EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr A West	and	The Chief Constable of Surrey Police

Hearing at Reading on: Hearing 1, 2, 3, 4, 8, 9, 10, 11, 15 October 2018
In chambers 16, 17, 18 October and 7 December 2018

Representation **Claimant:** In person
Respondent: Mr B Uduje, counsel

Employment Judge Mr SG Vowles **Members** Ms J Stewart
Mr M Selby

RESERVED UNANIMOUS JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties. From the evidence heard and read the Tribunal determined as follows.

Disability Harassment – section 26 Equality Act 2010

2. The Claimant was not subjected to disability harassment. This complaint fails.

Direct Disability Discrimination – section 13 Equality Act 2010

3. The Claimant was not subjected to direct disability discrimination. This complaint fails.

Discrimination Arising from Disability – section 15 Equality Act 2010

4. The Claimant was not subjected to discrimination arising from disability. This complaint fails.

Victimisation - section 27 Equality Act 2010

5. The Claimant was not subjected to victimisation. This complaint fails.

Protected Disclosure Detriment - section 47B Employment Rights Act 1996

6. The Claimant was not subjected to protected disclosure detriment. This complaint fails.

Failure to Make Reasonable Adjustments – section 20 Equality Act 2010

7. The Respondent was not in breach of the duty to make reasonable adjustments. This complaint fails.

Indirect Disability Discrimination – section 19 Equality Act 2010

8. The Claimant was not subjected to indirect disability discrimination. This complaint fails.

Reasons

9. This judgment was reserved and written reasons are attached.

REASONS

SUBMISSIONS

Claimant

1. On 20 June 2017 the Claimant presented an ET1 claim form with complaints of disability discrimination.

2. The claim was clarified in a case management order which was made following preliminary hearings held on 19 October 2017 and 4 December 2017. It was agreed between the parties that events up to 7 November 2017 would be considered although they post-dated the presentation of the claim form.

3. Additionally, during the course of this 9 day hearing held from 1 to 15 October 2018, the claim was further clarified. In particular, protected disclosure detriment was added to the list of complaints.

Respondent

4. On 3 August 2017 the Respondent presented a response and resisted all claims.

EVIDENCE

5. The Tribunal heard evidence on oath on behalf of the Claimant from:

   The Claimant, Mr Alan West (Police Constable).
   The Tribunal read a witness statement from Ms Ria Gray (former Police Constable) who did not attend the hearing.

6. The Tribunal also heard evidence on oath on behalf of the Respondent from:

   Police Constable Steven Ashley (Learning and Development Unit)
   Police Constable Mark Ellison (Training Team Instructor)
   Detective Chief Inspector Amy Buffoni (Public Protection)

Police Sergeant Mark Bracknell (Area Policing Team)
Mrs Elisabeth Eades (Head Occupational Health)
Mr William Davis (Head Employee Services)
Inspector Dallas McDermott (Area Policing Team)
Mrs Rachel Billington (Diversity Manager)
Police Sergeant Lesley Sumner (Foundation Team Leader)

7. The Tribunal also read documents in 6 lever arch files totalling over 2,500 pages.

8. From the evidence heard and read, the Tribunal made the following findings of fact.

FINDINGS OF FACT

Test Valley Police

9. The Claimant was employed as a police constable with Thames Valley Police (TVP) from 10 September 2007 to 24 May 2011 when he resigned.

10. On 4 April 2010 the Claimant suffered an injury on duty. He suffered a fractured sternum, anterior hip and wrist pain associated with a fall while pursuing a suspect. A consultant report dated 1 September 2010 recorded: *"Alan has predominantly mechanical low back pain with an overlay of emotional stress. Current problem is low back pain rather than pain on the sternum. He also has stiffness in the right wrist."*

11. The injury led to his absence on sick leave for just short of a year during which, in accordance with police pay policy, he was paid full pay for the first six months' sickness, then half pay for the second six months. The pay was due to reduce to nil at the one year point but he returned to work shortly before that point.

12. Also during the course of his service with TVP, he was diagnosed with an eye problem which affected his vision.

Surrey Police

13. Having resigned from TVP on 24 May 2011, the Claimant said he then worked as a personal trainer until he applied to join Surrey Police in October 2015. Prior to joining, he disclosed all his previous medical history and underwent an examination by the Surrey Police Force Medical Officer (FMO). Apart from the eye condition, he was declared fit for police service with no outstanding physical or mental impairments or disabilities. His employment as a PC with Surrey Police commenced on 4 April 2016.

14. Because he had previous service as a PC with TVP, he was regarded as a "transferee" but because there was a five year gap between his previous service and new service, he was required to take part in the Surrey Police Probationers' course which ran from 31 March 2016 to 24 June 2016. It was agreed that he would not have to pass any tests (which the

probationers had to pass) but must attend the course. He did not start until 4 April 2016 due to prior commitments. He was then absent on dependency leave on 5 and 6 April 2016 and then went on sick leave between 7 and 13 April 2016. He therefore joined the course on 14 April 2016. Initially, his line manager was PS Sumner.

Events of 25 and 26 April 2016

15. On 25 April 2016 the Claimant, together with other probationer PCs, took part in Officer Safety Training (OST). The session was conducted by PC Ellison assisted by PC Fraser Marshall and Force Fitness Advisor, Carl Warn.

16. There was a dispute between the Claimant and the Respondent as to the events of 25 and 26 April 2016. The Claimant claimed that his back injury was caused during OST on 25 April 2016. The Respondent claimed that any injury sustained by the Claimant during OST was an aggravation of previous back injuries and that he was not "Injured on Duty" (IOD).

17. The Claimant's account of the incident was set out in his witness statement as follows:

"26. We then started the Officer Safety Training session which consisted of some theory to start, followed by baton technique training consisting of opening the baton and strikes etc, then we practised restraint techniques and takedowns and arm pins up to lunchtime. Just before I went to lunch, Mark asked how I was and I replied that I was ok, just a little stiff in my upper back so he gave me some ice to use during the lunch break.

27. After the lunch break, we did not warm up or stretch at all and went straight into the takedown techniques.

28. At the time I was injured on duty, I was partnered with a student called Mark who was new to the role and police training. I was acting as the stoogle or suspect, and my partner Mark held my right dominant hand in a wrist lock in order to undertake a take-down manoeuvre and place me in a ground pin.

29. The environment in the training was such that myself and my colleagues were being instructed and shouted at by the training officers to carry out the manoeuvres in an excessively fast manner (excessive force) and using more force than was necessary (reasonable force) to conduct the techniques safely and with control.

30. I could see that my colleagues were not feeling confident performing the takedowns and pins, and I could hear the trainers shouting constantly to "use more speed … more force … come on … what you frightened of …come on". I felt that this was wrong and they should have been performing the take downs slow and controlled so that they could master the techniques first. I felt the training was unsafe and techniques were

rushed and being taught by the trainers with too much excessive and unnecessary force which prevented the class learning them safely and effectively.

31. I was pulled forward onto the right side by my colleague Mark who then stepped forward and threw me to the ground without any control. I ended up lying in a prone face down position with my spine twisted. The force was such that it was not controlled and I did not have the opportunity to break my fall in any way as would be reasonably expected in a training environment.

32. As a result, I sustained an injury to my lower back. I also complained of pain to my left hip within a short period of time after the incident.

33. Mark, the Officer Safety trainer approached me and asked if I was ok, I told him I had severe pain in my lower back, so he asked me to move to the side of the gym where I laid on my back as I could not sit due to the severe pain.

34. Mark the trainer came back to me around 15-20 minutes later and asked what I had done, and I told him I was injured during the take down technique. I felt it happen as soon as I was thrown down to the floor by my partner Mark and felt my spine twisted and felt a sharp and severe pain in my lower left back. I told him the technique was done too fast and without any control.

35. Mark the trainer then repeated himself saying that I had injured myself before starting the training this morning, and I stated "No, I wasn't injured at all … why do you keep saying that?". He kept saying it and I had to correct him as it wasn't true and that I was fully fit and healthy which he didn't like, and I felt from his attitude and tone of voice that he was trying to deny my injury happened during the takedown."

18. Thereafter the Claimant was sent home. The contents of Ms Ria Gray's statement largely supported the Claimant's account of the incident.

19. The Claimant attended work the next day, 26 April 2016, and had a meeting with PC Ashley and PC Rob Charles, both trainers. They suggested that he contact his GP because he was obviously in pain and he did so. He said that he had a further meeting with PC Ashley and PC Charles and that during this second meeting, Sergeant Sumner was also present.

20. The Claimant said that since the incident he had undergone extensive medical treatment and was found to have suffered prolapsed discs in his lower spine and a cam-type impingement of his left hip. In addition, he said that he developed depression following the incident and his treatment by the Respondent during the course of his sick leave.

21. PC Ellison's account of the incident was set out as follows in his witness statement, supported by a memo which he completed dated 27 April 2016:

"9. …He was questioned by PC Marshall regarding whether he had any injuries, if he did not then he need to complete the form writing 'none' in this section. Mr West took the form from PC Marshall and wrote 'none' in that section. He then turned to me and said, whilst holding his back, that his back was a little stiff. Mr West was asked by myself whether he was fit to train, to which he replied he was."

"11. My memo then describes what happened next which included the students receiving a further warm up. After we completed the restraint techniques we were due to have lunch. Before the students were sent for lunch they were asked if anyone had any injuries as a result of the training they had had so far. Everyone said no. However, after the class had left the gym I was approached by Mr West who said that his back continued to feel stiff. I offered him an ice pack, which he accepted. I advised him to keep the ice pack on for 20 minutes and when he comes back after lunch if his back still felt stiff to let me know.

12. After lunch Mr West did not come back to me so I believed he was fit to continue with the session.

13. We then went onto the 'take down' session. We start this session by refreshing the escort position and wrist lock restraint techniques with no resistance which acts as a warm up for the joints. We then teach the separate takedown techniques which consist of a wristlock takedown and a bar arm takedown, the students are told to get the technique right first then we build it into a full takedown to the floor. Once the students have got the hang of both techniques we then concentrate on the next stage which are the straight and bent arm pins which are initially practiced with no resistance and then built up to slight resistance to confirm control. The students are then taught the handcuffing techniques from the relevant pins without resistance and the lesson is then completed with the students putting all elements together again without resistance. On its completion Mr West was slow to get up from the mat. I asked if the Claimant was ok to which the Claimant replied that his back was feeling stiff again. I advised him to place another ice pack on for a further 20 minutes and to go and take a seat on the stacked up mats and rest against the wall and we would reassess him again in 20 minutes.

14. After a couple of minutes I noticed that the Claimant had not done what we had advised him to do; he was laying down on the floor with his legs up in the air resting on that mats. I went over to him and asked him what caused the stiffness in his back, He responded that he had done it training that day. I replied that he had stated at the beginning of the day, in the presence of PC Marshall and I, that he had a stiff back prior to the session starting. He said he had not said this. I responded by saying that he had told us he had this injury [a stiff back]. I went on that I felt he was no longer fit enough to train and called his tutors, PC Charles and PC Ashley, to find out what they wanted to do with the Claimant.

