment Judge Green records that the issues were "provisionally agreed". The parties, if they wished to comment or amend any of the issues, were asked to do so in writing to the other party copied to the Tribunal on or before 4.00pm on 8 March 2021. No such comments or amendments were received.

4. The Tribunal therefore proceeded on the basis that the issues as set out at the preliminary hearing on 22 February 2021 are the issues agreed between the parties (who at all stages have been represented by counsel), for the Tribunal's determination:

**1. Time Limits**

1.1 Are the claims made in time? Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 15 July 2020 may not have been brought in time.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Were the claims made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaints relate?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

**2. Disability**

2.1 The respondent accepts that the claimant is disabled due to physical impairment on the grounds that she was diagnosed with lymphoedema of her right hand, arm and post axillary fold following surgery for breast cancer in 2016. The respondent also accepts that it had knowledge of her lymphoedema and the effect of the same, by at least 27 December 2017. The respondent accepts that the claimant is disabled due to mental impairment by virtue of the

fact that she has been diagnosed with a generalised anxiety [dis]order, single episode depressive disorder with and without psychotic symptoms, but does not accept a diagnosis of OCD. The claimant no longer relies on OCD as a disability.

2.2 The respondent does not accept that, prior to January 2020, it knew or ought to have known, that the claimant was experiencing a mental impairment that had a substantial adverse effect on her normal day-to-day activities. The issues to be determined is:

2.2.1 Did the respondent have actual or constructive knowledge of the claimant's clinical anxiety disorder and clinical depression prior to January 2020 [and if so, when]?

**3. Discrimination arising from disability (Equality Act 2010 section 15)**

3.1 Did the respondent treat the claimant unfavourably by:

3.1.1 Reducing her pay in line with regulation 28 of the Police Regulations 2003?

3.1.2 Requiring her to take annual leave whilst off sick to allow her to receive full pay?

3.2 Did the following things arise in consequence of the claimant's disability:

3.2.1 Her sickness absence?

3.2.2 Her request for ill-health retirement?

3.3 Was the unfavourable treatment because of any of those things?

3.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

3.4.1 Retaining police officers on sick leave whilst managing public spending as prescribed by the Regulations in relation to sick pay. The proportionate means of achieving that aim are the application of the Police Negotiating Board Guidance when considering extension of pay.

3.5 The Tribunal will decide in particular:

3.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims?

3.5.2 Could something less or non-discriminatory have been done instead?

3.5.3 How should the needs of the claimant and the respondent be balanced?

3.6 Did the respondent know, or could it reasonably have been expected to know, that the claimant had the disability? From what date?

### 4. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

4.1 Did the respondent know, or could it reasonably have been expected to know, that the claimant had the disability? From what date?

4.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs?

4.2.1 Regulation 28 of the Police Regulations 2003 (i.e. not maintaining an officer's full pay during the IHR process).

4.2.2 Police Negotiating Board Guidance (i.e. a presumption that sick pay will not be extended).

4.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that receiving less than full pay through sickness absence, being a disadvantage disabled persons are more likely to suffer from?

4.4 Did the respondent know, or could it reasonably have been expected to know, that the claimant was likely to be placed at the disadvantage?

4.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

4.5.1 Maintaining her full pay during the IHR process;

4.5.2 Maintaining her half pay from 16 July 2020;

4.5.3 Allowing her to be ill-health retired.

4.6 Was it reasonable for the respondent to have to take those steps and when?

4.7 Did the respondent fail to take those steps?

### 5. Harassment related to disability (Equality Act 2010 section 26)

5.1 Did the respondent do the following things:

5.1.1 The length of time it took to refer her to the SMP;

5.1.2 The constant requirements to obtain full medical information;

5.1.3 The length of time it took to conclude the IHR process;

5.1.4 The respondent's failure to deal with the reduction in her pay in and efficient manner and the contradictory indications to the claimant during the process.

5.1.5 The respondent's refusal to attend the PMAB in London to allow an appeal determination on the claimant's IHR?

5.2 If so, was that unwanted conduct?

5.3 Did it relate to disability?

5.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

5.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

5. At the outset of this hearing the parties suggested that this five day hearing deal with liability only. The Tribunal agreed to that request. Accordingly, the issue of remedy has not been set out in the List of Issues referred to above whereas it does appear in the record of the preliminary hearing on 22 February 2021.

**Evidence**

6. The Tribunal had before it an agreed bundle comprising of 1243 pages. References in this judgment to pages are references to page numbers in the bundle.

7. The Tribunal heard from the following witnesses:

   (a) The claimant (in a statement running to 38 pages);

   (b) Lisa Winward, Chief Constable of North Yorkshire Police (in a statement running to 31 paragraphs);

   (c) Melissa Pearson, HR Specialist and, from April 2021, People Advisor; and

   (d) Catherine Hulbert, HR Professional Support Consultant within NYP's HR Professional Support Team from September 2004 and latterly from 1 April 2021, Employee Relations Manager.

**Background**

8. A significant amount of the claims the Tribunal is required to determine relate to the claimant's pay. Accordingly, the Tribunal outlines at this early stage the relevant sick pay provisions and practices applicable to the respondent. In this judgment the term "respondent" is used interchangeably with the term NYP.

Police Regulations 2003

9. Regulation 28 of the Police Regulations 2003 ("the Regulations"), and Annex K to the Home Secretary's Determinations, grant a public office-holder full sick pay for six months, and a further six months on half pay – both of which a Chief Officer may, from time to time, determine to extend at their discretion.

10. NYP has its own internal *"Extension to Sick Pay Entitlements Procedure" (Police Officers and Staff).* PNB Circular 05/01 encourages Police Authorities to have such internal procedures (bundle pages 1146 and following).

11. So far as relevant:

    (a) Regulation 28 creates a presumption that pay will automatically be reduced to half pay after six months' sickness absence or stopped after one year of sickness absence, unless there are reasons in a particular case to exercise discretion in the individual's favour.

    (b) Responsibility shall sit with the individual to apply for extension by writing to their line manager detailing his/her reasons for special dispensation.

    (c) Possible exceptional circumstances will be:

***"(c) Cases being considered in accordance with the PNB Joint Guidance on Improving the Management of Ill Health where there has been a referral of the issue of whether the police officer is permanently disabled to a Selected Medical Practitioner".***

    (d) In respect of the exceptional circumstances at (c) above only, the following action will be taken:

    - Pay will be automatically reduced to half pay or nil pay (as appropriate) in accordance with the sub-paragraph above, but

    - Where the decision is subsequently made by the Chief Constable/Deputy Chief Executive Officer, to medically retire an officer after he/she has gone through the SMP process (and any medical appeal resulting therefrom), then the police officer's pay will be restored to full pay for the period commencing from the date that the Deputy Chief Constable referred the question(s) regarding permanent disablement to the SMP to the date of the police officer's retirement.

PNB Circular 05/01 (bundle pages 1178 – 1180)

12. The Police Negotiating Board ("the Board") Circular 05/01 is dated January 2005 and is entitled, *"Guidance to Chief Officers on the use of discretion to resume/maintain paid sick leave".* It sets out an agreement reached by the Board on *"Additional Guidance to Chief Officers on the use of discretion to resume/maintain paid sick leave in support of the Secretary of State's determination of sick pay under regulation 28 of the Police Regulations 2003".* The Circular contains, at paragraph 2, confirmation that a Chief Office of Police *"may"* in a particular case determine that for a specified period a member who is entitled to half pay is to receive full pay, or that a member who is entitled to half pay is to receive full pay, or that a member who is not entitled to any pay while on sick pay is to receive either full pay or half pay.

13. Paragraph 3 of the Circular contains a reminder of an earlier PNB agreement of 9 May 2002 that: *"The PNB will consider guidance to situations where it would be*

*reasonable for Chief Constables to exercise their discretion favourably to resume/maintain paid sick leave".*

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

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

16. Paragraph 7 states that whilst each case must be considered individually:

*"The PNB considers it* would *be generally appropriate for Chief Officers to exercise the discretion favourably where:*

> *(a)* *The Chief Officer is satisfied that the officer's incapacity is directly attributable to an injury or illness that was sustained or contracted in the exercise of his/her duty; or*
>
> *(b)* *The officer is suffering from an illness which may prove to be terminal; or*
>
> *(c)* ***The case has been considered in accordance with the PNB Joint Guidance on Improving the Management of Ill Health and the Police Authority has referred the issue of whether the officer is permanently disabled to a selected medical practitioner****;*
>
> *(d)* *The Force Medical Advisor advises that the absence is related to a disability as defined by the DDA….."*

17. The Tribunal adds emphasis to paragraph "(c)" as that paragraph was the one which was most directly in issue in this matter.

18. The PNB Joint Guidance on Improving the Management of Ill Health referred to within exception (c) is set out in PNB Circular 10/4.

<u>PNB Circular 10/4 </u>(bundle pages 1181-1240).

19. This Circular has the status of guidance. This Circular essentially sets out the process that a Police Authority must follow where a police officer may be permanently disabled from carrying out the normal duties of a police officer. It includes the role of the Force Medical Advisor ("FMA"); it refers to the Selected Medical Practitioner ("SMP"); appeals against the SMP decision; the procedure for internal reviews of decisions and disputes; reviews of a decision on medical retirement; and appeals to the Board of Medical Referees – the Police Medical Appeal Board ("PMAB"), including the decision of the Board which is the end of the process. The full PNB Circular 10/4 is set out at pages 1181-1240 of the bundle.

<u>Absence Management Policy </u>(bundle pages1146-1151)

20. NYP has its own internal *"Extension to Sick Pay Entitlements Procedure" (Police Officers and Staff).* PNB Circular 05/01 encourages Police Authorities to have such internal procedures (bundle pages 1146 and following).

21. This procedure mirrors "little (c)" – the exception set out at paragraph 7 of the PNB Circular 05/01 – see paragraph 16 above. Line managers considering applications based on this exception should consult with the HR Advisor for information and advice.

The ill-health retirement process at NYP

22. Catherine Hulbert gave helpful evidence to the Tribunal about the general process to be followed when NYP manage potential ill health retirements. This process was not disputed by the Claimant and it is convenient to set out the summary provided by Ms Hulbert:

 (1) Stage 1 – Force Medical Advisor ("FMA") report which may recommend referral of the officer to the Selected Medical Practitioner ("SMP").

 (2) Stage 2 – An HR Advisor prepares a report for a member of the HR Senior Management Team to approve a referral to the SMP.

 (3) Stage 3 – If approved, the appointment with the SMP is requested through the SMP provider, Healthworks.

 (4) Stage 4 – SMP receives all relevant medical information with a summary report of the case.

 (5) Stage 5 – SMP writes a report and completes "SMP overall assessment and decision" section, and if appropriate a "Capability Assessment Form".