15. PC CHARLES and PC ASHLEY then attended the gym where I made them aware of what had happened and what had been said. PC WEST was called into the trainer's office and walked across the gym holding his back very slowly and looking very uncomfortable. I then left PC WEST with his tutors in the office."

22. PC Ashley also gave an account of the events of 25 and 26 April 2016 in his witness statement as follows:

"2. In 2016 I was one of the two trainers running the probationary training which started on 31 March 2016 and was due to be completed on 17 June 2016 …

3. On 25 April 2016 I was informed that the Claimant had injured his back during the Officer Safety raining ("OST") session. I went over to the gym in company with my co-trainer, PC Robert Charles. We could see he was no longer fit to continue this training, as he was walking tentatively with a limp and a hunch. He said that he wanted to drive home. However, his car was parked off site so I and the other co-trainer took him to his car. During this drive we advised him to go and see his GP.

4. The next morning [26 April 2016] the Claimant came into work at Surrey Police HQ first thing (sometime before 7:50 am). We walked up a set of stairs to a meeting room to discuss how he was with PC Robert Charles. The way he walked upstairs you could clearly see his back was not right. He certainly did not look fit for work.

5. At 7:50 am we met PC Robert Charles. A tape recording of this meeting was made. (It is our normal practice to record such meetings so as to avoid any later confusion about what was said by whom). I have since made a transcript of this meeting (pages 601 to 610) which is a true and accurate record of what we discussed.

6. During this meeting PC Charles and my concern was to offer support to the Claimant. We advised him to arrange to see his GP so he could understand the nature of any injury he had suffered.

7. Later on in the meeting the Claimant made the point that he was concerned that PC Mark Ellison had implied that he had been injured before he started the OST, something he denied as he said "… he was implying that I was injured before I had even started which wasn't the case so I just wanted to flag that up because that bugged me yesterday …." (page 3 of the transcript – page 603). When asked by PC Rob Charles when did the injury occur he responded "… after the obvious bleep test I was fine and it was, basically it started happening after that when we were doing the techniques, you know I started feeling this, you know, pain in my back. It felt tight to start off with and it got progressively worse and then I started getting a pronounced pain." (pages 3 and 4 of the transcript – pages 603 to 604). As you can see from the transcript he repeatedly said that it 'bugged [him]' that PC Mark Ellison may have implied that he had had the injury before he started this training.

8. He felt that his injury had been caused due to not doing sufficient warm ups and stretching.

9. Towards the end of the meeting I said that I would feedback to the OST what he had said about warm ups and stretching (page 9 of the transcript – page 609)."

27 April 2016 – 31 August 2018

23. The Claimant was thereafter absent on sick leave from 27 April 2016 until his resignation on 31 August 2018. During this period, the Claimant made several complaints regarding his treatment which are the subject of the complaints dealt with below. Factual findings made by the Tribunal are set out there.

Billington Investigation January – February 2017

24. One matter of note however at this stage is that on or around 11 January 2017 Mr Davis was asked to respond to a letter dated 11 January 2017 from Phillip Hammond MP on behalf of the Claimant, to the Chief Constable of Surrey. As a result, Mr Davis informed the Claimant that he would treat the correspondence to and from Mr Hammond as a formal grievance by the Claimant and that he would arrange for an independent investigator to investigate the matters raised.

25. On 1 February 2017 Mrs Billington was appointed as the investigator and she identified five distinct areas of grievance which formed the parameters for her investigation. These were as follows:-

(1) Occupational health and medical records;
(2) Officer safety training and health and safety incident reporting form completion;
(3) The force pay panel review process;
(4) Grievance procedure adherence; and
(5) Home visits.

26. Mrs Billington produced a report on her findings which was presented to the Claimant at a meeting on 24 February 2017. Having read through the contents of the report with the Claimant, he expressed dissatisfaction with the outcome and the process, in particular that his pay had not been reinstated. He expressed his intention to appeal. The Tribunal could find no evidence regarding an appeal or appeal outcome.

DISABILITY

27. The Tribunal would not normally be concerned with the cause of, rather than the fact of, a physical or mental impairment amounting to a disability. In this case, causation is relevant only insofar as there was a dispute between the Claimant and the Respondent as to the nature of the physical

impairment, when and how it was caused and whether it qualified as a disability and/or an injury on duty for the purposes of the Respondent's treatment of the Claimant during his absence on sick leave from 26 April 2016 and the impact of those matters on his entitlement to sick pay and to private medical treatment, and the exercise of discretion in respect of those matters.

28. It is not part of the Tribunal's function to make findings of fact regarding the cause of the Claimant's impairments. That is a matter for a court to determine during the course of a personal injury claim. At the start of the hearing, the Claimant confirmed that he had presented a personal injury claim to the court but said that it had recently been withdrawn by his solicitors. The circumstances of the personal injury claim were not material to the Tribunal's findings or decisions.

29. During the course of the proceedings, and before the start of the hearing, the Respondent conceded that the Claimant was a disabled person by reason of a physical impairment (injured lower left back and left hip) from 25 April 2017 and by reason of a mental impairment (depression, stress and anxiety) from November 2017.

30. The Claimant claimed that he was a disabled person by reason of both physical and mental impairments from 25 April 2016.

31. There was a dispute between the parties as to the material dates of the disabilities and as to the Respondent's knowledge of the disabilities.

Relevant Provisions

32. In assessing the fact and dates of disability, the Tribunal took account of the following provisions.

33. Equality Act 2010

Section 6 - Disability

(1) A person (P) has a disability if –

(a) P has a physical or mental impairment, and
(b) The impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.

Schedule 1 Part 1 paragraph 2:

2. Long term effects

(1) The effect of an impairment is long term if –

(a) It has lasted for at least 12 months,
(b) It is likely to last for at least 12 months, or

(c) It is likely to last for the rest of the life of the person affected.

34. The Tribunal also took account of the provisions of *"Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)"* issued by the Secretary of State.

35. The Tribunal also took account of the provisions of the Equality and Human Rights Commission: Code of Practice on Employment (2011), Appendix 1.

Physical Impairment

36. The Respondent conceded that the Claimant's back and hip injuries satisfied the test of disability but only from 25 April 2017, that is the point at which the impairment had lasted for at least 12 months.

37. The Tribunal accepted that as at 25 April 2017, the physical impairment had lasted for at least 12 months. However, it went on to consider whether, at any time before that date, there was evidence that it was likely to last for at least 12 months. There was no evidence that the impairment was likely to last for the rest of the life of the Claimant.

38. In the Guidance, it is stated that "likely" should be interpreted as meaning that it could well happen. That reflects the definition of the House of Lords in SCA Packaging Ltd v Boyle [2009] ICR 1056. According to Baroness Hale in that case, the word "likely" in each of the relevant provisions of the DDA (now Equality Act 2010) simply meant something that is a real possibility, in the sense that it could well happen rather than something that is probable or more likely than not.

39. In paragraphs 54 to 64 of the Claimant's witness statement, he described in detail the medical evidence relating to his back and hip impairment.

40. In an occupational health report dated 16 August 2016, it stated:

"Alan remains unfit for work, full operational duties and participation in both the FFT and OST and at this point in time, I am unable to provide a timescale for his return to work. I am currently unable to recommend any adjustments or restrictions, however I have advised Alan to contact the OHU as soon as he has a date for his procedure and we can then refer him for physiotherapy input."

41. Up to 16 August 2016, there was no medical prognosis regarding how long it was likely the physical impairment would last. However, on 12 September 2016, the Claimant was reviewed by Dr Rajib Dutta and in his report, he states:

"I have had detailed discussions with Mr West and Mrs West and I have told them the pathogenesis of spinal pain can sometimes take up to like 2 to 2½ years."

42. It follows that as at 12 September 2016, there was evidence that the physical impairment was likely to last for at least 12 months, that is it could well happen. In his report Dr Dutta was referring to both the typical length of such an effect on an individual and relevant factors specific to the Claimant.

43. The Tribunal found therefore that so far as the physical impairment was concerned, the Claimant was a disabled person with effect from 12 September 2016.

Mental Impairment

44. The Claimant referred to medical evidence regarding the mental impairment in paragraphs 65 to 98 of his witness statement.

45. In the occupational health report dated 16 August 2017 the FMO, Dr Assoufi, stated:

"Current Impairments

Mr West suffers from continuous back pain in his left hip which can be at times very severe. He has been feeling very low in mood and with loss of self-esteem. His day to day activities are limited by his condition. He is unable to sit or stand for more than 10-15 minutes at a time and he reports he is only able to walk a few metres."

46. There is no mention in that report of depression. Although the report contains references to *"feeling stressed"* and *"very anxious"* and *"very low in mood"*, if the Claimant was also depressed, then the Tribunal expected that the FMO would have referred directly to that condition. He did not. He went on to say:

"Equality Act (Disability)

On the balance, he is likely to be covered by UK Equality Act because:
(1) His physical health conditions are long term (over 12 months);
(2) The impact on his ability to undertake activities of daily living would be considered to be more than trivial;
(3) Removal of treatment would increase the impact of his condition on his ability to undertake activities of daily living."

47. The first written medical evidence which refers directly to depression is the GP report from Dr Warwicker dated 2 February 2018 in which he states:

"In November 2016 he saw me with quite marked depressive symptoms. This was precipitated by the injury in that he was in constant pain, was unable to work and had financial issues as a result. He was very tearful and felt worthless when I saw him in spite of good family/home support and good coping strategies. At the time he told me how upset and tearful

he was, feeling worthless and empty. In spite of support he did feel isolated, very low and agitated. These symptoms continue in spite of psychotherapy. There is no doubt that the trigger for his depression was a work related injury on 25 April. The depression, stress and anxiety continues to the present time."

"Therefore I can confirm in my opinion his severe depression, stress and anxiety was triggered by his injury on 25 April 2016. Certainly since then there has been a progressive deterioration in his depression, stress and anxiety. This has had a substantial adverse effect on his ability to carry out normal day to day activities of daily living as previously mentioned."

48. There was therefore a diagnosis of depression in November 2016 but no prognosis at that time as to how long the mental impairment was likely to last.

49. The Respondent's position was that it was November 2017 that the mental impairment had lasted for 12 months.

50. Taking account of the medical evidence, the Tribunal concluded that the mental impairment amounted to a disability with effect from November 2017.

BURDEN OF PROOF – EQUALITY ACT 2010

51. For discrimination claims under the Equality Act 2010 the burden of proof is set out in section 136 of the Act. If there are facts from which the Tribunal could decide in the absence of any other explanation that a person contravened the provision concerned, the Tribunal must hold that the contravention occurred. But that does not apply if the person shows that he or she did not contravene the provision.

52. There is guidance from the Court of Appeal in Madarassy v Nomura International plc [2007] IRLR 246. The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination, they are not without more sufficient material from which a Tribunal could conclude that on the balance of probabilities the Respondent had committed an unlawful act of discrimination. The Claimant must show in support of the allegations of discrimination a difference in status, a difference in treatment and the reason for the differential treatment.

53. If the burden of proof does shift to the Respondent, in Igen v Wong [2005] IRLR 258 the Court of Appeal said that it is then for the Respondent to prove that he did not commit or is not to be treated as having committed the act of discrimination. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden

of proof and to prove that the treatment was in no sense whatsoever on the prohibited ground.

54. Section 23 requires that on a comparison of cases there must be no material difference between the circumstances relating to each case.

FINDINGS OF FACT AND DECISIONS ON CLAIMS PURSUED BY THE CLAIMANT

55. The Claimant's claims were clarified at the preliminary hearing held on 4 December 2017 and were set out in a case management order. They are set out below in **bold** type.

Harassment - section 26 Equality Act 2010

56. Equality Act 2010

Section 26 – Harassment

(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. …

(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.

Section 40 - Employees and applicants: harassment

(1) An employer (A) must not, in relation to employment by A, harass a person (B) –
(a) who is an employee of A's;

57. In Grant v HM Land Registry [2011] EWCA Civ 769 the Court of Appeal said that in that case even if the conduct was unwanted, and the Claimant was upset by it, the effect could not amount to a violation of dignity, nor could it properly be described as creating an intimidating, hostile degrading, humiliating or offensive environment. It said that Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.

58. In Richmond Pharmacology v Dhaliwal [2009] ICR 724 it was said that dignity is not necessarily violated by things said or done which are trivial and transitory, particularly if it should have been clear that any offence was unintended. … It is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.

6 Section 26: Harassment related to disability:

6.1 Did the Respondent engage in unwanted conduct as follows?

6.1.1: Covering up the Claimant's injuries

59. The Tribunal did not find this allegation factually proved.

60. This allegation is linked to allegations **6.1.3, 6.1.4, 6.1.5** and **6.1.6** referred to below. During cross-examination, the Claimant said that there was a cover up of the true facts of the incident on 25 April 2016 in which he was injured in order to avoid the consequences of that incident. He said that it was part of a conspiracy involving the Chief Constable down to the OST trainers and many others in between who dealt with his case.

61. Although, as found below, the incident was not reported as it should have been to the Respondent's internal health and safety department or to the Health and Safety Executive, in fact a contemporaneous record of the incident on 25 and 26 April 2016 was made by the OST trainers.

62. In a record made by PC Ellison dated 25 April 2016, it was stated:

Surrey Police Officer Safety Training

Name: Alan West Rank: PC FIN: 4780 Course: Blue Class A
Hours Trained: 7 JRFT: 54 Officer fit to train: Yes Date: 25/4/16
Injuries Declared Prior to Training: None
Injuries Declared During/After Training:

Trainers Comments: Complained of injury (stiff back) prior to training although did not make a note on any paperwork. Was given ice when he made instructors aware, carried on training and when given ice in the afternoon for the second time did not do as advised by instructor. PC West trainers were called and he was sent home from training due to his injury.

JRFT	✓	*Takedowns*	✓	*Control and Restraint*	✓
Theory	✓	*Handcuff Takedown*	✓	*Handcuffing from pin*	✓
Baton	✓				

Officers Comments/Feedback regarding the training: ……

……

Officer to Sign: (A West) Conflict Trainer to Sign: (signed)

63. Additionally, on 26 April 2017, the Claimant was interviewed by PC Charles and PC Ashley and the interview was audio-recorded. The transcript of the recording included the following:

Steve	*First of Alan, how's your back today?*
Alan	*It's hurting, obviously following from the safety training yesterday, so yeah.*
Steve	*Obviously we have seen you walk up the stairs and you are not exactly walking in the freest of fashion. To put it bluntly, should you be here?...*
Alan	*I do have a concern with. It's just what Mark said yesterday. He kind of implied that I was injured before I even started and I said no and I said that, you know several times, because you know, the thing that I am concerned with and coming from my background as well. As I mentioned to you yesterday I was, prior to the police I was a personal trainer for 24 years, so I know fitness and I know you know. The fact that we are not doing any kind of warm up and stuff and stretching or anything before, really concerned me which is why I think this has basically happened, you know either a good warm up, a good stretch out, I always have done for, you know, since the day I started training. So you know I have got concerns and it's just the fact that he was, even though I said no, you know, he was implying that I was injured before I had even started which wasn't the case so I just wanted to flag that up because that bugged me yesterday.*
Rob	*Right*
Alan	*You know and I did make it clear to him no.*
Rob	*When did the injury occur?*
Alan	*It occurred, it was after the obviously bleep test I was fine and it was, basically it started happening after that when we were doing the techniques, you know I started feeling this, you know, pain in my back. It felt tight to start off with and it got progressively worse and then I started getting a pronounced pain and you know when I tried to tell Mark that. He was just implying that it had started before, you know I had the injury before which wasn't the case. I am fit and healthy, I have been, you know. It just bugged me, you know, it was as though he was trying to change my words. I thought no, so I just wanted to make sure that was clear, because that bugged me when I got home, so….*
Rob	*Anything you would like to add at the moment.*
Alan	*No it's just that thing that was bugging me, you know in regards to what was said.*
Steve	*So that's been caught on tape. So that's absolutely fine.*
Alan	*So will they, you know will they do warm ups and stretches in*

	future. Because that's still a concern. I hope sincerely that they will address this. We do wrist locks and stuff without any kind of warm up. This is terrible, it's asking for trouble."

64. Additionally, PC Ellison completed a detailed typewritten note dated 27 April 2016 setting out the circumstances of the incident on 25 April 2016. It included the following:

"PC WEST left this section blank and was questioned by PC MARSHALL if he had any injury or not, if he didn't then he needed to complete the form by writing 'none' in this section. PC WEST took the form from PC MARSHALL and wrote 'none' in this section and then turned to me and stated whilst holding his back that his back was a little stiff. PC WEST was then asked by myself if he was fit to train to which he stated he was …"

"Once the class had left the gym I was then approached by PC WEST who stated that his back continued to feel stiff so I offered him an ice pack which he accepted. PC WEST was advised by me to keep the ice pack on for 20 minutes and then when he comes back from lunch if it was still stiff to let me know.
After lunch we resumed the lesson and PC WEST did not come to see me therefore I believed he was fit to continue the session.

On completion of the take down session PC WEST was slow to get up from the mat, I asked if he was ok to which he stated that his back was feeling stiff again. I advised him to place another ice pack on for a further 20 minutes and go and take a seat on the stacked up mats and rest against the wall and I would re-assess him in 20 minutes.
After a couple of minutes I noticed that PC WEST had not done as advised but was now laying down on the floor with his legs up in the air resting on the mats. I went over and asked PC WEST how he had caused the stiffness to his back at which point he claimed he had done it training today. I then pointed out to PC WEST that he had stated that he had a stiff back to myself in the presence of PC MARSHALL at the beginning of the day which he declined stating he had never said that. I then told PC WEST that he had stated to me that he had the injury prior to the session and that I felt he was no longer fit enough to train at which point I called PC CHARLES 1584 and PC ASHLEY 3948 his tutors to find out what they wanted to do with PC WEST.

PC CHARLES and PC ASHLEY then attended the gym where I made them aware of what had happened and what had been said. PC WEST was called into the trainer's office and walked across the gym holding his back very slowly and looking very uncomfortable. I then left PC WEST with his tutors in the office."

65. Additionally, PC Fraser Marshall completed a note dated 12 May 2016 regarding the events on 25 April 2016 which included the following:

"In the presence of PC Ellison I called PC WEST over and said "DO YOU HAVE ANY INJURIES PLEASE PUT NONE IF YOU DON'T". PC WEST

took the form and proceeded to write "NONE" on the form and stated to PC Ellison "No, but I do have a niggle in my back". PC ELLISON reiterated whether he was fit to train to which PC West said he was. …"

"I took the Baton element of the training. Building on from the job related fitness test, which also acts as an initial warm up, students are given joint manipulation exercises as part of the drills for opening and closing batons, and then moving onto upper and lower body strikes. Students are taught to reduce the power to fine tune technique and then increase the power when they are happy to progress. No injuries were highlighted to me at the end of the session by PC WEST.

Towards the end of the morning session, I was aware that PC WEST had spoken to PC Ellison in relation to a sore back. PC Ellison had administered first aid, providing PC West with an ice pack. I had observed PC West lying on the floor with his feet up, with an ice pack. PC Ellison had a further conversation with him. I was advised that PC WEST was being removed from the session. Shortly after his Foundation Trainers PC 15584 Charles and PC 3948 Ashley attended to gym and left with PC WEST."

66. The Claimant alleged that these reports were inaccurate, that the dates of the reports were incorrect and had been post-dated and fabricated. The Tribunal did not find any evidence to support this allegation. These were clearly contemporaneous records of the incident on 25 April 2016 and the events of the following day which counter the Claimant's assertion that the Respondent was attempting to cover up his injuries sustained during the incident. That conclusion is supported by the fact that the reports are largely consistent with the Claimant's own account in his witness statement referred to above.

6.1.2: Failed to apply discretion to extend sick pay;
6.1.8: Failed to reinstate the Claimant's pay at the monthly salary review

67. The Tribunal found these allegations factually proved. The Respondent did not apply its discretion to extend or reinstate the Claimant's sick pay.

68. The composition of the Force Pay Review Panel is the Head of Employee Services, the Occupational Health Manager, an Employee Relations representative, and a nominated Federation representative.

69. The Respondent's sick pay policy includes the following:

"PNB Circular No. 05/01

AGREEMENT REACHED IN THE POLICE NEGOTIATING BOARD

1. At the meeting of the Police Negotiating Board on 21 March 2003, agreement was reached on additional guidance to chief officers in 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. Following agreement between the Sides, the Police Negotiating Board has agreed to amend the guidance to reflect the provisions of the Disability Discrimination Act. Details are set out in the attached memorandum. …

….

1. *The Secretary of State's determination of sick pay under regulation 28 of the Police regulations 2003 provides that a member of a police force who is absent on sick leave shall be entitled to full pay for six months in any one year period. Thereafter, the member becomes entitled to half pay for six months in any one year period.*

2. *The chief officer of police may in a particular case determine that for a specific period:*

    - *A member who is entitled to half pay while on sick leave is to receive full pay;*
    - *Or that a member who is not entitled to any pay while on sick leave is to receive either full pay or half pay.*

3. *The PNB Agreement of 9 May 2002 includes agreement that:*

    "The PNB will consider guidance in relation to situations where it would be reasonable for chief constables to exercise their discretion favourably to resume/maintain paid sick leave."