 (6) Stage 6 – The police officer and NYP receive a copy of the SMP report at stage 5 above.

 (7) Stage 7 – The police officer is informed that he/she can appeal the SMP decision.

 (8) Stage 8 – If there is an appeal against the SMP recommendation, NYP and the officer may refer the matter back to the SMP for reconsideration, usually the officer will be providing new medical information.

 (9) Stage 9 – An HR Consultant prepares a report which includes:

 9.1 The SMP report;

 9.2 A statement of the officer's suitability and aptitude for retention; and

 9.3 A recommendation as to whether the officer should be retained.

 (10) Stage 10 – The report at stage 8 above is submitted to a member of the HR Senior Management Team for a recommendation.

 (11) The reports at stages 9 and 10 are submitted to the Chief Constable for a decision on whether the officer is to be retained or retired on the grounds of ill health.

 (12) Stage 12 – The Chief Constable's decision is confirmed to the officer in writing.

(13) Stage 13 – The officer may appeal to the Police Medical Appeal Board ("PMAB") which is constituted by three medical professionals and usually sits in Leeds.

13.1 NYP submit Form B to the PMAB;

13.2 A date is agreed for NYP and the officer to attend the PMAB, and NYP and the officer have 35 days prior to the PMAB hearing to submit their representations.

(14) PNB hearing:

14.1 PNB hears NYP's and the officer's representations;

14.2 The officer is examined.

14.3 PMAB provide an opinion whether or not the officer was permanently disabled from performing the ordinary duties of a police officer with a medical basis for that opinion.

**Findings of Fact**

23. As both counsel acknowledged, the facts of this matter are not materially in dispute. Nevertheless, it is important to set out those facts chronologically in order to inform the Tribunal's decision when determining the issue.

24. The claimant became a Police Constable on 17 January 1994.

25. On 23 May 2016 the claimant transferred to the Covert Surveillance Unit ("CSU") assigned to the Covert Rural Observation Post ("CROP").

26. Regrettably, in September 2016 the claimant was diagnosed with breast cancer. The claimant continued to work right up until the date of her scheduled surgery. She commenced sickness absence on 23 September 2016 and commenced chemotherapy after her surgery on 6 December 2016. Between March and May 2017 the claimant underwent radiotherapy.

27. The claimant returned to work on 26 June 2017, back into her duties to CROP in the CSU.

28. In August 2017, the claimant was diagnosed with Lymphedema which involves tissue swellings by an accumulation of protein rich fluid which is usually drained through the body's lymphatic system. It was accepted that the lymphedema was caused by the claimant's necessary cancer surgery. The claimant's treating consultant for surgical purposes was Dr Adeleken at Harrogate Hospital. The claimant was referred to a lymphedema specialist – Jane Jones, a physiotherapist at St Michael's Hospice. Prior to and on her return the claimant's line manager was Detective Sergeant Andrew Clark.

29. The claimant subsequently became depressed as a side effect of Tamoxifen, the medication the claimant was prescribed as part of her cancer recovery treatment.

30. On 13 December 2017 the claimant had a first appointment with the Force Medical Advisor ("FMA"), Dr Catherine Swales. In her report dated 27 December 2017 (bundle pages 123-125). Dr Swales at this early stage recommended that the claimant undergo Cognitive Behavioural Therapy ("CBT") and that the claimant should avoid CROP tasks for an initial period of three months pending further advice from her lymphedema specialist. There were other recommendations from Dr Swales, including using wider gripped pens when her hand was swollen and painful because of the lymphedema. A risk assessment was also undertaken in relation to the driving duties associated with the claimant's role in CROP. There were some other operational adjustments made to her role.

31. NYP have monthly Sickness Case Conferences. Both police officers and their Police Federation representative are permitted to make representations at each monthly conference. The Chief Constable said that from September 2018 she initiated a change to the monthly conferences such that the Police Federation and Unison reps were invited to all meetings. The claimant's case was first considered at the case conference in February 2017, at which point the former Chief Constable, Chief Constable Jones, exercised his discretion to maintain the claimant on full pay until July 2017. In her evidence, the current Chief Constable, Chief Constable Winward, told the Tribunal that she would have taken the same decision as Chief Constable Jones in the same circumstances.

32. On 12 February 2018, the claimant had her second appointment with the FMA, Dr Swales. On 28 February 2018 (bundle pages 155-156) Dr Swales provided a second report, again recommending CBT. At this stage the earlier recommendation of CBT had not been actioned by NYP.

33. On 4 June 2018, the claimant had her third appointment with the FMA, Dr Swales, in which the claimant discussed her difficulties with driving safely to an advanced level due to the lymphedema compression that she had to wear on her right arm.

34. On 7 June 2018, the FMA (Dr Swales) produced a third report (bundle pages 190-191). In this report the FMA recommended for the first time that the claimant was unfit to undertake an advanced driver training course or an OST course – which the claimant needed to undergo in order to continue in her role. The FMA also recommended for the first time that NYP should consider referring the claimant to a Selected Medical Practitioner for ill health retirement consideration. Dr Swales also recommended that NYP obtain a report from the claimant's lymphedema specialist in order to inform the ill health retirement process.

35. On 13 June 2018, the SMP, Dr Swales, wrote to Dr Adeleken asking for input on the effect of the claimant's lymphedema condition. The claimant properly pointed out in evidence that Dr Adeleken was the consultant responsible for her surgery and was not responsible for diagnosis or treatment of her lymphedema. It was Jane Jones, not Dr Adeleken, who at that time was the relevant specialist as far as the claimant's lymphedema was concerned.

36. On 23 August 2018, DS Clark submitted a management referral to Occupational Health including enquiries regarding obtaining CBT/counselling services for the claimant's mental health condition. DS Clark was informed that there would be no counselling or CBT made available to the claimant because the claimant's injury from which her mental health condition stemmed was not an injury suffered at work.

37. On 24 September 2018, the claimant for the first time met with Ms Janine Hall, Welfare Officer, which had resulted from DS Clark's enquiries of Occupational Health regarding the claimant's mental health.

38. On 2 October 2018, Dr Adeleken wrote to the FMA, Dr Swales, in general terms about lymphedema. He was, for the reasons referred to above, unable to give specific advice in relation to the claimant's particular condition. The claimant had informed the FMA, Dr Swales, at their meeting on 4 June 2018 that Dr Adeleken was not the correct clinician to contact about her lymphedema as he had only performed her surgical procedures.

39. In mid-November 2018, the claimant contacted Ms Pearson (the HR team member who was in the most direct contact with the claimant regarding her health) to enquire further about whether the SMP referral had been taken forward. Ms Pearson informed the claimant that the FMA had decided that she needed further information from Dr Adeleken and the claimant's lymphedema specialist before she could compile her report to the SMP with the information necessary for the SMP to consider the claimant's case. Also in November 2018, the claimant contacted a private lymphedema specialist, Dr Catherine Groom, through her partner's private medical insurance.

40. On 7 January 2019, Dr Groom sent a report to the claimant who forwarded it to the FMA, Dr Swales, to assist NYP to action the referral process to an SMP. In that report (bundle pages 258-262) Dr Groom advised:

*"The risk of cellulitis is always there, but heavy use of the affected arm or injury to it, puts not only the risk of cellulitis higher (and further damage to the lymphatics), but the risk of increased swelling and the problems associated with this chronic condition."*

41. Dr Groom also pointed out the need to avoid trauma including minor scratches to the right hand and arm area, as well as reporting:

*"The psychological and physical impact of living with lymphedema should not be underestimated."*

42. On 16 January 2019, the claimant's treating clinician at Calderdale and Huddersfield lymphedema service also submitted a report to NYP (bundle page 264). This report advised that there were *"no concerns over [the claimant's] return to work".* This was somewhat at odds with Dr Groom's report, and the claimant said in evidence that her treating clinician at Calderdale and Huddersfield had not understood the demands required in the role of a Police Officer.

43. On 25 February 2019, the claimant had a fourth appointment with the FMA, Dr Swales, this time by telephone. The claimant expressed concern about the risk of infection arising out of her work duties.

44. On 4 March 2019, the FMA, Dr Swales, provided her fourth report (bundle pages 272-273). In that report Dr Swales says that there is sufficient medical information to refer the claimant for an assessment by an SMP to determine whether the claimant is *"permanently disabled from performing the duties of a police officer"*.

45. On 12 March 2019, Ms Pearson, HR advisor, submits paperwork to the HR Professional Support Unit regarding the claimant's SMP referral for HR Professional Support to review.

46. On 16 April 2019, the claimant chased Ms Pearson regarding the arrangements for her SMP appointment.

47. On 30 April 2019, the claimant commenced another period of sick leave. The claimant's evidence was that she suffered a mini breakdown and went off work sick. She felt extremely low and anxious and was experiencing a lot of pain and swelling in her right arm and hand, which exacerbated her low mood. The claimant, as at the date of this Tribunal hearing, was still absent from work on account of the period of sickness leave which had commenced on 30 April 2019. The claimant says that this is because of her lymphedema and work-related stress (bundle pages 366, 429-437).

48. On 1 May 2019 the claimant received a letter from HR confirming that she had been referred to an SMP (bundle page 303). It was on 7 May 2019 that NYP referred the claimant to the SMP (bundle pages 319-325). The claimant points out that this was some 11 months after Dr Swales had written her report that first suggested that she be referred to the SMP. The claimant was referring to the third report of the FMA, Dr Swales, which was made on 7 June 2018. It should also be noted that it was not until 4 March 2019 that Dr Swales says that she had *“sufficient medical evidence to refer the claimant to the SMP”*. The claimant points out that much of that delay was because Dr Swales was contacting the wrong person in relation to getting more information on her lymphedema. Nevertheless, the claimant entered the PNB Joint Guidance on Improving Management of Ill Health process on 7 May 2019 with a referral to the SMP.

49. The claimant’s evidence was that the delay in sending the referral to the SMP resulted in the claimant's pay being reduced. She said it was being reduced in accordance with regulation 28 after six months’ absence. The claimant says that that delay nevertheless impacted adversely on her mental health.

50. On or around 10 May 2019, Dr Clark requested that NYP pay the excess on the claimant's partner’s private health medical insurance which had arranged for the claimant’s privately funded counselling services in the sum of £100. DS Clark’s request was refused.

51. On 20 June 2019 the claimant was assessed for the first time by an SMP, Dr Andrew Lister. Dr Lister suggested that the claimant see a psychiatrist for her mental health problems. It is convenient to refer to the assessment by Dr Lister as SMP1.