4. *PNB has considered the matter and agreed the following guidance.*

5. *The decision to exercise the relevant discretion is one for the chief officer who must consider each case on its merits. A force cannot have a fixed policy that discretion always will or will not be exercised in a particular kind of case. It is however possible for forces to lay down guidelines to promote fairness and consistency in the decision making process, so long as the possibility of exceptions is not ruled out.*

6. *The PNB recommends that forces have a written policy on the exercise of the discretion. Such a policy should:*

    - *Set out the procedure by which decisions will be reached;*
    - *Include an appropriate opportunity for an affected officer to make representations prior to the decision being made;*
    - *Provide for a periodic review of decisions;*
    - *Set out guidelines in relation to the exercise of the discretion, while emphasising that each case should be considered on its merits;*
    - *Have due regard to relevant legislation, including the Disability Discrimination Act.*

7. *Whilst each case must be considered individually, the PNB considers it would generally be appropriate for chief officers to exercise the discretion favourably where:*

    - *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 execution of his/her duty or*
    - *The officer is suffering from an illness which may prove to be terminal; or*
    - *The case is being considered in accordance with the PNB Joint Guidance on Improving the Management of Ill Health and the police authority has referred to the issue of whether the officer is permanently disabled to a selected medical practitioner*
    - *The Force Medical Adviser advises that the absence is related to a disability as defined by the DDA* (* "A physical or mental impairment which has a substantial and long term adverse effect on the ability to carry out normal day-to-day activities.") and the chief officer considers that it would be a "reasonable adjustment" to extend sick pay, generally speaking to allow (further) reasonable adjustments to be made to enable the officer to return to work.*

8. *Chief officers are reminded that disability-related sickness absence should be recorded separately from non-disability-related sickness absence (such as flu) and from disability-related leave, e.g. leave allowance for treatment, hospital appointments or rehabilitation.*

9. *Chief officers are reminded that these guidelines do not remove the obligation to consider each case on its merits. A chief officer may decide to exercise discretion favourably in circumstances not covered by the guidelines set out above or may decide not to exercise discretion favourably in a case which is covered by those guidelines. In particular a chief officer may decide not to exercise the discretion where:*

    - *There is evidence of default or neglect on the officer's part; or*
    - *The officer's actions may be delaying the process of recovery; or*
    - *The officer is unreasonably failing to co-operate with a rehabilitation programme, or with an adjustment to facilitate a return to duty within a reasonable timeframe, or to comply with requests to attend medical examinations or to supply medical information; or*
    - *The officer is actively engaged in a business interest during the period of absence*

10. *Where extensions of full or half pay have been granted, chief officers should review their decisions regularly. An appropriate interval between reviews might be one month."*

70. Part of Mr Davis's role was to chair the Force Pay Review Panels for both Surrey and Sussex Police. The Force Pay Review Panels meet once a month to consider all cases where pay is due to be cut to half pay or nil pay in line with PNB Circular No 5/01. The Chair of the panel has delegated authority and makes the decision whether to exercise the discretion to extend full sick pay beyond the standard timescale of 6 months full pay, 6 months half pay, and thereafter nil pay.

71. Mr Davis stated in his witness statement:

"Pay Review Panels concerning the Claimant (between September – November 2016)

12. On 21 September 2016 the Claimant was discussed by the Panel. In attendance were: myself, Liz Eades, Andrea Bishop, Huw Williams (from the Federation). No business case was submitted by the Claimant's managers as he had not engaged with them to support any return to work. This was evidenced by copy of emails from the Line Manager in question – see emails during 9 – 14 September 2016 between Angie Gillot, Julie Rose, Mark Bracknell and Ami Buffoni (pages 736-740). The Claimant stated that his absence was the result of an injury on duty during conflict training. I did not, however, consider that we had any clear evidence of this. The advice I received from Liz Eades was that she had not seen any evidence, from the Claimant's occupational health file, to say he had suffered an injury on duty. (I should make it clear that Liz did not divulge any specific medical information relating to the Claimant.) Further at the meeting we did not have a copy of the Health & Safety Incident Reporting Form, and therefore, following the meeting a copy was requested.

13. On the basis of the information which we had access to at the time, a decision was provisionally made that the discretion would not be exercised but that this would not be notified to the Claimant until we had had the opportunity to consider the Health & Safety Incident Reporting Form. This form was made available to me on 22 September 2016. A form, dated 21 September 2016, was completed confirming this decision (page 757). I subsequently drafted a letter to the Claimant dated 21 September 2016 confirming the decision that the Claimant's pay would be reduced to half pay from 20 October 2016 (page 758).

14. On 22 September 2016 and prior to sending the pay letter, I reviewed the Health & Safety Incident Reporting Form No. 14942 (pages 585 – 588). Both Trainers present on the training day in question both stated clearly on the form that 'NO' injury had occurred on Officer West during the training session. As a result, this supported the position that there was no proof that there was an injury on duty."

72. On 20 October 2016 the Claimant's case was considered again by the panel. The Claimant had himself submitted a business case for exercise of discretion in his favour but Mr Davis concluded that there was no information available which would support a change to the earlier decision.

On 24 November 2016 the Claimant's pay was again considered and the decision remained the same as before.

73. Further pay review meetings were held on 22 December 2016, 11 January 2017, 19 January 2017, 16 February 2017, 17 March 2017, 20 April 2017 and 17 May 2017. By this time, the Claimant's absence on sick leave had extended beyond one year, and his pay was reduced to nil. The Panel found no grounds to exercise a discretion in his favour to extend payment of sick pay.

74. On the evidence put before the Tribunal, it found that the Respondent exercised the discretion reasonably having regard to relevant factors set out in PNB Circular No. 05/01. This was consistent with the conclusions of Mrs Billington who, as part of her investigation into the Claimant's grievance, found that the Pay Review Panel had exercised its discretion reasonably. The Panel, and those who provided information to the Panel, concluded that the Claimant was failing to engage with his managers to support a return to work, that there was insufficient evidence to support the Claimant's assertion that he had suffered the injury on duty and, until August 2017, occupational health advice from the FMO was that the Claimant's absence was not related to a disability. Those were relevant matters to take into account under PNB Circular No. 05/01.

75. The Tribunal found that the decision not to exercise discretion regarding sick pay in the Claimant's favour was based upon reasonable and proper grounds and a genuine belief that the Claimant was not engaging with the Respondent's return to work processes and had not sustained an injury on duty.

76. In respect of the assertion that a failure to exercise the discretion in his favour was an act of harassment, it was clearly conduct unwanted by the Claimant but was not related to his disability. It was because of his continued absence on sick leave and the absence of any grounds to exercise the discretion in his favour.

77. The reasonable and proper exercise of a policy (PNB Circular No 05/01) which applied to police forces nationwide was not an act of harassment within the meaning of section 26 Equality Act 2010.

6.1.3: Failing to respond to the Claimant's request for Health and Safety incident report form

78. The Tribunal found this allegation not factually proved. It was denied by the Respondent.

79. On 29 June 2016 the Claimant wrote to Sergeant Sumner with a request as follows:

"Dear Sargeant Sumner,

I understand that a report should have been completed by yourself following my injury at work whilst on duty, to make a record of this (Form 12/2 ?)

Please may I ask you kindly to forward this to me.

Many thanks in advance
Kind regards
Alan West."

80. On 1 July 2016, Sergeant Sumner forwarded the Claimant's email to Sergeant Bracknell who responded to the Claimant on 18 July 2016 stating that a report had been completed but he was waiting for the Health and Safety Officer to return to work and would chase up the report in the near future. On 1 August 2016 the Claimant sent a chaser to Sergeant Bracknell and on 3 August 2016 Sergeant Bracknell replied to the Claimant as follows:

"Dear Alan

I would like to arrange a time for us to meet up face to face so that I can go through the supportive plan I have for you.

I have found out that the original injury on duty form for you was not completed as it looks like someone had thought someone else had done it etc and this wasn't the case.

This is being completed retrospectively by the officer that was instructing the conflict training session and I will have a copy for you when we meet."

81. Eventually, the forms were duly provided, although they were late and, initially, not fully completed. The evidence supports the Respondent's position that the Respondent did respond to the Claimant's request for a Health and Safety Incident Report Form.

82. Additionally, as found above, the Claimant was not a disabled person by reason of physical impairment until 12 September 2016 and any failure or delay in producing the report would not have been related to disability.

6.1.4: Completing Health and Safety Incident report form with the wrong information

83. The Tribunal found this allegation factually proved. The Respondent accepted that the reporting of the incident on 25 April 2016 did not adhere to the Respondent's policy and was completed retrospectively and not within 24 hours as required by the policy.

84. In fact, eventually, two separate forms were produced (forms 2/12). The first was on 4 August 2016 which was incomplete because it did not have

the Claimant's personal details on it. This error was rectified on 5 August 2016 when a fully completed form 2/12 was produced.

85. The Tribunal found that the main reason for the failure to produce the incident report was that PC Ellison did not consider that the Claimant had been injured during the Officer Safety Training and there was some confusion as to who was responsible for completing the form. When the form was subsequently completed, it was done by people who were not involved with the training on that day. The Tribunal accepted these as plausible explanations for these errors. There was no evidence that any offence was intended and it was not reasonable for the conduct to have the effect set out in section 26 of the Act.

86. These matters occurred before 12 September 2016 which was the date the Tribunal found the Claimant became a disabled person by reason of physical impairment. Therefore, the treatment was not related to the Claimant's disability.

6.1.5: Failing to report the Claimant's injuries to Health and Safety Executive until January 2017

87. The Tribunal found this factually proved. The Respondent accepted that there was a failure to report the incident to the Health & Safety Executive.

88. The reason for the failure was partly because the incident report form 2/12 had not been completed and sent to the Respondent's internal health and safety department until 5 August 2016. There was then a further delay before a report was made to the HSE on 28 February 2017.

89. There was however no evidence to support a causal link between the delay and the Claimant's disability. The Tribunal found that the reason for the delay was a lack of competent compliance with the Respondent's reporting policies. The Respondent was not informed formally by the FMO that the Claimant was to be regarded as a disabled person until the occupational health report in August 2017.

90. In any event, when reported to HSE, they confirmed that it was not a suitable case for them to take any further action.

91. The Tribunal could find no evidence to support the allegation that this failure was related to the Claimant's disability. It was simply an error and a failure to comply with policies. It did not amount to an act of harassment within section 26 of the Act.

6.1.6: Failing to conduct a full investigation of the Officer Safety Training Department

92. The Tribunal found this factually proved. The Respondent accepted it did not conduct a full investigation into the Office Safety Training Department. The reason given by the Respondent was, having regard to all the

circumstances of the Claimant's complaints and allegations, the Respondent did not consider that it was proportionate to conduct a full investigation of the OST.

93. An investigation of specific allegations about the training and trainers was undertaken as part of the investigation of the Claimant's grievance by Mrs Billington. She concluded that given the timescales involved, she would be unable to conduct a full investigation into the culture of the Officer Safety Training team but she made a recommendation that such a review should be carried out. She did however find that the Respondent had clear accreditation standards, that there was no evidence of any unapproved techniques being adopted by the OST team and she found no evidence to support the allegation regarding a lack of warm up procedures before training took place.

94. It was not unreasonable for the Respondent, especially in circumstances where the Claimant's allegations were disputed by the trainers in contemporaneous written records, for the Respondent to take the approach that a full investigation was unnecessary.

95. There was no evidence to support the Claimant's allegation that a failure to undertake such an investigation was related to his disability or in any way motivated by it. It did not amount to an act of harassment within section 26 of the Act.

6.1.7: Refusing the Claimant's request for telephone appointment to see Force Medical Officer (c. May 2017)

96. The Tribunal found this factually proved. The Claimant had previously attended a face-to-face consultation with the FMO on 10 November 2016 at Camberley but afterwards complained about the distance he had to travel, the lack of parking, being kept waiting and being provided with inadequate seating before the appointment.

97. In May 2017 the Claimant was again requested to attend a face-to-face meeting with the FMO but the Claimant refused and requested a telephone consultation instead.

98. Mrs Eades considered that a face-to-face consultation was necessary in order that a proper and full consultation could take place. She attempted to obtain medical advice from the Claimant's GP to establish whether the Claimant was capable of attending a consultation apart from at his home address. On 31 July 2017 the Claimant's GP wrote a letter which contained the following:

"31-Jul-2017
TO WHOM IT MAY CONCERN

….

Mr West tells me his last face to face appointment with the Force Medical Officer aggravated his symptoms due to the significant walking to and from the venue. He says he was kept waiting a long period of time and was not provided with adequate seating. He feels this has severely impacted on his pain.

In view of Mr West's present condition and advice given to him by his Orthopaedic Consultant and the symptoms that have deteriorated during his last appointment with the Force Medical Officer, it seems reasonable and logical that he should limit any travel. He has told me that he has requested to have any further Occupational Health appointments either by telephone or at his home. I do not think that is unreasonable given his previous experience. Hopefully if you can accommodate his request this might speed up and resolve the issues he has with you to a satisfactory conclusion."

99. The GP's letter did not address the issue of whether the Claimant was attending appointments at his GP surgery and with his consultant at the hospital. In other words, whether he was able to travel away from his home for medical appointments.

100. Mrs Eades considered that a telephone consultation would be of limited use as it would not permit a full assessment but in order for some form of consultation to take place, she reluctantly agreed to a telephone consultation which took place on 16 August 2017.

101. The Respondent's initial refusal to the request for a telephone appointment with the FMO was reasonable and was unrelated to the Claimant's disability. The purpose was to ensure that there was a full assessment in order to establish whether any adjustments were required to enable the Claimant to return to work. It did not amount to an act of harassment within section 26 of the Act.

6.1.9: Failed to pay for the Claimant to have private medical treatment

102. The Tribunal found this allegation factually proved. The Respondent accepted that its policy was not to fund private medical treatment, other than physiotherapy and psychotherapy.

103. Mrs Eades explained that prior to 2013 Surrey Police did offer access to private health care, subject to being referred by the occupational health department. Shortly after May 2013, as a cost-saving measure due to a cut in its budget, the Respondent withdrew funding for private medical treatment for officers. Mrs Eades said she was aware of only one case, which she described as exceptional, where a prosthetic limb was funded by Surrey Police. She confirmed that the officer involved did not request this, it was instigated by the Chief Constable at the time. She said that save for these very exceptional circumstances, Surrey Police had not funded any other private medical treatment for officers or staff other than

physiotherapy and psychotherapy. The Claimant benefited from the physiotherapy treatment.

104. The Claimant requested private medical treatment on 6 June 2016 and was informed on 9 June 2016 that the Respondent did not have funds to pay for private treatment. On 1 August 2016 Sergeant Bracknell confirmed again that the police would not pay for private medical treatment.

105. It did not amount to an act of harassment within section 26 of the Act.

106. Additionally, the refusal to fund private medical treatment came before the Claimant became a disabled person by reason of physical impairment on 12 September 2016. The refusal could not therefore be related to or because of his disability.

6.1.10: Recorded the Claimant's absence as sickness and not disability related sickness

107. The Tribunal found this allegation was factually proved. The Respondent accepted that the Claimant's absences were recorded as sickness absence and not disability-related absences.

108. This allegation was focused on paragraph 8 of the PNB Circular No. 05/01 relating to sickness pay that: *"Disability-related sickness absence should be recorded separately from non-disability-related sickness absence"*.

109. This appears to have been the only part of the PNB which was not complied with by the Pay Review Panel. In any event, under paragraph 7 of the PNB, the Force Medical Officer had not advised that the absence was related to disability and he did not confirm, until August 2017, that it was likely to be related to disability. Other factors were in play regarding the Pay Review Panel, namely their conclusion that the Claimant was not engaging with his managers regarding a return to work and that he had not sustained an injury on duty.

110. The Claimant was also focused in this respect upon part of the Unsatisfactory Attendance Procedure (UPP) which states that: *"The procedure should not automatically be invoked where the officer's "incapacity or illness results from an injury in the execution of duties" or "illnesses related to a disability as defined within the Equality Act 2010"*. However, the Tribunal found that the UPP procedure was reasonably and properly invoked. As stated above, the FMO did not confirm disability status until August 2017 and the Respondent did not accept that the Claimant had been injured on duty. A supportive plan was put in place on 22 August 2016 and UPP Stage 1 procedure was invoked on 31 January 2017.

111. None of this treatment was because of, or related to, the Claimant's disability. The supportive plan and the UPP procedure were in place to

assist the Claimant in improving his attendance and to facilitate his return to work.

112. The Tribunal found that the Claimant suffered no detriment because of recording his absences as sickness rather than disability-related absences. It did not fall within the definition of harassment in section 26 of the Act and could not properly be described as amounting to a violation of dignity, nor could it be described as creating an intimidating, hostile degrading, humiliating or offensive environment.

6.1.11: Subjected the Claimant to an improvement plan

113. The Tribunal found this allegation factually proved. The Respondent accepted that the Claimant was made the subject of a supportive plan by Sergeant Bracknell on 22 August 2016, which was after 6 months' sickness absence, in circumstances where a date for his return to work had not been identified.

114. The UPP procedure was invoked on 31 January 2017. The UPP procedure contains the following:

"Unsatisfactory Performance/Attendance Procedure: Line Manager Guidance (Police Officer)

The performance/attendance procedure will seek to assist officers who performance or attendance is below the standard expected of them and allow them to improve their performance/attendance.

When considering initiating action under the performance procedure due to perceived unsatisfactory attendance each case must be considered on its merits. However, the following points should be emphasised:

- *The intention of attendance management including formal action under the performance procedure is to improve attendance*
- *Where officers are injured or ill, they should be treated fairly and compassionately*
  Reasonable adjustments should be made, wherever possible, to assist the individual improve their attendance
  Surrey Police's trigger points should be used as an indication that the individual's attendance is below the required standard. See below.

The following may indicate that the officer's attendance is not at the required standard:

- *Where there is no realistic prospect of a return to work in a reasonable time frame i.e. 3 – 6 months*
- *The individual has been on long term sickness for over 28 consecutive days*

- *The individual has 3 or more episodes of sickness absence amounting to 6 or more days in a rolling 6 month period*
- *Where there are concerns that an underlying health problem exists*
- *A pattern has emerged of an individual being regularly absent, for example on Mondays, Fridays or at the beginning or end of a shift cycle*
- *A pattern has emerged of self certified absence e.g. cold, flue, virus*

If any of these triggers apply, further investigation into an individual's attendance may be needed."

115. The application of the Unsatisfactory Attendance procedure is not a detriment. On the contrary, its purpose is to improve attendance and to facilitate a return to work.

116. There is no legal obligation to discount disability-related absence when considering action in respect of an employee due to absence from work. Additionally, there is no absolute prohibition on considering disability-related absence under the UPP procedure.

117. The UPP procedure was applied in accordance with the policy over a lengthy period of time. The supportive plan was put in place on 22 August 2016 and UPP Stage 1 on 31 January 2017. On 1 March 2017, a written improvement notice and first stage action plan was put in place and the procedure was reviewed on 21 July 2017. On 7 November 2017, a UPP Stage 2 meeting took place and on 10 November 2017, a further Stage 2 action plan and an Improvement Notice was put in place. Part of the attendance plan stated that if the Claimant returned to work on recuperative/adjusted duties and remained under the Equality Act then he would be afforded a discretionary uplift of 100%, increasing the 28 consecutive days long term sickness absence taken into account to 56 days.

118. The Tribunal found that the application of the UPP was not put in place or conducted because of the Claimant's disability but because of his long term sickness absence. It was reasonable and proportionate and the aim was to secure a satisfactory level of attendance. It did not amount to an act of harassment within section 26 of the Act.

6.1.12: Failed to consider the Claimant's health before placing him on an improvement plan

119. The Tribunal found this allegation not factually proved.

120. The Respondent took full account of the Claimant's health by conducting welfare visits to his home and making occupational health referrals.

121. There was an occupational health report produced on 26 May 2016 and the FMO produced medical reports on 11 November 2016 and 18 September 2017. Sergeant Bracknell was keen to ensure that the

Claimant's health was taken into account during the course of the UPP procedure and on 7 February 2017 wrote to the Claimant: *"I have emailed a further occupational health referral for you as the UPP procedure can be a stressful time. This is a management referral and they will be in touch with you directly to arrange."*

6.1.13: Failed to allow the Claimant to have the Unsatisfactory Performance Stage meetings at the Claimant's home address

122. The Tribunal found that this allegation was factually proved. The Respondent accepted that Sergeant Bracknell and Inspector McDermott refused to hold the UPP meetings at the Claimant's home address.

123. The UPP Stage 1 meeting was held on 21 February 2017 at Esher Police Station and was attended by Police Sergeant Bracknell, PC Tom Arthur (the Claimant's Federation representative) and Police Sergeant Greg Turner (who had been appointed as the Claimant's Welfare Manager). Police Sergeant Bracknell gave reasons why he refused to hold the meeting at the Claimant's home address as follows:

"I did not consider it appropriate to carry out the UPP Stage 1 meeting at the Claimant's home for a number of reasons. The Claimant has been very hostile during numerous previous home visits and would only allow visitors subject to various conditions. Further, the Claimant had previously raised concerns about his neighbours hearing his conversations because the walls of his home were very thin. He had actually stated that he had been involved in a dispute with his neighbours and was concerned that they would hear his business. He was also concerned that any of his neighbours would be aware that he was a Police Officer. Given the sensitive nature of the information we would be discussing with the Claimant, I wanted the meeting to take place in an environment where we could communicate freely.

I also did not consider it appropriate to carry out the meeting at the Claimant's home because the Claimant had shown signs that he was vulnerable, particularly in relation to his mental health. I therefore considered that it would be better for him not to carry out a meeting, which could potentially be a stressful situation for him, in his home environment. I considered that it would be better for the Claimant if he could maintain some distinction between his work and his personal life.

In an email on 13 July 2017 the Claimant stated, in terms, that he would not be attending the UPP Stage 1 Review Meeting and that he would leave it to myself and his Federation representative, Tom Arthur, to agree a date for that meeting."