52. On 27 June 2019, Dr Lister produced the first SMP report. Dr Lister reported that the claimant was an emotional “wreck”; that she would benefit from counselling; and that she was permanently disabled from carrying out the ordinary duties of a police officer due to her lymphedema. In the opinion of the SMP, the claimant was therefore permanently disabled on account of the physical disability of lymphedema. However, in his report of 27 June 2019 Dr Lister also expressed the opinion that the claimant <u>was</u> fit “for other adjusted duties”.

53. On 2 July 2019, the claimant received a copy Dr Lister's SMP1 report. The claimant was critical of this report and in particular Dr Lister's opinion that the claimant was fit to perform adjusted duties consistent with but different from the ordinary duties of a police officer. The claimant's position was that her lymphedema meant that she needed to stay active. Inactivity and repetitive actions, such as typing, the claimant said caused her symptoms to worsen, which she said was evidenced by the time that she remained at work undertaking administrative tasks in the CSU following her lymphedema diagnosis and connected challenges. The claimant also referred to Dr Groom's advice, in which Dr Groom advises the claimant against avoiding static positions for any length of time (bundle page 261). It was also advised that the claimant avoid heavy lifting, leading to the conclusion that alternative administrative roles were entirely unsuitable for her. Nevertheless the claimant did acknowledge, albeit with some sadness, that she was no longer fit to perform the normal role of a police officer which involved confrontational duties.

54. The Chief Constable in her evidence relies on Dr Lister's opinion to the effect that while the claimant was permanently disabled from performing the ordinary duties of a police officer, Dr Lister had also said the claimant was "fit for other duties" and that Dr Lister set out the duties in his report (bundle pages 394 and following). The Chief Constable says that this therefore required her to make a decision on whether under regulation A20 of the Police Pension Regulations the claimant should be medically retired or retained as police officer.

55. On 18 July 2019, there was a meeting between the claimant, DS Clark and the claimant's then Federation representative, Will Eastwood. The meeting was also attended by Ms Pearson from HR. At that meeting office-based roles were discussed. However, the claimant says that she was not suitable for any of them because of the struggle she had had for the 18 months before taking sickness absence in office-based roles – i.e. the adjustments and limitations that were placed upon her in the CSU. She referred to handwriting, typing and other repetitive tasks which caused her pain and, in the claimant's view, "irreversible physical harm". One of the outcomes of that meeting was that the claimant and NYP agreed that the claimant should get further clarity from Dr Groom regarding the implications of her lymphedema on office-based roles. That would enable the claimant to challenge the "working capabilities" section of Dr Lister's SMP report. Such a challenge is permitted by PNB Circular 10/04.

56. On 25 July 2019, the claimant received an amended report from Dr Groom. That report also addressed the mental health consequences of "the claimant's cancer; subsequent cancer treatment; lymphedema impact; and the impact of Tamoxifen medication on mental health". The claimant says she made both the FMA, Dr Swales, and SMP1, Dr Lister, aware of the outcome of that report. However, the SMP, Dr Lister, was not willing to make any amendments to his report until the claimant had at least tried to undertake some of the tasks he had identified as potentially suitable for her. An impasse was therefore reached: Dr Lister would not amend his report until the claimant tried the roles identified in the SMP1 report; and the claimant would not attempt any of the roles identified for her because she said she had been doing such tasks for 18 months and it had not worked out due to her lymphedema.

57. On 19 September 2019, the claimant was told that with effect from 19 October 2019 she would be reduced to half pay and if her absence continued, she would be reduced to nil pay on 19 April 2020. The Chief Constable said that approach is simply the correct application of regulation 28 of the Police Regulations. This was the beginning of a matter of contention between the claimant and NYP. The claimant's position was that one of the four exceptions i.e. "paragraph 7 (c)" applied. The Chief Constable therefore had the discretion to maintain the claimant on full or half pay. The claimant's position was that exception little (c) provides that that an exception to the presumption of a reduction in pay after 6 and 12 months' sickness absence may be made where an officer's case is being considered in accordance with the PNB Joint Guidance and the SMP process had commenced but the claimant is still awaiting a decision whether the claimant should be granted ill-health retirement ("IHR").

58. A pivotal decision was taken on 27 September 2019. At the September Sickness Case Conference (bundle pages 441-447) the Chief Constable considered a report she had received with the following recommendations:

***HR Advisor**:*

*"The recommendation of PNB Circular 03/19 Annex A paragraph 43 states that the 'objective is to retain the officer, wherever practicable'. Paragraph 46 also states that the Chief Constable should consider whether 'there is a sufficient range of further posts likely to be available to the officer…until compulsory retirement age to make it consistent with a police career, albeit on a limited scale'.*

*The SMP has stated that DC Owens is permanently disabled from the ordinary duties of a police officer due to lymphedema in her right arm.*

*The SMP has stated that DC Owens is currently capable of some capabilities without adjustments. He has also identified that there are a number of working capabilities which require adjustments. The SMP has also stated that the permanently disabling condition is unlikely to affect DC Owen's attendance with these adjustments in place, with the exception of hospital follow-ups.*

*Management have considered the SMP report, and the issues identified by DC Owens, and have expressed that the required workplace adjustments are unsuitable within the Crime Support Unit. Having considered the comments of the SMP, our responsibilities under the Equalities Act, the Police Pensions Regulations, and the comments of both management and DC Owens, it is my recommendation that the DC Owens is retained under Police Pension Regulations 1987, and redeployment into one of the following roles is considered:*

- *PC Cert (Community Resilience Team) – for the role to be adjusted appropriately to support Shelley's requirements.*

- *PC Investigation Hub (Harrogate) – for the appropriate risk assessment to be conducted to avoid any confrontational duties. Management would have to ensure any interviewing of members of the public was conducted by an alternative member of the team.*

- *PC Safer Neighbourhood Service Desk (Harrogate) – for the role to be adjusted appropriately to support Shelley's requirements."*

***Head of HR and Training Recommendation***

*Recommend retention under A20 Regulations.*

***Rationale***

*"Whilst noting the comments of the officer and her desire to be retired, I believe that there would be adjustments such as Dragon software which could further assist her and reduce the need for typing and the potential impact this would have on her.*

*As there are roles identified which could be appropriately adjusted to facilitate DC Owen's retention in line with the recommendations of PNB Circular 03/19 I support the recommendation to retain under the A20 Regulations.*

*I would also recommend though that the Occ Health and Welfare work with her to identify solutions to minimise impact to provide reassurance to DC Owens.*

59. The Chief Constable explained that she had considered the report and all the circumstances of the case and come to the conclusion to accept the recommendations that the claimant be retained under the Police Pension Regulations 1987 and redeployed into one of three roles:

    - Community Resilience Team.
    - PC Investigation Hub.
    - PC on the Safer Neighbourhood Service Desk.

60. The Chief Constable sets out her rationale at paragraph 13 of her witness statement in which she says as follows:

*"Having considered all of the medical information, the views of the claimant and the recommendations, and taken into account the PNB guidance, my decision was that the claimant should be retained under regulation A20. The rationale for this decision was as follows:*

*I have read all of the available information on this case and have taken into account the wishes of DC Owens, line manager, HR and medical opinion.*

*I empathise with the difficult circumstances that DC Owens has experienced during her medical treatment and fully understand why she may not wish to remain in the workplace. However, the medical opinion of those who have the qualifications to make this assessment are clear in that DC Owens is capable of undertaking a number of tasks. The national recruitment of police has provided a clear message regarding the need to retain and recruit a substantial number of officers over the coming years. Many of these skills will be required in the roles that have been proposed for DC Owens and her experience would be invaluable to those younger in service. There are people who are already accommodated by suitable adjustments with disabilities in these roles.*

*I appreciate that DC Owens may not want to undertake these roles and therefore it is crucially important that line management and those supporting DC Owens make her aware that my decision does not prevent her from resigning from the service if she does not wish to continue to work in these roles.*

*The Regulations are clear and in this particular case, in order to comply with the Regulations, the only option available to me is to retain DC Owens in one of the proposed roles set out in this report with the requisite support, Occupational Health advice and adjustments for her to undertake these roles."*

61. It was therefore the Chief Constable's position that in the light of the medical advice and recommendations the only option open to her consistent with compliance with Regulations and her responsibilities was the retention of the claimant as recommended.

62. Also on 27 September 2019, the claimant was told by her line manager at the time, DS Clark, that the Chief Constable's decision was to retain her in NYP. DS Clark also identified the three roles referred to above as ones which the claimant was being asked to choose between. As indicated above, the claimant says that all of those duties would aggravate her existing disability. To that extent at least, the claimant was at odds with SMP1, Dr Lister.

63. On 30 September 2019 Ms Pearson of HR confirmed the Chief Constable's decision in writing and enclosed job descriptions of the three alternative roles.

64. On 1 October 2019 the claimant emailed DS Clark indicating that she wished to appeal the Chief Constable's decision.

65. Meanwhile, the claimant was asked in a letter of 30 September 2019 to confirm by 4 October 2019 which role she would prefer out of the three options.

66. On 9 October 2019, Ms Pearson of HR assigned the claimant to the safer Neighbourhood Service Desk role. At that time the claimant remained absent on account of sickness and had not indicated which of the three jobs she preferred. However, with the deadline of 4 October 2019 having expired, Ms Pearson nominated a role for the claimant. The claimant was also advised that in light of this transfer her new line manager would be Police Sergeant Hannah Robinson. The claimant was also informed that various adjustments would be made to the role to accommodate her limitations in the light of her lymphedema. These included avoiding prolonged driving; having the use of read and write software known as Dragon; being given regular breaks; having a phased return to work; and having flexibility with her shifts so she could attend medical appointments.

67. At the October Sickness Case Conference, the Chief Constable decided to defer the claimant's move to half pay from full pay from 19 October 2019 as originally indicated for one month. She would therefore remain on full pay to allow for the appeal process to be ascertained (bundle pages 520-521). It was the Chief Constable's position that none of the exemptions in paragraph 7 of PNB Circular 05/01 applied to the claimant. The Chief Constable's rationale for her decision in October 2019 was set out as follows (bundle pages 520-521):

*"Having reviewed the information contained I do not believe any of the criteria for exemption applies. Even though the officer is going through SMP appeal no decision*

*has been made around the decision to retire and therefore criteria does not apply. However, it is possible that the appeal could be concluded shortly so it would not be appropriate to make a determination whilst this may be the case. Reasonable adjustments will be applied for one month whilst we ascertain the timescale for the appeal process and a further review to take place then. Maintain on full pay for one month, but supervisor to prepare the officer to go to half pay if the appeal process is protracted."*

68. It is noteworthy that the claimant was not appealing Dr Lister's SMP decision. That was an appeal option open to her, which she chose not to pursue. The appeal that was ongoing was the challenge that the claimant was making to the Chief Constable's decision to retain her consequent upon the September Case Conference on 27 September 2019. The Chief Constable says upon realising this she invoked half pay.