124. The UPP Stage 1 Review Meeting was held on 21 July 2017, and again Police Sergeant Bracknell decided not to agree to the Claimant's request to hold the meeting at his home address.

125. The final UPP Stage 2 Meeting took place at Staines Police Station on 7 November 2017 attended by Inspector McDermott, PC Tom Arthur (the Claimant's Federation representative), Police Sergeant Bracknell (the Claimant's line manager) and Police Sergeant Daniel Moreton (minute taker). Inspector McDermott had previously informed the Claimant that the meeting would take place at the Camberley offices of Surrey Heath Borough Council which was closer to the Claimant's home, and closer than Reading, but the Claimant again repeated his request to have the meeting held at his home and that was refused.

126. In his witness statement, Inspector McDermott set out his reasons for his decision:

"Following those discussions. I drafted an email to Julie Rose on 23 October 2017 for her advice before I sent it to Mr West – page 1563. In summary I explained that following consultations with his line manager, Mark Bracknell and his Police Federation representative, Tom Arthur, I had decided not to hold the UPP Stage 2 meeting at his home address because:

- *We did not wish to mix home life with work life;*
- *We had not done this before;*
- *Mr West had attended, in person, a preliminary hearing* [on 19 October 2017] *at the Employment Tribunal in Reading (I had been advised of this by the Assistant Business Partner, Julie Rose. I noted that he attended with the support of his father, cushions and regular breaks were provided and he would be afforded the same at my meeting with him).*

127. The Respondent also provided evidence that the Respondent had offered to provide a taxi to convey the Claimant to and from meetings but he had declined the offer.

128. Although the Respondent's officers had made several previous visits to the Claimant's home address for various reasons, mostly welfare visits, it was not unreasonable or improper for the Respondent to insist that these formal meetings should take place at a suitable location of their choosing, within reasonable distance of the Claimant's home, although not at the Claimant's home itself. The Claimant was not housebound, and was able to travel to other appointments.

129. This treatment of the Claimant was not related in any way to his disability but to ensure that formal meetings were held at appropriate and neutral venues. This did not amount to an act of harassment within section 26 of the Act.

6.1.14: Required the Claimant to have an Unsatisfactory Performance stage 2 meeting on 7 November 2017 before the Claimant could have a review with his treating consultant on the 8 November 2017

130. The Tribunal found this allegation factually proved. The Respondent accepted that the Claimant had notified the Respondent of the 8 November 2017 appointment with his consultant in advance but submitted that the Claimant had never asked for the meeting on 7 November 2017 to be postponed until after his appointment on 8 November 2017.

131. The Claimant suggested that the Respondent could have organised some videolink with him at home so that even if the meeting could not be held at his home, he could participate in some way.

132. The Tribunal found that the Respondent did not consider a videolink but additionally the Claimant had not requested such a facility. He had said that he would not attend any meeting unless it was held at his home address. All such meetings were in fact attended by his Federation representative, PC Tom Arthur, who made representations on his behalf.

133. There was no obvious detriment, disadvantage or unfavourable treatment in holding the meeting on 7 November 2017 as previously notified. There were reasonable, proper, non-discriminatory reasons for the Respondent's decision to go ahead with the meeting. The decision was not related to the Claimant's disability. It did not amount to an act of harassment within section 26 of the Act.

Summary of Findings on Harassment Claims

134. In respect of the above events which have been found proved, and which the Claimant claims amounted to harassment under section 26 of the Act, the Tribunal found that the Respondent's conduct and treatment of the Claimant was not related to the Claimant's disability. All the above events were undertaken by the Respondent under policies designed to deal with long term sickness absence by police officers. The policy and procedures, and their implementation by the Respondent in respect of the Claimant, involving reduction in pay, implementation of the UPP procedure and the requirement to attend medical appointments and with the Claimant's line managers were all reasonable and proper and there was no evidence that any of them was done because of, or related to, the Claimant's disability.

135. Although the conduct was unwanted by the Claimant, it did not have the purpose of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. Nor was it reasonable for such reasonable and proper conduct to have that effect.

136. The Claimant's perception that it was unreasonable and related to his disability was unfounded. Taking into account all the circumstances of the above events, the Tribunal found that, of those found factually proved, none amounted to harassment within the meaning of section 26 of the Act.

Direct Disability Discrimination – section 13 Equality Act 2010

137. Equality Act 2010

Section 13 – Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

138. Under section 39 an employer must not discriminate against an employee by dismissing him or subjecting him to any other detriment.

7 Section 13: Direct discrimination because of disability:

7.1 Has the Respondent subjected the Claimant to the following treatment falling within section 39 Equality Act, namely:

7.1.1: Covering up the Claimant's injury (the Claimant will say that the Respondent lied about the accident record; retrospectively and incorrectly completed the accident report; failed to report the incident of the Claimant's injury to the HSE; failed to comply with its own reporting policy)

139. The Tribunal has already found that this allegation was not factually proved under **6.1.1** above. The individual elements set out in brackets have also been dealt with above.

7.1.2: Failed to apply discretion to extend sick pay

140. This aspect of the Claimant's claim has also been dealt with above under **6.1.2** and **6.1.8**. The reduction in pay and the exercise of the discretion to extend sick pay was done in compliance with the PNB Circular No. 05/01 which has national application. Indeed, the Claimant accepted that during his absence on sick leave when serving with TVP, his pay was reduced to half pay at the 6 month point and was due to be reduced to nil pay at the 12 month point but he returned to work shortly before that point. Additionally, the sick leave during employment with TVP in 2010/2011 was caused by injury sustained on duty, yet the sick pay was still reduced.

141. The Tribunal found that a hypothetical comparator, that is a police officer with long term sickness absence who did not have a disability, would have been treated no differently.

142. The Claimant was not treated less favourably because of his disability. On the contrary, the Tribunal found that there was clear evidence of a non-discriminatory reason for the exercise of the discretion not to extend sick pay, that is by reason of the application of national policy.

7.1.3: Taking action in relation to the Claimant under the Unsatisfactory Performance Policy

143. The application of the UPP procedure has also been dealt with above under **6.1.10** and **6.1.11**. It is a procedure designed to deal with unsatisfactory performance and unsatisfactory attendance.

144. The supportive plan was instigated on 22 August 2016 when the Claimant had been absent for 4 months. The first stage meeting was instigated on 21 February 2017 when the Claimant had been absent for 10 months. The second stage meeting took place on 7 November 2017 when the Claimant had been absent for 19 months.

145. The Tribunal found that a hypothetical comparator, that is a police officer who was absent on sick leave for such a long period who did not have a disability would have been treated no differently. The reason for the UPP procedure being implemented was the Claimant's lengthy absence on sick leave and not his disability. It was designed to facilitate a return to work. There was no evidence of less favourable treatment.

146. The Claimant was not treated less favourably because of his disability. On the contrary, the Tribunal found that there was clear evidence of a non-discriminatory reason for the action taken under the UPP as found above.

7.1.4: Prematurely taking action under the Unsatisfactory Performance Policy (the Respondent failed to make the necessary enquires before they applied the policy)

147. This matter has also been dealt with above under **6.1.10** and **6.1.11**. The Tribunal did not accept that the UPP policy was implemented prematurely. There were welfare visits and occupational health involvement before the procedure was applied.

148. The Tribunal could find no less favourable treatment when compared to a hypothetical comparator in the same circumstances who was not disabled.

149. The Claimant was not treated less favourably because of his disability. On the contrary, the Tribunal found that there was clear evidence of a non-discriminatory reason for the action taken under the UPP as found above.

7.1.5: Requiring that the Claimant attend the Unsatisfactory Performance stage meetings at Surrey Police premises and not consenting to the meetings taking place in the Claimant's home

150. The decisions of Police Sergeant Bracknell and Inspector McDermott are dealt with above under **6.1.13**. The Tribunal accepted their accounts of why they regarded the Claimant's home address as being unsuitable for formal meetings. A hypothetical comparator would have been treated no differently.

151. There was no less favourable treatment. The Claimant was not treated less favourably because of his disability. On the contrary, the Tribunal found that there was clear evidence of a non-discriminatory reason for the Respondent's conduct.

7.1.6: Holding a formal Unsatisfactory Performance stage 2 meeting on 7 November 2017 when the Claimant had a review with his treating consultant on the 8 November 2017

152. This matter has also been dealt with above under **6.1.14**. There was no evidence to suggest that a hypothetical comparator would have been treated any differently. There was no evidence of any less favourable treatment. The reason for the treatment is described above.

153. The Claimant was not treated less favourably because of his disability. On the contrary, the Tribunal found that there was clear evidence of a non-discriminatory reason for the Respondent's conduct.

7.1.7: Failing to reinstate the Claimant's pay at the monthly salary review meetings

154. This matter was dealt with above and is largely the same as the allegation at under **6.1.2**, **6.1.8** and **7.1.2**. It did not amount to less favourable treatment because of disability.

Summary of Findings on Direct Discrimination Claims

155. The Claimant was not treated less favourably because of his disability. On the contrary, the Tribunal found that there was clear evidence of non-discriminatory reasons for the treatment of the Claimant, conducted in accordance with reasonable and proper police policy and implemented in a reasonable and proper manner. A hypothetical comparator would have been treated no differently. There was no evidence in respect of any of the above matters of less favourable treatment.

Discrimination Arising from Disability – section 15 Equality Act 2010

156. Equality Act 2010

Section 15 – Discrimination arising from disability

(1) 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 the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

157. The EHRC Code of Practice on Employment (2011) paragraph 5.7 states that "*unfavourably*" means that the person must have been put at a disadvantage.

158. On the subject of the Respondent's defence of justification, the Tribunal considered the following.

159. In Homer v Chief Constable of West Yorkshire Police and West Yorkshire Police Authority [2012] UKSC 15, it was said that to be a legitimate aim, the aim must correspond with a real need.

160. So far as proportionality is concerned in the case of Hardy & Hansons Plc v Lax [2005] EWCA Civ 846, it was said:

"The principle of proportionality requires the Tribunal to take into account the reasonable needs of the business. But it has to make its own judgment upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary."

161. The EHRC Code of Practice on Employment (2011) paragraph 4.27 suggests that the question of whether the provision, criterion or practice is a proportionate means of achieving a legitimate aim should be approached in two stages. Firstly, is the aim of the PCP legal and non-discriminatory, and one that represents a real objective consideration? Secondly, if the aim is legitimate, is the means of achieving it proportionate - that is appropriate and necessary in all the circumstances?

8 Section 15: Discrimination arising from disability

8.1 The allegation of unfavourable treatment as "something arising in consequence of the Claimant's disability" falling within section 39 Equality Act.

162. During the course of the hearing, the Claimant confirmed that the "something arising in consequence of the Claimant's disability" was his continued absence from work on sick leave and the Tribunal considered the claims under section 15 on that basis.

8.1.1: Not providing the Claimant funding for private treatment

163. This matter has also been dealt with above under **6.1.9**.

164. The event occurred before the Claimant became a disabled person on 12 September 2016.

165. The Tribunal found that it could amount to unfavourable treatment, in that the Claimant felt that he had been put at a disadvantage, but it was not because of something arising in consequence of his disability, namely his continued absence from work on sick leave. It was because of the implementation of the Respondent's policy not to fund private treatment because they did not have the funds to do so. It was justified in accordance with the legitimate aim set out at **8.4.2** below, that is ensuring that public funds are utilised in an efficient and effective manner.

8.1.2: Failed to apply discretion to extend sick pay
8.1.8: Failure of the Respondent to reinstate the Claimant's pay at the monthly salary review meetings.

166. This matter has also been dealt with above under **6.1.2**, **6.1.8**, **7.1.2** and **7.1.7**.

167. The Tribunal found that this was unfavourable treatment because of something arising in consequence of the Claimant's disability, namely his sickness absence. However, the Tribunal found that it was justified because it was a proportionate means of achieving a legitimate aim, namely the implementation of the Respondent's sickness absence pay policy in accordance with the legitimate aim set out at **8.4.2** below, that is ensuring that public funds are utilised in an efficient and effective manner.

8.1.3: Serving the Claimant with a formal written improvement notice 28 February and 1 March 2017
8.1.5: Taking action in relation to the Claimant under the Unsatisfactory Performance Policy

168. The Tribunal found this factually proved. It has also been dealt with above under **6.1.11** and **7.1.3**.

169. The Tribunal found that it could amount to unfavourable treatment, in that the Claimant felt that he had been put at a disadvantage, and it was because of something arising in consequence of his disability, namely his continued absence from work on sick leave.

170. However, the purpose of the application of the formal written improvement notice under the Unsatisfactory Attendance procedure is to improve attendance and to facilitate a return to work. Even if it was unfavourable it was a proportionate means of achieving the legitimate aim of improving attendance and facilitating a return to work. It was justified in accordance with the legitimate aim set out at **8.4.1** below, that is having officers who can attend work regularly in order to successfully complete officer probationer foundation course and perform the role of protecting and serving the public.

8.1.4: Refusing the Claimant's request for telephone appointment to see FMO (c. May 2017)

171. The Tribunal found this factually proved. It has also been dealt with above under **6.1.7**.

172. The Tribunal found that this treatment was not because of something arising in consequence of the Claimant's disability, namely his sickness absence. Also it was not unfavourable treatment, on the contrary it was to ensure that he could be properly medically assessed by the FMO with a view to returning to work.

173. It was also justified because it was a proportionate means of achieving a legitimate aim, namely ensuing that the Claimant was properly medically assessed by the FMO.

8.1.6: Requiring that the Claimant attend the Unsatisfactory Performance stage meetings at Surrey Police premises and not consenting to the meetings taking place in the Claimant's home;

174. The Tribunal found this factually proved and it has also been dealt with above under **6.1.13**.

175. The Tribunal found that the requirement to attend UPP meetings was because of something arising in consequence of the Claimant's disability, namely his sickness absence. However, the requirement to attend meetings at Surrey Police premises was not unfavourable treatment. It was to ensure that formal meetings took place at an appropriate venue and to properly progress the UPP plan which was to improve attendance and facilitate a return to work.

176. It was justified for the reasons given by Sgt Bracknell and Inspector McDermott above, which the Tribunal accepted were proportionate and legitimate.

8.1.7: Holding a formal Unsatisfactory Performance stage 2 meeting on 7 November 2017 when the Claimant had a review with his treating consultant on the 8 November 2017

177. The Tribunal found this allegation factually proved and it has also been dealt with above at **6.1.14**.

178. The Tribunal did not find that it was unfavourable treatment. There was no obvious detriment, disadvantage or unfavourable treatment in holding the meeting on 7 November 2017 as previously notified. There were reasonable, proper, non-discriminatory reasons for the Respondent's decision to go ahead with the meeting, namely to progress the UPP plan which was to improve attendance and facilitate a return to work. The decision was not because of the Claimant's absence on sick leave.

8.2 Does the Claimant prove that the Respondent treated the Claimant as set out in paragraph above?

179. The Tribunal's findings are set out above in respect of each individual claim under this section.

8.3 Did the Respondent treat the Claimant as aforesaid because of the "something arising" in consequence of the disability?

180. The Tribunal's findings are set out above in respect of each individual claim under this section.

8.4 Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent relies on the following:

8.4.1: Having officers who can attend work regularly in order to successfully complete officer probationer foundation course and perform the role of protecting and serving the public

8.4.2: Ensuring that public funds are utilised in an efficient and effective manner

8.4.3: It is not in issue that the above matters are legitimate aims the Claimant will say that the way the Respondent carried them out was not legitimate, because: the Respondent failed to consider the medical evidence relating to the Claimant; the Respondent did not have regard to the fact that the Claimant sustained injury on duty; the Respondent did not have regard to its power to exercise discretion to extend full pay where the injury was sustained at work.

181. The Tribunal's findings are set out above in respect of each individual claim under this section.

182. As found above, the Respondent did consider medical evidence relating to the Claimant, it did consider whether the injury had been sustained on duty and decided that it was not and it did have regard to the power to exercise discretion to extend full pay where injury was sustained at work. All of these matters have been dealt with above at some length.

8.5 Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability? The Respondent will say that it was aware of the Claimant had a physical impairment, the Respondent does not make the same concession in respect of any knowledge relating to a mental impairment.

183. The Tribunal proceeded on the basis that the Respondent knew that the Claimant's absence on sick leave from 26 April 2016 was because of the physical impairment and that the Claimant became a disabled person by reason of that physical impairment with effect from 12 September 2016. The Claimant was not a disabled person by reason of depression until November 2017.

<u>Victimisation- section 27 Equality Act 2010</u>

184. Equality Act 2010

Section 27 – Victimisation

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

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

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

d. bringing proceedings under this Act;
e. giving evidence or information in connection with proceedings under this Act;
f. doing any other thing for the purposes of or in connection with this Act;
g. making an allegation (whether or not express) that A or another person has contravened this Act.

Protected disclosures – sections 43A, 43B, 47B and 48 Employment Rights Act 1996

185. Employment Rights Act 1996

Section 43A - Meaning of protected disclosure

In this Act a protected disclosure means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

Section 43B - Disclosures qualifying for protection

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

Section 47B - Protected disclosures

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker (W) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done -

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

Section 48 - Complaints to employment tribunals

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(2) On a complaint under subsection (1), (1ZA), (1A), or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

186. In Ministry of Defence v Jeremiah [1980] ICR 13, the Court of Appeal said that "detriment" meant simply "putting under a disadvantage" and that a detriment exists if a reasonable worker would or might take the view that the action of the employer was in all the circumstances to his detriment. What matters is that, compared with other workers (hypothetical or real) the complainant is shown to have suffered a disadvantage of some kind. Someone who is treated no differently than other workers, even if the reason for an employer's treatment is perceived to arise from, or be connected to, the act of making a protected disclosure, will find it difficult to show that he or she has suffered a detriment.

9 Section 27: Victimisation
[A Protected Disclosure Detriment claim was added at start of hearing based upon the same allegations]

9.1 Has the Claimant carried out a protected act [or protected disclosure]**? The Claimant relies upon the following:**

9.1.1: A complaint about injury he sustained made to Sgt Sumner and PC Steve Ashley on 26 April 2016

187. The transcript of a tape-recorded interview with the Claimant conducted by PC Charlton and PC Ashley on 26 April 2016 is set out in paragraph 62 above.

188. The Tribunal found that the information provided by the Claimant during this interview amounted to protected disclosure within the meaning of section 43B(1)(d) that is that the health or safety of an individual has been, is being or is likely to be endangered. The Claimant referred not only to an injury suffered by him but also to the likelihood that others may be injured in the future. He was clearly referring to the probationary constables who might undergo such training in the future and whose health or safety would

likely be endangered if there was a failure to perform sufficient warm ups and stretches. Although it related to only a small group of persons, it was sufficient to show that the Claimant had a reasonable belief he was making a disclosure in the public interest (see Underwood v Wincanton plc [2016] EAT).

189. The Tribunal did not find there was any protected act done within the meaning of section 27(2) Equality Act 2010.

190. Additionally, the Tribunal did not accept the Claimant's contention that there was a further meeting on that day attended by Police Sergeant Sumner. The first interview was recorded and there is no obvious reason why, if there was a second part to the interview, that would not be recorded as well. PC Ashley and Police Sergeant Sumner both denied that there was any second meeting and there was no contemporaneous written record of such a meeting.

9.1.2: A letter from Phillip Hammond MP to the Respondent sent in about December 2016

191. The Tribunal could not find a copy of Mr Hammond's letter in the bundle but assumed that the Claimant 's letter to Mr Hammond dated 4 December 2016 (pages 955-962) was copied by Mr Hammond to the Respondent and the Tribunal therefore took that as part of what is said to be Mr Hammond's letter. The letter included the following:

"Officer Safety Training Injuries

Whilst on my first days Officer Safety Training (OST) one of my colleagues, "Olly" was assaulted by one of the OST Trainers. Myself and the rest of the class witnessed this. Olly was placed in a painful headlock by the trainer which IS NOT AN APPROVED Home Office OST Technique therefore this amounts to assault. Following the incident, Olly was clearly in pain/distress and in tears and walked out of the class. The class continued, but the OST Sargeant came in with other officers and they clearly trying to keep it quiet and make sure he didn't report it! Olly was subsequently sent home early.

Why was an OST Trainer performing "unapproved" OST techniques on another officer?

Why wasn't members of the class who witnessed this "assault" take place allowed to provide a witness statement?

Why was the OST trainer allowed to continue and not reprimanded?

Why didn't the OST Trainers complete an accident at work report at the time of my injury?

To learn an OST technique correctly, it must be undertaken with slow controlled and restrained movement. During OST training, students are taught by the trainers to use pain control and compliance. It follows, that each student would use a different threshold of pain and compliance, some more excessively than others, which increases the risk of injury.

Why are the OST Trainers actively teaching student officers to perform OCT techniques on other students with excessive force, way beyond what was required to perform them safely, and in order to prevent increasing the risk of injury? …

On each occasion I attended OST Training no warm up or stretching was provided, which is paramount to safe and effective training and the prevention of injury, and which was certainly a major contributable factor to my own spinal injury. …

When I attended a medical examination with the NHS Orthopaedic Consultant, I was informed that I was the 2nd Police Officer seen in recent weeks to have sustained spinal injuries directly resulting from Officer Safety Training. The amount of injuries occurring and not being reported correctly raises grave concerns regarding Police sickness, which according to a recent survey, is up by 58%".

192. The Tribunal found that these extracts amounted to disclosures under section 43B(1)

"(a) that a criminal offence had been committed, is being committed or is likely to be committed,
(d) That the health and safety of any individual has been, is being or is likely to be endangered, …
(e) That information tended to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

193. The letter was sent by Mr Hammond on behalf of the Claimant and therefore amounted to a disclosure to his employer. For the same reasons given above, relating to injury to himself and the likelihood of injury to others, it was a disclosure which he reasonably believed was made in the public interest.