69. On 30 October 2019, Ms Pearson advised the claimant that her full pay would be extended by one month. In fact, the actual extension amounted to 12 days as the claimant was due to be moved down to half pay on 19 October 2019 and her pay in fact reduced on 1 November 2019. The claimant points out that at this stage she believed she was still remaining within the SMP process and therefore should remain on full pay in accordance with exception "little (c)".

70. On 8 November 2019, the claimant was told of the Chief Constable's decision to (1) reject her appeal to remain on full pay; and (2) to refuse to rescind her decision to retain the claimant in NYP rather than retire her from it.

71. At the November Sickness Case Conference, the Chief Constable decided again not to exercise her discretion to keep the claimant on full pay. Her rationale was that the SMP had determined that PC Owens <u>is</u> capable of being retained; that there were a number of suitable roles identified; and that the Chief Constable would need evidence that the suitable roles were at least attempted and could not reasonably be adjusted. Otherwise, the Chief Constable's position was that regulation 28 needed to be applied and the claimant reduced to half pay. In the Chief Constable's own words (bundle page 516):

*"The expert assessment of the SMP has determined that PC Owens is capable of being retained in the workplace and therefore a number of suitable roles have been identified and unless further information is made available that these roles have been attempted and cannot be reasonably adjustments as a suitable role, the Regulations will apply. Therefore, half pay will be adopted. It should be explained to PC Owens that if she does not wish to remain at work that she has the option to resign from the organisation if she wishes to do so, however, the current medical assessment is that she is fit to work and therefore ill health retirement is not met."*

72. In December 2019 the claimant started private treatment. In particular, psychotherapy; Cognitive Behavioural Therapy; and Acceptance and Commitment therapy. The claimant's Police Federation also arranged at their own expense for her to receive six sessions of counselling.

73. On 2 January 2020, the claimant attended an appointment with a psychiatrist, Dr Beaini. That appointment was also funded by the Police Federation. On 3 January 2020, Dr Beaini provided a report. The claimant is diagnosed as having generalised

anxiety disorder, single episode depressive disorder and OCD. Dr Beaini's recommendation was that the claimant would be unfit for work for between 1-5 years before recovering, and that she should pursue psychological therapies. Dr Beaini was also of the view that all mental disorders were linked to the claimant's work and that she was unfit for the role of police office due to permanent incapacity.

74. Later in January 2020, consequent upon Dr Beaini's report, the claimant's Police Federation representative (by now Mr R Bowles replacing Mr W Edwards) asked NYP for a further referral to the SMP to consider whether the claimant was permanently disabled from performing the duties of a police officer as a result of her psychological health (bundle page 591).

75. On 5 February 2020, the claimant was told that there would be a second referral to the SMP (referred to in this judgment out of convenience as SMP2) within six weeks. The Chief Constable would be taking a decision three weeks after that. In fact it took three months before the Chief Constable took her decision in relation to SMP2.

76. On 17 February 2020 the FMA, Dr Swales, made the referral to SMP2, commenting:

*"I am satisfied that this officer is permanently disabled from returning to police office duties on account of both her physical and mental health with the two being related."*

77. On 13 March 2020 the claimant attended SMP2. On this occasion the SMP was Dr Iqbal. Dr Iqbal confirmed the diagnosis of a major depressive disorder and severe anxiety. However, Dr Iqbal doubted Dr Beaini's diagnosis that the claimant was suffering from OCD.

78. Dr Iqbal agreed with the conclusion of Dr Lister (SMP1) that in terms of the claimant's physical health, her lymphedema rendered her *"permanently unable to perform the duties of a police officer…and [it would be] likely to cause further absences which could not be remedied or reduced".* In effect, that no adjustments could alleviate the medical position.

79. In relation to the claimant's mental health, Dr Iqbal's opinion was that the claimant was <u>not</u> permanently disabled due to a depressive disorder and there was scope for full recovery *"over the course of time"*. Dr Iqbal estimated that time period to be between 12-18 months.

80. On 8 April 2019, Mr Bowles contacted Dr Beaini to seek clarification of some of the points he dealt with in his report. That clarification was intended to assist both Dr Iqbal and the Chief Constable who would soon be reviewing her retain decision.

81. On 14 April 2020 the claimant was informed that she would be going down to half pay from 19 April 2020.

82. Also on 14 April, Jane Jones, the claimant's lymphedema specialist physiotherapist from St Michael's Hospital, reported: *"…Office-based work is unsuitable for Shelley"*.

83. On 15 April 2020 Mr Bowles wrote to Ms Canning (Senior Manager NYP HR Team), explaining that there was no representation of the claimant at the April

Sickness Case Conference because Mr Bowles had not been aware that the claimant's case was up for review. He also made the point that the claimant was in line to maintain pay as she was well progressed in the SMP process.

84. On 17 April 2020, Ms Pearson (HR) informed the claimant that she can take annual leave to restore pay until she exhausts her annual leave entitlement. The claimant points out that she should be on full pay and asked for her pay position to be reviewed at the earliest opportunity because the Chief Constable should alter her decision to retain the claimant. In those circumstances the claimant said that she should be retained on full pay.

85. On 21 April 2020, the claimant made a formal appeal to the Police Medical Appeal Board ("PMAB") against Dr Iqbal's (SMP2) decision. That decision was that the claimant was:

*"(1) Not permanently medically unfit to perform the duties of a police officer in the light of her mental health condition; and*

*(2) That the claimant would be fit to return to work in 12-18 months."*

86. On 22 April 2020, Dr Beaini provided a supplemental report which was received by the claimant on 24 April 2020 and forwarded on the same date by Mr Bowles to Dr Iqbal (SMP2) and to the Chief Constable. The Chief Constable decided to review her decision in advance of the PMAB appeal hearing and the claimant had no objection to that.

87. On 1 May 2020, the claimant was informed that due to the pandemic PMAB hearings were not progressing appeals hearings until 20 June 2020 at the earliest.

88. On 12 May 2020, the claimant was informed by Ms Pearson that the Chief Constable had, at the May Sickness Case Conference, decided to keep the claimant on nil pay. The claimant was informed that the Chief Constable's reasons were:

    *(1) Regulations and PNB Guidance 05/01do not support either a return to pay or to ill health retirement*.

89. In 7 May 2020, the Chief Constable was also asked to review her decision *"in the light of further medical information"*. The Chief Constable agreed with the view of the Senior HR Manager (Ms Canning) that information was needed from Dr Iqbal (SMP2) to do so.

90. On 19 April 2020, the claimant was due to go to nil pay. The Chief Constable said in her evidence that the SMP process had been finalised at the time of the decision on whether to exercise discretion to remain on half pay. The Chief Constable had reviewed her position and she remained of the view that no exception applied under PMB guidance 05/01. There was insufficient evidence, in the Chief Constable's view, to support either a return to pay or ill health retirement. The upshot was, therefore, was that the claimant remained on nil pay.

91. On 7 May 2020, the claimant was informed by Ms Pearson that she (Ms Pearson) had asked three additional questions to Dr Iqbal.

92. On or around 18 May 2020, Dr Iqbal (SMP2) produced a supplemental report. This was to the effect:

    (1) A recovery period of 12-18 months (as per Dr Iqbal's report of 13 March 2020) remained so, but Dr Iqbal would not rule out it taking up to five years (the timescale anticipated by Dr Beaini); and

    (2) Dr Iqbal disagrees with Dr Beaini that mental health is work-related or permanent.

93. Dr Iqbal had seen the three additional questions that Ms Pearson sent him on 7 May 2020 by the time of this report, but he had not seen Dr Beaini's further report.

94. By 2 June 2020, the Chief Constable had received Dr Iqbal's updated report. The Chief Constable reconsidered her decision (bundle pages 832 and 889-891). The Chief Constable concluded that there was nothing in the additional information to change her decision. The Chief Constable's rationale was as follows:

    (1) Current medical position remains that DC Owens is capable of undertaking other roles.

    (2) It would be wrong for the Chief Constable to assume medical expertise despite having "immense empathy" for the claimant.

    (3) The regulations are based around retention unless no roles could be identified.

    (4) Roles identified were not attempted by the claimant.

    (5) There was no information by which to assess the viability in practice of the option of alternative roles since they had not been attempted by the claimant.

    (6) Unless further medical evidence as a result of the PMAB hearing emerges, DC Owens is to be retained in service.

    (7) The claimant will, on 30 November 2021, be 50 years old, she has more than 25 years' service and could therefore access her accrued 1987 Pension Scheme. She would be unable to access her 2015 pension payments until State Pension Age (66 years).

    (8) If the claimant was unfit on the grounds of mental health so the SMP finds that she is not fit to return to work in any capacity, then there would be no suitable roles as DC Owens has already been unable to return to a readjusted role for the claimant and then the only option would be ill health retirement.

95. On 5 June 2020, Ms Pearson wrote to the claimant confirming that Chief Constable had decided to retain her; that the claimant was to be reduced to half pay on 22 July 2020 when her annual leave ended; and on 2 August 2020 the claimant would be reduced to nil pay.

96. On 10 June 2020 the claimant received the Chief Constable's written confirmation of her decision to retain the claimant. At that stage Dr Beaini's supplemental report had only been seen by NYP and not by Dr Iqbal (SMP2).

97. At the July Sickness Case Conference, the Chief Constable again reviewed the claimant's pay. The Chief Constable found no justification for applying any of the exemptions under paragraph 7 of PNB Circular 05/01 so as to put the claimant onto either full or half pay. The Chief Constable's rationale was that medical professionals had assessed this case regarding capability and ill health retirement and made it clear that they consider that the claimant had the ability to undertake the restricted roles that she had been offered. The claimant had stated that she wished to retire, and the Chief Constable reiterated that the claimant had the option to resign if she wished to do so. The Chief Constable's expectation was that the claimant would return to work as per the medical assessment unless a further medical assessment is provided to the contrary. The Chief Constable stated that the Regulations applied, and absence for 12 months invokes nil pay on the relevant date.

98. The Chief Constable accepted that prior to her appointment NYP had been in the practice of operating a presumption of full pay "in many cases". Upon her substantive appointment as Chief Constable of NYP, Chief Constable Winward corrected the position to reflect what she saw as the correct approach so that the starting point is, as the Police Regulations envisage, a presumption of half pay and then nil pay after six and 12 months' absence respectively unless the Chief Constable exercised her discretion due to one of the exceptional circumstances. The Chief Constable did not consider one of those exceptional circumstances applied in the case of the claimant.

99. On 23 June 2020, the claimant was advised by HR that she would go to half pay on 22 July 2020 and nil pay on 2 August 2020.

100. On 14 July 2020, the claimant was informed by Ms Pearson that her appeal for the Chief Constable to reverse her "retain" decision had been rejected because the medical opinion was that the claimant remained fit for work.

101. On 22 July 2020, the claimant was reduced to half pay. On 2 August 2020 the claimant was reduced to nil pay.

102. Ms Sarah Mekin of the NYP HR Professional Support Team provided HR support for the claimant's appeal to the PMAB. Ms Mekin is currently absent on account of sickness. Catherine Hulbert gave evidence in her absence. At the time relevant to these proceedings, both Ms Hulbert and Ms Mekin were HR Support Consultants in the NYP HR Professional Support Team.

103. There were significant delays to the PMAB process predominantly to do with the pandemic.

104. On 21 April 2020, Ms Mekin received a completed Form A from the claimant as required by the PMAB process.

105. On 1 May 2020, Ms Mekin acknowledged receipt of Form A and reminded the claimant that the PMAB was currently suspended until at least 20 June 2020 due to Covid-19.

106. On 15 June 2020, Ms Mekin updated the claimant on the current status of the PMAB suspension.

107. On 7 July 2020, the PMAB restarted in London only (not Leeds, where the NYP's PMABs were customarily held) and were being conducted in person only. Ms Mekin tried to see if PMAB could convene regionally or remotely. She was unsuccessful in those endeavours. At the same time, the regional SMPs indicated that they were not prepared to travel to London due to the pandemic.

108. On 18 August 2020, Ms Mekin completed the NYP Form B as is required under the PMAB appeal procedure.

109. On 24 August 2020, Ms Mekin again updated the claimant about the difficulties surrounding convening PMAB appeal hearings.

110. On 8 September 2020, Healthworks (the SMP provider) confirmed that its SMPs were not prepared to travel to London "for the foreseeable future". Ms Hulbert gave evidence that the Home Office were taking the matter up directly with the PMAB, specifically as to why PMAB could only be held in London.

111. On 7 October 2020, Ms Mekin is given a provisional PMAB hearing date in London of 25 November 2020.

112. On 9 October 2020, the claimant was informed that neither the NYP representative nor the SMP could attend a hearing on 25 November 2020. Ms Mekin again enquired about whether the PMAB could be undertaken remotely, again in vain.

113. On 13 October 2020, Ms Mekin was told that remote PMAB hearings "were not possible at that time". The Chief Constable in the light of that outcome said that her June 2020 decision to retain the claimant still stands.

114. On 24 February 2021, the PMAB hearing took place. It upheld the opinion of SMP2, Dr Iqbal, that the claimant's depressive disorder/mental health did not permanently disable her from carrying out the ordinary duties of a police officer. The claimant was therefore not permanently disabled and was likely to return to work in 2-3 years' time. It was noted that the claimant was eligible for voluntary retirement in two years' time.

115. On 6 April 2021, Mr Bowles (the claimant's Police Federation representative) asked the Chief Constable of NYP to reconsider her decision in the light of new information arising from the PMAB hearing.

116. On 23 June 2021, Trish Nixon, HR Advisor, offered the claimant counselling and CBT support funded by NYP.

117. On 28 June 2021, Charlotte Clark, of NYP Legal Department, confirmed to the claimant that the Chief Constable would not be reconsidering her decision to retain the claimant in the light of the outcome of the PMAB.

*The claimant's current status*

118. In her evidence, the claimant summarised her position at the time of this hearing as follows.

119. The claimant is currently on nil pay. She remains employed by NYP. It took 11 months from the FMA recommendation that she should be referred to the SMP before the SMP appointment took place. The process was delayed and inefficient. The claimant says the delay caused her financial disadvantage. The claimant gave evidence that she felt offended and degraded due to:

(1) The inefficiency of NYP in dealing with the IHR process; and

(2) The contradictory positions adopted by the respondent.

120. The claimant also pointed to the unreasonable refusal by NYP to attend the PMAB meeting in London, which left her feeling "offended and degraded". The claimant also points to the opinion of the clinicians involved in the decision-making. There were three medical practitioners on the PMAB: Dr Swales was the FMA; Dr Lister and Dr Iqbal were the two SMPs and Dr Beaini was the claimant's Police Federation funded consultant psychiatrist.

121. The claimant says that all practitioners agree that she remains currently unfit for the ordinary duties of a police officer – for both physical and mental health reasons. The PMAB's decision was that she was likely to remain unfit in connection with her mental health condition for 2-3 years. The claimant points out that takes her beyond her minimum retirement age. Dr Lister, SMP1, concluded that the claimant was permanently physically disabled as a result of lymphedema and that she was therefore unfit to carry out the ordinary duties of a police officer.

122. The claimant also complains that the Chief Constable was being "derisory and disbelieving". The claimant refers to certain remarks made by the Chief Constable, including that her "mental health appears to have become a problem was an issue", because the claimant did not want to come back to work (bundle page 821); that the claimant could always resign if she did not wish to work (bundle page 902); and that the claimant had "no intention of returning to work and does not wish to do so" (bundle page 907). The claimant says she finds these comments extremely distressing and humiliating. She says that they clearly indicate that the Chief Constable believes *"I have made up or exaggerated the extent of my disabilities and the impact these have on my ability to work as a police officer"*. The claimant says she feels as though she is being branded as a "shirker" by the Chief Constable.

123. The claimant also points to the respondent's own guidance (bundle pages 438-439/938-939), where a referral of the issue of whether a police officer is permanently disabled is made to the SMP, the Chief Constable will consider exercising discretion to extend full pay in the police officer's favour. The claimant therefore says that her pay should have been maintained throughout the SMP process, up until and including the decision of PMAB on 21 February 2021.

124. The Chief Constable set out her position in response as follows. The Chief Constable says that it is clearly set out in the Police Regulations what happens in relation to pay during a period of extended sickness absence. The Chief Constable

says that £4million of the total NYP budget of £170million is spent on ill health retirement. She says that that is the equivalent of 80 officers' time and service, and to add to that there is the cost and time to recruit new officers. That is why, the Chief Constable says, there is a presumption in favour of retention of experienced officers to use more effective and efficient use of resource for there to be skills transferable to younger in-service officers. The Chief Constable points to her obligations to the taxpayer.

125. The Chief Constable refers to the PNB Guidance (bundle page 1178) and reflected in the NYP's own procedure (bundle page 1146). The Chief Constable says her decision needed to be made in line with the Police Regulations. Finally, she made a conscious decision with HR involvement and support as well as significant medical input, and the decision to retain was taken in the light of all of that. The Chief Constable points out that public funding is finite and there needs to be a balance between retaining police officers and approving ill health retirement.

126. The Chief Constable also says that even where a police officer is considered medically to be permanently disabled from performing the ordinary duties of a constable, <u>there is still a duty on the Chief Constable to utilise the assets of the organisation in the most effective, efficient and legitimate manner</u>. It is therefore paramount, she says, to retain valuable skills of those officers in other roles if the SMP determines that they are capable of performing a role with reasonable adjustments. The Chief Constable points out that the claimant at no stage attempted to carry out any of the three alternative duties that the SMP considered that she should undertake.

127. Ms Hulbert also gave evidence regarding the question of delay, especially the highly unusual circumstances of the pandemic and the responses to it from stakeholders in the PMAB process. Ms Hulbert's evidence on the timeline was as follows:

- On 31 March 2020 the claimant indicated her wish to appeal to the PMAB.
- On 21 April 2020 the claimant filled in Form A as she is required to do under the PMAB process.
- On 24 February 2021 the PMAB hearing took place.

128. Ms Hulbert compares that to other cases that were impacted by the pandemic. In case A, Form A was completed on 18 October 2019 and the PMAB hearing was heard on 7 April 2021. In the case B, Form A was completed on 24 October 2018 and the PMAB is still awaited as of 21 September 2021 (being the date of Ms Hulbert's statement).

129. In those circumstances, and acknowledging that the impact of the pandemic brought about significant delay, Ms Hulbert says that the claimant's case out of all those impacted by the pandemic was the quickest between Form A being filed and the PMAB hearing taking place. Ms Hulbert says that those delays are not disability related. They relate solely to the pandemic. Pre-pandemic, the average time between Form A and a PMAB hearing was 6-8 months. In the claimant's case it was ten months.

## The Relevant Law

Unlawful Discrimination

130. It is unlawful for an employer to discriminate against an employee in the way it affords him or her access, or by not affording him or her access, to opportunities for transfer or for receiving any other benefit, facility or service by dismissing him or her or by subjecting him or her to any other detriment: section 39(2) of the Equality Act 2010 ("EqA").

Discrimination arising in consequence of disability

131. Section 15(1) EqA concerns discrimination arising out of disability and provides:

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

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

(b) A cannot show that it did not know, and could not reasonably have been expected to know, that the employee had the disability; or

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

132. "Unfavourably" must be interpreted and applied in its normal meaning; it is not the same as "detriment" which is used elsewhere in the EqA, but a claimant cannot succeed by arguing that treatment that is in fact favourable might have been even more favourable: Williams v Trustees of Swansea University Pension and Assurance Society [2018] UKSC 65. The effect of that decision of the Supreme Court says that there is probably little difference between "unfavourable" treatment and other phrases such as "disadvantage" or "detriment" found in other provisions.

133. Guidance on the correct approach to a claim under section 15 EqA was provided by Simler P in Pnaiser v NHS England [2016] IRLR 170. The EAT gave the following guidance:

- 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.

- 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 section 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.

- 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". 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 a disability may require consideration, and it would be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

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

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

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

Failure to make reasonable adjustments

137. Under section 39(5) EqA a duty to make reasonable adjustments applies to an employer. A failure to comply with that duty constitutes discrimination: EqA section 21.

138. Section 20 EqA provides that the duty to make reasonable adjustments comprises three requirements, set out in sections 20(3), (4) and (5). This case is concerned with the first of those requirements, which provides that where a provision, criterion or practice of an employer's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer must 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 this requirement is a failure to comply with the duty to make reasonable adjustments.

139. In considering whether the duty to make reasonable adjustments arises, a Tribunal must consider the following:

(1) Whether there was a provision, criterion or practice ("PCP") applied by or on behalf of an employer;

(2) The identity of the non-disabled comparators (where appropriate); and

(3) The nature and extent of the substantial disadvantage in relation to a relevant matter suffered by the employee: Environment Agency v Rowan [2008] IRLR 20.

140. The concept of a PCP is one which is not to be construed narrowly or technically. Nevertheless, as the Court of Appeal said in Ishola v Transport for London [2020] EWCA Civ 112 IRLR 368:

*"[To] test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantaged caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. However widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief that the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP. In context, and having regard to the function and purpose of the PCP in the 2020 Act, all three words carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. 'Practice' connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises."*

141. A duty to make reasonable adjustments does not arise unless the PCP in question places the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial (i.e. more than minor or trivial) and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled: Royal Bank of Scotland v Ashton [2011] ICR 632, EAT.