194. However, the Tribunal could find nothing in the letter which amounted to a protected act under section 27(2) Equality Act 2010.

195. There was also an allegation of a failure to comply with a legal obligation under the Data Protection Act:

"Breach of Confidentiality – Data Protection Act

30th November 2016 – During a welfare visit by Sgt Bracknell and Insp Milligan. Sgt Bracknell stated that he had read and been provided with a copy of my FMO report.

This was totally against my wishes and breaches both medical record confidentiality and the Data Protection Act."

196. This was not a protected disclosure within section 43B(1)(b). There can have been no reasonable belief in a public interest as the matter concerned only the Claimant and did not affect anyone else, either directly or indirectly.

9.1.3: A complaint made to the HSE in about December 2016

197. On 12 March 2018, at the Claimant's request, the Health and Safety Executive confirmed that he had disclosed information to them:

"Dear Mr West
I can confirm that you raised your concern about your accident at work with the Health and Safety Executive (HSE) on 1 February 2017."

198. The Tribunal found that this amounted to a protected disclosure under section 43B(1)(d), that is that the health or safety of any individual has been, is being or is likely to be endangered. It was effectively a repeat of the Claimant's reports regarding his injury and the possibility of injury to others as found above.

199. However, again as found above, there was nothing to indicate that the report to HSE amounted to a protected act under section 27(2) Equality Act 2010.

9.2 If there was a protected act [or protected disclosure] **has the Respondent carried out any of the treatment set out following because the Claimant had done a protected act** [or protected disclosure] **?**

9.2.1: The Respondent failed to apply his discretion to extend sick pay

200. The Tribunal found that the decision not to exercise discretion in the Claimant's favour regarding a cut in sick pay did not amount to a detriment within the meaning of section 47B Employment Rights Act 1996. Other police officers would be treated no differently.

201. Even if it did amount to a detriment, the Tribunal could find no causal link, between any of the protected disclosures and the Respondent's failure to apply a discretion to extend his sick pay. The Tribunal has described above at some length the reasons why the Claimant's sick pay was cut in accordance with the PNB Circular.

202. Mr Davis confirmed in his witness statement that he knew of the letter from Mr Hammond and the Claimant's allegation of injury caused during Officer Safety Training. There was however no evidence that these matters influenced his decision, or the decision of any other member of the Pay Review Panel. The Respondent's witnesses had provided cogent evidence showing that the reason for not exercising the discretion was a non-discriminatory reason. It was based upon the lack of sufficient grounds to exercise the discretion in the Claimant's favour in accordance with the PNB Circular. The decision, and the reasons for it, were well documented and provided to the Tribunal. Also, as found above, during the Claimant's employment with TVP, during his absence on sick leave due to an injury on duty, his pay was also cut under the same PNB Circular which was of nationwide application to all police forces. It was a policy of nationwide application and applied with reasonable cause in the case of the Claimant.

203. Additionally, the Claimant's pay was cut to 50% before the Hammond letter had been received by the Respondent. It could not therefore have influenced that decision.

9.2.2: The Respondent prematurely took action in relation to the Claimant under the Unsatisfactory Performance Policy

204. The UPP was instigated by Sergeant Bracknell.

205. The Tribunal found that Sergeant Bracknell became aware as at 30 November 2016 during the course of a meeting with the Claimant when he was accompanied by Inspector Milligan, that the Claimant had made a complaint about his injuries to PC Ashley and that the Claimant intended to involve Mr Hammond in the near future.

206. However, the supportive plan was instigated by Sergeant Bracknell on 22 August 2016 which came before his knowledge of the complaint to PC Ashley and the letter from Mr Hammond and the complaint to the HSE.

207. Sergeant Bracknell had initially denied in his witness statement that he was aware of the alleged protected disclosures but accepted during cross-examination that the first and second protected disclosures were discussed during the meeting on 30 November 2016.

208. However, the Tribunal could find no causal link between any of the protected disclosures and the implementation of the UPP procedure.

209. The UPP procedure was conducted in accordance with the Respondent's policy and was transparent and well documented. The purpose was to facilitate the Claimant's return to work in accordance with the stated purpose of the policy itself. It was not implemented prematurely. The first stage meeting was on 21 February 2017 but had been preceded by a supportive plan on 22 August 2016. There was no element of undue urgency or improper application of the provisions of the policy.

210. The Tribunal found that it was not in any event a detriment. Other police officers would be treated no differently. The Respondent would be rightly criticised if it took no steps to facilitate the return to work of a police officer who had been absent since 26 April 2016.

211. The Respondent's witnesses had shown by cogent evidence that the implementation of the UPP procedure was in no sense whatsoever was because of the protected disclosures and there was a clear, well documented, non-discriminatory reason for the application of the policy.

Failure to Make Reasonable Adjustments - section 20 Equality Act 2010

212. Equality Act 2010

Section 20 - Duty to make adjustments

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

10 Reasonable adjustments: section 20 and section 21

10.1 Did the Respondent apply the following provision, criteria and/or practice ('the provision') generally, namely?

10.1.1: Failing to accede to the Claimant's request to fund his medical treatment;

10.1.2: Applying the Respondent's standard policy in relation to sick pay;

10.1.3: Invoking the Respondent's unsatisfactory performance policy;

10.1.4: Requiring the Claimant to attend a face to face consultation with the Force Medical Officer (FMO)

213. The Tribunal found the above four matters were applied, and each amounted to a provision, criterion or practice within the meaning of section 20(3) Equality Act 2010.

10.1.5: The Respondent failed to investigate the complaint made by the Claimant on 26 April 2016 and failed to follow its own procedure

214. The Tribunal did not find this matter amounted to a provision, criterion or practice. It was a one-off event, applicable only to the Claimant.

10.2 Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:

10.2.1: The Claimant was unable to work due to these impairments

215. The Tribunal found that the Claimant was not put to a substantial disadvantage by the matters set out in paragraphs **10.1.1 to 10.1.4** above in comparison with persons who are not disabled. A police officer who had been absent on long term sick leave in materially the same circumstances, but not disabled, would have been treated no differently.

216. The comparator would also be denied funding for private medical treatment in accordance with the Respondent's policy. Additionally, there was no evidence that privately funded treatment would have enabled the Claimant to return to work earlier, or at all.

217. The comparator also would not have had discretion exercised in his favour to retain full sick pay. Additionally, there was no disadvantage to the Claimant in terms of returning to work. Retaining full sick pay would not enable him to return to work and was more likely to act as a disincentive to return to work.

218. In O'Hanlon v HM Revenue and Customs Commissioners [2007] ICR 1359 the Court of Appeal said that it will only be in highly exceptional circumstances that it could be considered a reasonable adjustment to give a disabled person higher sick pay than would be payable to a non-disabled person who in general does not suffer the same disability-related absences.

219. Invoking the UPP policy, far from preventing the Claimant from returning to work, was designed to enable him to do so. A non-disabled comparator in the same circumstances would have been subject to the UPP policy.

220. The requirement to attend a face-to-face consultation with the Force Medical Officer was similarly designed to enable the Claimant to return to work and a non-disabled comparator would have been faced with the same requirement. It was not a substantial disadvantage.

10.2.2: The Claimant was subjected to disciplinary action as a result of his absence which was marked as sickness and not disability

221. The Claimant's reference to "disciplinary action" presumably refers to the UPP attendance procedure.

222. Under this heading, the Claimant does not allege any substantial disadvantage as a result of the PCPs above but alleges a disadvantage in respect of something which is not a PCP, that is, his absence being recorded as sickness and not as disability-related. The Claimant suffered no disadvantage as a result of this apparent mis-recording of his absence.

223. In Bray v London Borough of Camden [2002] UKEAT/1162/01) it was said that an employer is not under a legal obligation to discount all, or indeed any, disability-related absence when calculating sickness levels.

224. It would rarely, if ever, be a reasonable adjustment to require an employer to dis-apply the terms of its absence management and attendance policies by discounting all disability-related absences.

225. The Tribunal found that in this case it would not be a reasonable adjustment to dis-apply the attendance procedures.

Indirect discrimination (section 19 Equality Act 2010)

Section 19 – Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies a provision, criterion or practice which is discriminatory in relation to a protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a protected characteristic of B's if-

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) It puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

11 Section 19: Indirect discrimination in relation to disability

11.1. Did the Respondent apply the following provision, criteria and/or practice ('the provision') generally, namely?

11.1.1: Failing to accede to the Claimant's request to fund his medical treatment;
11.1.2: Applying the Respondent's standard policy in relation to sick pay;
11.1.3: Invoking the Respondent's unsatisfactory performance policy;
11.1.4: Requiring the Claimant to attend a face to face consultation with the Force Medical Officer (FMO)

226. The Tribunal accepted that these matters amounted to a provision, criterion or practice, in accordance with its finding of the same matters under section 20 referred to above.

227. However, the Claimant presented no evidence of any group disadvantage.

228. Indirect discrimination is established where a policy that an employer applies puts those who share a protected characteristic at a particular disadvantage when compared with those who do not share it. Section 6(3)(b) Equality Act 2010 says that in relation to disability, a reference to persons who share a protected characteristic is a reference to persons who have the same disability. Accordingly, for indirect discrimination purposes, the particular disadvantage must affect those who share the Claimant's particular disability. However, even people who have the same disability cannot easily be treated as an identical class, since the way in which the same disability manifests itself will vary from person to person, making it difficult for a disabled person to demonstrate a group disadvantage.

229. In this case, back and hip impairments, and mental impairments, would manifest themselves in various different ways from person to person. The impairments would give rise to a variety of symptoms on a wide spectrum. One person with the impairments could be adversely affected by the application of the employer's policies and others less so or not at all.

230. It follows that this claim must fail through lack of any evidence of a group disadvantage.

12 Time Limitation Issues

231. Equality Act 2010

Section 123 – Time limits

(1) Subject to sections 140A and 140B, proceedings on a complaint within section 120 may not be brought after the end of-

(e) the period of 3 months starting with the date of the act to which the complaint relates, or
(f) such other period as the employment Tribunal thinks just and equitable. …

(3) For the purpose 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.

232. In view of the findings made on each of the substantive claims above, the Tribunal did not find it necessary to perform a detailed assessment of time limits and whether the time limits had been exceeded.

233. If time limits had been exceeded, the Tribunal considered that it would have found it just and equitable to extend the time limits in view of the fact that there would be no prejudice to the Respondent because the matters complained of by the Claimant were, as one would expect from a large organisation such as a police force, well documented, and the matters

contained in the Claimant's grievance had been investigated by Mrs Billington in her investigation.

234. It was just and equitable to extend time because most of the events were well documented and there was no prejudice to the Respondent if time was extended. The Tribunal considered that it had jurisdiction to consider all the complaints.

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Employment Judge Vowles

Date: ……2 January 2019

Sent to the parties on:

……7 January 2019.....

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For the Tribunal Office

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