142. Simler P in Sheikholeslami v Edinburgh University [2018] IRLR 1090 held:

*"The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP…*

*The Equality Act 2010 provides that a substantial disadvantage is one which is more than minor or trivial: see section 212(1). The EHRC Code of Practice states that the requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people: see paragraph 8 of App 1. The fact that both groups are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured*

*by comparison with what the position would be if the disabled person in question did not have a disability."*

143. The substantial disadvantage must be *"in relation to a relevant matter".* Schedule 8 of the EqA makes it clear that, in this context, a *"relevant matter"* means employment by the respondent.

144. An employer is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know, that the employee is likely to (i.e. could well) be placed at the substantial disadvantage.

145. The predecessor to the EqA, the Disability Discrimination Act 1995, contained guidance as to the kind of considerations which are relevant in deciding whether it is reasonable for someone to have to take a particular step to comply with the duty. Although those provisions are not repeated in the EqA, the EAT has held that the same approach applies to the 2010 Act: Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43, [2015] ICR 169. It is also apparent from Chapter 6 of the Code of Practice on Employment (2011), issued by the Equality and Human Rights Commission, which repeats, and expands upon, the provisions of the 1995 Act. The 1995 Act provided, as does the Code of Practice, that in determining whether it is reasonable for an employer to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had in particular to:

(1) Whether taking any particular steps would be effective in preventing the substantial disadvantage;

(2) The practicability of the step;

(3) The financial and other costs of making the adjustment and the extent of any disruption caused;

(4) The extent of the employer's financial and other resources;

(5) The availability to the employer of financial or other assistance to help make an adjustment; and

(6) The type and size of the employer.

146. It is clear from the cases of O'Hanlon v Commissioners for H M Revenue & Customs [2007] EWCA Civ 283 and Meikle v Nottingham County Council [2004] EWCA Civ 859, that paying money, such as enhanced sick pay, to an employee who is absent sick is, in principle, capable of falling within the duty to make adjustments. However, as the EAT made clear in O'Hanlon, it would be a rare and exceptional case in which an employer would be expected to enhance an employee's sick pay entitlement. As Elias P said in that case:

*"First, the implications of this argument are that Tribunals would have to usurp the management function of the employer, deciding whether employers were financially able to meet the costs of modifying their policies by making these enhanced payments. Of course we recognise that Tribunals will often have to have regard to financial factors and the financial standing of the employer, and indeed section 18B(1) requires that they should. But there is a very significant difference between doing that with regard*

*to a single claim, turning on its own facts, where the cost is per force relatively limited, and a claim which if successful will inevitably apply to many others and have very significant financial as well as policy implications for the employer. On what basis can the Tribunal decide whether the claims of the disabled to receive more generous sick pay should override other demands on the business which are difficult to compare and which per force the Tribunal will know precious little about? The Tribunals would be entering into a form of wage fixing for the disabled sick.*

*Second, … the purpose of this legislation is to assist the disabled to obtain employment and to integrate them into the workforce."*

147. Following these cases, in G4S Cash Solutions (UK) Ltd v Powell [2016] IRLR 820 EAT, HHJ Richardson held that, whilst not anticipated to be *"an everyday event for an Employment Tribunal to conclude that an employer was required to make up an employee's pay long-term to any significant extent",* there could be cases where this may be a reasonable adjustment for an employer to have to make as part of a package of adjustments to get an employee back to work or keep an employee in work.

148. In Tameside Hospital NHS Foundation Trust v Mylott UKEAT/0352/09 (11 March 2011, unreported), the EAT observed:

*"The whole concept of an adjustment seems to us to involve a step or steps which make it possible for the employee to remain in employment and does not extend to, in effect, compensation for being unable to do so. This is consistent with the fact that the duty to make adjustments only arises if a PCP puts an employee at a substantial disadvantage in relation to employment with the respondent."*

Harassment

149. Section 26 EqA provides as follows:

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

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

(2) …

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

(a) The perception of B;

(b) The other circumstances of the case;

(c) Whether it is reasonable for the conduct to have that effect.

150. The Tribunal has had regard to the guidance given by the EAT in Richmond Pharmacology v Dhaliwal [2009] IRLR 336 as reviewed by the Court of Appeal in Pemberton v Inwood [2018] EWCA Civ 564 per Underhill LJ at [85-88].

Jurisdiction

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

152. The Tribunal's attention was also drawn to R v Commissioner of Police of the Metropolis ex parte Weed [2020] EWHC 287 (Admin).

Burden of Proof

153. The burden of proof in relation to allegations of discrimination is dealt with in section 136 of the Equality Act 2010, which sets out a two-stage process:

(1) First, the Tribunal must consider whether there are facts from which the Tribunal could conclude (in the absence of an adequate explanation) that the respondent has committed an unlawful act of discrimination against the claimant. In deciding whether the claimant has proved such facts, it will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. If the Tribunal could not reach such a conclusion on the facts as found, the claim must fail.

(2) Where the Tribunal could conclude that the respondent has committed an unlawful act of discrimination against the claimant it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed, that act.

Limitation

154. Section 123 of the EqA sets out the relevant provisions relating to time limitation of claims under the 2010 Act.

155. Section 123 of the EqA provides:

(1) Proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of three 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.

156. Where it is contended that there is conduct extending over a period, if any of the acts in the period are not established factually or not found to be discriminatory they cannot form part of the continuing act: South Western Ambulance Service NHS Foundation Trust v King EAT 0056/19.

A failure to act is not the same as an act. Under section 123(3)(b) of the EqA failure to do something is to be treated as occurring when the person in question decided on it. The Tribunal needs to determine the point in time at which either a decision was made or the end of the period in which the employer might reasonably have been expected to comply with the relevant duty to make adjustments: Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194; and Hull City Council v Matuszowicz [2009] ICR 1170.

## Conclusions

157. Before we set out our conclusions on the List of Issues, it is convenient to set out the Tribunal's view on the correct construction of the exception at paragraph 7 "little (c)" and what the IHR process means in the context of the PNB Circular 05/01.

The construction of the exception at Paragraph 7(c) of PNB Circular 05/01

158. The claimant's case as set out in Mr Crammond's written submissions is that paragraph 7(c) requires two things:

(a) that the case is being considered in accordance with the PNB joint Guidance on Improvement of the Management of Ill Health; and

(b) that the authority has referred (past tense) the issue of whether the claimant is permanently disabled to a selected medical practitioner.

159. The claimant points out that exception (c) does not require:

(a) Any notion that the officer is eventually ill-health retired for it to apply, not does it cause pay to reduce automatically and then later to be reimbursed if there is actually ill health retirement; or

(b) Any notion that the officer is likely to be ill health retired or that the evidence obtained in the process (including from an SMP) means that they are likely to be ill health retired; and that

(c) Even an ongoing SMP referral, as long as there has been one, is sufficient.

160. The claimant further submits that the SMP process does not end with a negative decision from the SMP or upon a decision to retain being made. The ending of the process set out within the PNB Circular 05/01, among other matters, clearly includes, on a flowchart (bundle page 1213), referral to the SMP and the process of going to the FMA; appeals against the SMP decision; review decisions under dispute; reviews of a decision on medical retirement; appeals to the PMAB; right up to the decision of the PMAB. The claimant says that all of those elements are part of being managed in accordance with the PNB Circular for the purposes of paragraph 7 (c). The claimant submits that Ms Hulbert in her evidence agreed that all such steps form part of management in accordance with the ill health retirement guidance. The claimant says that the construction for which the respondent contends would render otiose the express reference to "being managed in accordance with the PNB Circular on ill health management" which is present in paragraph 7(c).

161. The claimant says the net effect of the above is that the claimant was being managed in accordance with the PNB Circular from at least the point of the first referral to SMP (29 April/7 May 2019) and was also being managed within the IHR process much earlier given the inclusion of FMA referrals in PNB Circular and continuously thereafter up to the conclusion of the PMAB, whose report was dated 17 March 2021.

162. In the alternative, the claimant points out that there were two SMP referrals during which the claimant is plainly being managed within the meaning of the PNB Circular:

(1) SMP1 – referred on 29 April 2019. The claimant submits this plainly falls within the management of the claimant within the PNB Circular;

(2) SMP2 – referred on 11 February 2020. The claimant says she is being managed in accordance with the PNB Circular until the outcome of the PMAB hearing on 17 March 2021.

163. The claimant submits that at all material times the two requirements of paragraph 7(c) were met by the claimant. There had been an SMP referral and she was being managed in accordance with the PNB Circular as to ill health management.

164. In relation to pay, the claimant points out:

(a) At the point of the SMP1 referral on 29 April 2019 the claimant was on full pay.

(b) At the point of the SMP2 referral on 11 February 2020 the claimant was in receipt of half pay (but should have been on full pay).

165. Accordingly, the claimant says that she was entitled to receive full pay throughout the process. The claimant seeks to distinguish Weed v The Commissioner of Police of the Metropolis [2020] EWHC 287 in this regard, which related (the claimant says) to a case in a different Force, on different evidence and on different facts and in respect of a different claim (judicial review not the Equality Act 2010).

166. The respondent's position on paragraph 7(c) is as follows.

167. The respondent says that the concept of "the IHR process" which is referred to in the claimant's pleaded case and variously in the claimant's evidence and submissions, is not a term to be found in either the PNB Circular 05/01 or the PNB Guidance. To the extent that the claimant predicates her case on the basis that (c) equates to the IHR process that, the respondent says is simply wrong.

168. The respondent points to the wording of paragraph 7(c); the context of the circular and the purpose of this section.

169. The respondent says that the wording is clear, and in particular refers to the inclusion of the word "and" in the sentence "this case is being considered in accordance with the PNB Joint Guidance on Improving the Management of Ill Health and the Police Authority has referred the issue of whether the officer is permanently disabled to a Selected Medical Practitioner" (emphasis added). The respondent says that it is only where the case is being considered both in accordance with the Joint Guidance and has been referred to the SMP that the exception paragraph 7(c) applies. The respondent says that if the claimant's construction of paragraph 7(c) is correct, then the part of the sentence "and the Police Authority has referred the issue of whether the officer is permanently disabled to a Selected Medical Practitioner" would be otiose. Ms Mellor makes that submission on the basis that if the claimant's construction of (c) is correct, (c) would have to have said only "this case has been considered in accordance with the PNB Joint Guidance on Improving Management of Ill Health" and ended there. It is otiose to add on the additional requirement that there has been a referral of permanent disability to an SMP.

170. The respondent submits that there is a very clear and specific reference to the SMP: that is because the role of the SMP is distinct to any other part of the process. If the claimant's construction of paragraph 7(c) is correct and it applies to the whole of the PNB Guidance then paragraph 7(c) would also apply where there is "on-going action by officer, management and FMA on his/her health and attendance" (Annex A bundle page 1173). The respondent says that cannot be right as this would be for a significant amount of time, as was indeed the case with the claimant. The respondent submits that if the exception at paragraph7(c) applies where the claimant says it does, then the discretion under regulation 28 (the discretion to increase pay from nil pay to half pay, half pay to full pay or nil pay to full pay) would be rendered superfluous. The respondent also points out the quasi-judicial role played by the SMP which, in the respondent's submission, has a specific role to play in the Pension Regulations 1987 (or 2015) with statutory questions being required as part of the SMP process.

171. The respondent also submits that from a purposive construction of the statutory questions in the SMP referral – to determine permanent disablement – suggests that it is only during an SMP referral that the exception at paragraph 7(c) applies. The purpose of paragraph 7(c) is to ensure, submits the respondent, that there is a discretionary extension of pay where an officer may be permanently disabled because of the forthcoming decision of the SMP. The respondent further submits that paragraph 7(c) makes no reference to appeal and, in particular, no reference to an ongoing right to pay pending an appeal to the PMAB. Furthermore, the respondent submits that there is a broad public policy implication to adopting the

construction of paragraph 7(c) for which the claimant contends. The effect of the claimant's construction would mean that any officer being managed in accordance with PNB Guidance at any stage of the process can "expect" an extension of pay. The respondent points out that this finding would have a significant impact not only on NYP but nationally as the Regulations in the PNB Guidance are applicable to all police officers.

172. After having carefully considered the respective contentions in relation to the construction of paragraph 7(c), the Tribunal prefers the respondent's construction, notwithstanding the exhaustive and valiant attempts of Mr Crammond. It may very well be the case that paragraph 7(c) is not blessed with clarity, but the conjunctive "and" is better understood in the Tribunal's opinion as requiring both the application of PNB Circular 05/01 and an extant SMP referral, not simply that ill health management is being undertaken by NYP in general terms. The Tribunal also accepts the respondent's submission that a purposive construction of the statutory questions which must be asked of the SMP is also consistent with a discretion to extend pay during the currency of SMP referrals and not during the general management of the officer's ill health management under the PNB Circular.

***The issues to be determined***

<u>Issue 1 – Discrimination arising in consequence of disability</u>

1. Did the respondent treat the claimant unfavourably by:

   1.1 Reducing her pay in line with regulation 28 of the Police Regulations 2003? (referred to below as unfavourable treatment 1).

   1.2 Requiring her to take annual leave whilst off sick to allow her to receive full pay? (referred to below as unfavourable treatment 2).

173. The respondent accepted that reducing the claimant's pay in line with regulation 28 of the Police Regulations 2003 amounts to unfavourable treatment. Given that concession, the Tribunal need say no more about that.

174. The respondent does not accept that the claimant has established as a matter of fact that she was "required" to take annual leave while on sick leave in order for her to receive full pay. The Tribunal agree with the respondent's position. On 17 April 2020, in an email timed at 13:57, the claimant wrote to her then line manager, DS Andrew Clark, in the following terms:

*"…Just so you are aware **<u>I</u>** suggested to HR if **<u>I</u>** could use my leave entitlement to cover me whilst in the SMP process rather than go onto no pay, initially they said no but then Melissa came back with the below…"* (emphasis added)

175. Melissa Pearson replied in broadly positive terms saying that it has been agreed that NYP can "return you to work" taking annual leave. Ms Pearson goes on to explain to the claimant how NYP would administer that process (bundle page 769).

176. Again, on 25 April 2020 the claimant says that she has agreed to be returned to work on 20 April. It is true that she attributes that to financial difficulties and also states that she believed she should still be on full pay.

177. However, the Tribunal do not consider that to be a requirement by the employer rather than a suggestion by the claimant acquiesced in by the respondent. The fact that the claimant may have been suffering financial difficulties does not turn her request into a requirement by her employer. This is not a claim where the claimant has lost any annual leave. The Tribunal therefore concluded that the claimant taking annual leave whilst on sick leave was not a requirement made by NYP. The claimant has therefore not proved that the alleged unfavourable treatment occurred as a question of fact and/or that allowing the claimant to take annual leave during sick leave constituted unfavourable treatment neither treatment by NYP or unfavourable treatment at all.

2. Did the following things arise in consequence of the claimant's disability:

2.1 Her sickness absence?

2.2 Her request for ill-health retirement?

178. The respondent, in respect of unfavourable treatment 1, accepted that the claimant's “absence” was the cause of the unfavourable treatment of reducing her pay in line with regulation 28. In respect of unfavourable treatment (1), the respondent therefore relies upon having a legitimate aim for so doing pursuant to section 15(1)(b) EqA.

179. In respect of unfavourable treatment 2, the Tribunal does not accept the respondent’s contention that the request by the claimant for ill health retirement was in consequence of something arising from disability (i.e. disability related sickness absence) but because of the application of regulation 28. The Tribunal considers that the chain of causation is such that the claimant’s request for ill health retirement was in consequence of the direct effects of her disability, namely her potential inability to carry out police work. The respondent must therefore also rely on a section 15(1)(b) legitimate aim in respect of unfavourable treatment 2.

3. Was any unfavourable treatment a proportionate means of achieving a legitimate aim?

180. The identified legitimate aim is the aim of retaining police officers on sick leave whilst managing public spending as prescribed by the Regulations in relation to sick pay. The proportionate means of achieving that aim are the application of the Police Negotiating Board Guidance when considering an extension of pay.

181. The claimant submits that the legitimate aim identified by the respondent, even if capable in principle of amounting to a legitimate aim, is is not an aim being pursued by the respondent in this case. The claimant says that neither unfavourable treatment (1) or unfavourable treatment (2) achieved that aim as a reduction in pay is more likely to lead to losing officers, not keeping them. The claimant points to the Chief Constable’s reference to resignation and the claimant’s option to resign. The claimnat says that the respondent’s aim was to get the claimant to leave. Accordingly, on the facts the claimant disputes that the respondent was in fact pursuing the legitimate aim it identifies. The claimant also says that there was no evidence to support the aim, and the burden is on the respondent to show both the legitimate aim and its proportionality.

182. The respondent's position is simply put. The Chief Constable's evidence in her witness statement was to the effect that it is obvious that a generous sick pay scheme will lead to the retention of skilled workers. The Chief Constable also rejects the suggestion that the respondent's aim was to any extent to get the claimant to leave NYP's employment. The Chief Constable points out that she was at all times looking to retain the services of the claimant.

183. In terms of whether it was a proportionate means, the claimant submits that it was not reasonably necessary to reduce the claimant's pay because paragraph 7(c) applied and full pay should have been mentioned; and the respondent was responsible for the delays leading to nil pay.

184. The respondent submits that it is plain as a matter of fact that retention was the Chief Constable's aim. After all, and as noted already above, it was the Chief Constable's decision to retain the claimant which was reconsidered and confirmed on a number of occasions and the Tribunal does not accept that by so doing the real intention of the Chief Constable was to procure the claimant's resignation.

185. The Tribunal accepted the Chief Constable's rationale that her decision to retain the claimant was made in the light of the medical evidence, none of which recommended the claimant for ill health retirement. The Tribunal also accepted the Chief Constable's evidence that it stands to reason that a generous sick pay scheme promotes the retention of officers in the police service.

186. The respondent also points out that NYP is a publicly-funded organisation that cannot reasonably be expected to maintain officers on full pay indefinitely, especially when they do not meet the established criteria. The respondent also relies upon O'Hanlon as to the broader implications of continuing the pay for this particular claimant in accordance with a construction of paragraph 7(c) which would apply generally and nationally across the whole of the service significantly extending the period of time over which officers would be entitled to full or half pay rather than half or nil pay.

187. As was said in O'Hanlon, "where the cost is per force relatively limited, and a claim which if successful inevitably applied to many others and will have very significant financial as well as policy implications for the employer", then that is very different to a situation which only impacts one officer. Accordingly, the respondent submits that it may be right that NYP could afford to pay one officer for a period of sickness outside regulation 28, but that a decision to that effect in this claim would have dramatic ramifications for the wider management of police officers' pay during sick leave. The respondent also points out that there is no general obligation on an employer to pay an employee a wage in these circumstances and it would be disproportionate to find that there is.

188. The Tribunal finds as follows.

189. The guidelines to which Ms Mellor refers are those contained in the PNB Guidance and in the NYP's own policy covering the exercise of discretion by Chief Constables to pay an officer more than their presumptive entitlement under the Police Regulations. The PNB Circular encourages Forces to have their own policy and says a Force can have guidance "to promote fairness and consistency in the decision-making process". NYP has such guidelines which are contained in a

written policy. The Tribunal is satisfied that in accordance with the PNB Circular, NYP does not have a fixed policy that discretion always will or always will not be exercised in a particular kind of case. NYP's policy is that, although each case will be considered on its own merits, it is expected that only in exceptional circumstances will discretion be exercised in favour of the member of staff. The policy sets out a list of what it describes as "possible exceptional circumstances" in which discretion might be exercised. That list mirrors the examples of exceptional circumstances including the circumstances contemplated by paragraph 7(c) of the PNB Circular 05/01.

190. Given our finding that paragraph 7(c) only applies to periods when the claimant was under an extant referral to the SMP, we address our conclusions to those periods only.

191. The Tribunal finds that in line with the guidance the Chief Constable considered the claimant's case on its merits in deciding not to continue full pay but rather to reduce it to half pay and then to nil pay, and that by so doing the Chief Constable was applying Regulation 28 appropriately. The NYP's policy and the PNB Circular provide for an extension of pay only in exceptional cases and in the light of the Tribunal's finding on the correct construction of paragraph 7(c), none of the exceptions in paragraph 7 applied to the claimant's circumstances.

192. The Tribunal finds that the respondent's decision to exercise its discretion to reduce the claimant's pay to half pay was also consistent with NYP's policy and the Guidance. These are relevant factors in determining pay during sick leave for officers, particularly as the respondent's case is that one of the aims of pay reduction was to ensure consistency of treatment across the police service nationally.

193. The Tribunal must weigh against that the impact of the reduction in pay on the claimant. We do not doubt that the impact of having her pay reduced from full pay to half pay and subsequently half pay to nil pay was significant and must have caused the claimant a great deal of anxiety.

194. On the other hand, the claimant had been absent from work on full pay since 30 April 2019. In that time, the respondent had exercised discretion for a short extension of the claimant's full pay until certain matters were clarified. There was also the conclusion of SMP1, that the claimant was fit for certain alternative duties, as we have identified in our fact finding above. The claimant did not attempt to carry out any of those duties to see if she could undertake them, preferring to assert her unfitness to undertake even administrative tasks at NYP based on the difficulties she experienced on adjusted duties in CSU/CROP.

195. A good example of adjustments that were available but which the claimant never attempted, is her failure even to try Dragon dictation software to see whether voice activation would address the difficulties she experienced with traditional typing methods. Regardless of the merit of that dispute, the claimant had not provided any service to NYP for a very significant period of time and there was no sign that she would be able to do so in the future, particularly given her stance that she was unable to do any work at NYP and that the only option in the claimant's view was her ill health retirement.

196. NYP do not have unlimited resources and cannot be expected to continue indefinitely to pay officers who are unable (or unwilling) to perform their duties. That being the case, at some point a line must be drawn. The Tribunal has referred above to the case of O'Hanlon. Although that was a case on the duty to make reasonable adjustments, the EAT's conclusion that it would be a rare and exceptional case in which an employer would be expected to enhance an employee's sick pay entitlement is apposite. The cost to NYP of increasing the claimant's pay may have been manageable in and of itself. However, if NYP and by extension the police service as a whole were to apply that same approach consistently and nationally, that would have very significant financial and policy implications for the service.

197. In all the circumstances, we are satisfied that the decision of the Chief Constable not to exercise her discretion to maintain the claimant's pay at full pay and therefore reducing the claimant's pay to half pay and then to nil pay was a proportionate means of achieving the legitimate aim relied on by the respondent.

198. In those circumstances the claimant's claim that she was discriminated against contrary to section 15 of the 2010 Act is not made out.

Harassment related to disability

199. The following things were identified by the claimant as amounting to harassment related to disability for the purposes of section 26 EqA:

(1) The length of time it took to refer the claimant to the SMP;

(2) The constant requirements to obtain full medical information;

(3) The length of time it took to conclude the IHR process;

(4) The respondent's failure to deal with the reduction in her pay in an efficient manner and the contradictory indications to the claimant during the process; and

(5) The respondent's refusal to attend the PMAB in London to allow an appeal determination on the claimant's IHR.

200. The Tribunal agrees with the claimant that it took a significant amount of time for the claimant to be referred to the SMP. For example, it was plainly incorrect of the FMA, Dr Swales to contact Dr Adeleken to obtain information about the impact of the claimant's lymphedema. Dr Adeleken was the clinician responsible for the claimant's breast cancer related surgery and not for the diagnosis or treatment or on-going assessment of the claimant's lymphedema and its implications for her health and ability to work.

201. However, the Tribunal does not think that it is appropriate to equate legitimate criticisms of managerial competence with matters of harassment. Plainly, there may come a time when the effect of such conduct by an employer has the prescribed effect. However, we do not think that to be the case in this particular instance. Nor does the Tribunal conclude that the length of time that the process has taken relates to the claimant's disability. It is not a but for test. The delays that occurred related to the need to meticulously follow a multi-stage process and case

management inefficiencies that appeared either to be endemic to the process or attributable to clinicians acting on behalf of NYP. Those shortcomings would have occurred equally to persons who were not disabled within the meaning of section 6 EqA and who were going through the ill health retirement process.

202. The fact that there were requirements for additional medical information is not something that the Tribunal consider can correctly be described as unwanted. Plainly, it was in the claimant's (as well as NYP's) own best interests to have the as much relevant and up-to-date medical information put before the FMA, the SMPs and the PMAB. Indeed the claimnat herself was keen to get updated medical information from, for example, Dr Beaini.

203. It is difficult not to empathise with the claimant's sense of frustration. However, harassment related to disability is something with must have the prescribed effect and not simply to cause upset or frustration however understandably

204. Similarly, the Tribunal does not consider that any inefficiencies or contradictory indications given to the claimant for a failure to deal with the reduction in the claimant's pay in an inefficient manner had the prescribed purpose or effect. This was a difficult case with contrasting objectives on the part of the claimant and NYP. To the extent that prescribed effect was experienced by the claimant the Tribunal does not consider it reasonable for it to have done so. Again, the Tribunal can readily understand why the claimant became upset and frustrated, but the Tribunal does not consider that the threshold for harassment has been met.

205. The Tribunal can also empathise with the claimant's frustrations regarding attendance at the PMAB. However, it is also clear that Melissa Pearson was chasing the PMAB and seeking to persuade it to sit regionally or remotely and, indeed, to put questions to the SMP outside of the PMAB hearing itself (as in fact did occur). The reason for the refusal by the respondent to attend the PMAB were due to the pandemic and then availability which, while obviously frustrating do not in the Tribunal's view amount to harassment as defined in section 26 EqA.

206. It can also be seen that delays in relation to the PMAB were as a consequence of decisions taken by other bodies. It is accepted that those bodies may be acting on behalf of NYP, however in each case the SMP and the PMAB were adopting a blanket approach to restrict their activities during the COVID pandemic and, frustrating and annoying as this no doubt was to the claimant, the Tribunal do not think in the overall context and circumstances of the case that this has the prescribed purpose or effect under section 26 of the 2010 Act

207. Accordingly, the conduct identified at (1)-(5) above was no doubt unwanted and may be said to relate to disability in the sense that it related to the IHR process which itself relates to disability, but the Tribunal does not consider that the purpose or effect of that conduct was to violate the claimant's dignity, or to create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We have taken the claimant's perception into account as well as the other circumstances of the case, but to the extent that the claimant did consider that the conduct had that purpose or effect in the Tribunal's view it was not reasonable for it to have done so.

208. The Tribunal was concerned about the references by the Chief Constable to the claimant's right to resign her employment if she wished to do so and the claimant's perception that she was perceived as a shirker and/or was exaggerating the effects of her health condition. The Tribunal acknowledged that this was a stressful process and that pay is important to any employee. However, the Tribunal accepts that the context in which the Chief Constable referred to resignation was a direct response of the perception by the Chief Constable that the claimant did not wish to remain in the service of NYP, informed at least in part by the claimant's refusal even to attempt to undertake one of the alternative roles suggested by Dr Lister, SMP1 either at all or so that any required adjustments could be identified and considered. It was therefore not the Chief Constable's purpose that these remarks were for the purpose prescribed and nor do we consider it reasonable for the claimant to have considered it to have had that effect.

209. The Tribunal has also had regard to the evidence of Ms Hulbert in which she explained that it was not specific to the claimant's case that there was a significant delay regarding the PMAB hearing and decision. The evidence of case A and case B suggests that the pandemic had a similar, if not more significant, impact on other cases in similar circumstances.

210. Moreover, we are satisfied that the respondent's conduct generally was based on medical evidence from two SMPs and ultimately the PMAB. None of those required sources of medical advice concluded that the claimant was either physically unable to carry out any duties at all (the three jobs that were identified so demonstrates) and the mental health condition was not considered to permanently disable the claimant in the opinions of Dr Beaini, Dr Iqbal or the PMAB.

<u>Failure to make reasonable adjustments</u>

211. The Tribunal considers that the respondent had constructive knowledge of the claimant's mental health disability from January 2020 when NYP received Dr Beaini's psychiatric report diagnosing the claimnat with clinical depression and anxiety disorder. This was sufficient for further enquiries to have been made which, given the prognosis for the claimant's recovery extended well over 12 months would have alerted NYP to the fact that the claimant's mental health impairments were likely to satisfy the definition of disability in section 6 EqA.

212. The respondent accepted that the PCPs relied upon amounted to a provision, criterion or practice. In particular, the respondent accepted that the application of regulation 28 of the Police Regulations 2003 (i.e. not maintaining an officer's full pay during the HR process) was a PCP and that the application of the Police Negotiating Board Guidance (i.e. the presumption that sick pay would not be extended) was also a PCP.

213. The respondent accepts PCP1 were applied to the claimant. The respondent accepts that PCP1 placed the claimant at a substantial disadvantage compared to non-disabled persons. The respondent also accepts that PCP1 caused the claimant to suffer that substantial disadvantage.

214. The Tribunal finds that the respondent had knowledge that the PCPs would put the claimant to that disadvantage.

215. The respondent does not accept that the PCP2, the PNB Circular, provides an exception to the usual practice of the presumption in reduction in pay and in fact confers greater benefit to those who are likely to be disabled. In those circumstances PCP2 does not put the claimant to a substantial disadvantage. The Tribunal accepts the respondent's submission in that regard.

216. The claimant was also not put to the financial disadvantage complained of. During the SMP process the claimant's pay was actually unaffected. The claimant received six months' full pay and six months' half pay with a short extension. There was accordingly no unfavourable treatment as there was no reduction in pay or omission to exercise discretion favourably.

217. In any event, the Tribunal finds that the steps identified by the claimant were not steps that it would have been reasonable for the respondent to take. The step of maintaining full pay is not a reasonable adjustment. It is a contention that the claimant should be entitled to more pay than she was receiving. Reasonable adjustments are about getting people back to work and it is unclear how maintaining full pay would have had that effect, particularly in circumstances where it was the claimant's own case that she was permanently disabled from carrying out any role in NYP because of both of her physical and mental impairments. The same considerations apply to maintaining half pay from 16 July 2020.

218. In those circumstances, the Tribunal reject all three suggested adjustments, including allowing the claimant to be ill health retired. In all three cases they were not steps that would get the claimant back to work. Insofar as they related to pay, very rarely can a Tribunal reset sick pay parameters beyond those set in the workplace (O'Hanlon). In all these circumstances the claimant's claim for a failure by NYP to make reasonable adjustments is not made out.

219. I reaching its conclusions, the Tribunal has, as it must, determined what it considers to be the legal merit of the claimant's claims. The Tribunal appreciates that the circumstances in which the claimnat found herself through absolutely no fault of her own from September 2016 onwards would have been and continue to be extremely distressing. Central to the difficulties the claimant has experienced is the realisation that she can no longer carry out the normal duties of a police officer including having to give up what must have been an interesting and rewarding role in the CSU/CROP. Nor is it the role of the Tribunal to pass judgment, one way or the other on the efficiency of management in a general sense unrelated to matters of disability. The Tribunal has confined itself to applying its understanding of the law to each of the aspects of the claimant's case when reaching its conclusions.

220. Each of the claimant's claims of disability discrimination are therefore dismissed.

Employment Judge Loy

Date: 21 September 2022

RESERVED JUDGMENT AND REASONS

SENT TO THE PARTIES ON

21 September 2022

FOR THE TRIBUNAL OFFICE

The Hearing
This was a remote hearing which was consented to by the parties. The form of remote hearing was via CVP. A face-to-face hearing was not held because the parties agreed to the hearing being conducted via video link.

**Public access to employment tribunal decisions**
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.