



EMPLOYMENT TRIBUNALS

Claimant: Miss K Rose

Respondent: The Commissioner of Police for the Metropolis

Heard at: East London Hearing Centre

On: 5th - 8th January 2021

Before: Employment Judge McLaren

Members: Ms J Clark
Mr L Bowman

Representation:

Claimant : In Person
Respondent: Ms K Loraine, Counsel

JUDGMENT

It is the unanimous decision of the tribunal that the claims for discrimination are dismissed.

REASONS

Background

1. The claimant was employed from 23.02.2008 until her resignation on 22.11.19. Latterly she had been engaged as a Trainee Detective Constable, having transferred to the CID from a role as a Police Community Support Officer.
2. The claimant suffers from a number of medical conditions and brought claims of disability discrimination arising from a period of absence in August 2019.
3. The hearing took place remotely via CVP as it was not practicable to have an in-person hearing. The claimant represented herself but was supported throughout the proceedings by Ms Holmes. A break was taken approximately every 45 minutes and the claimant participated fully in the hearing.

Evidence before us

4. We heard evidence from Ms S Holmes and the claimant on her own behalf. We heard from Mr A. Lowe and Mr C Christoforou. We were provided with a paginated bundle of 568 pages.

5. In reaching our decision we considered the evidence that we heard together with those pages of the bundle to which we were taken. We were also assisted by helpful submissions from both sides.

Issues

6. The issues in the case had been agreed between the parties as follows:

Disability

a. It is conceded that the Claimant was, at all material times, a disabled person for

i. the purposes of S.6 Equality Act 2010 ('EqA') due to the physical impairment of osteoarthritis and the mental impairment of anxiety and depression.

b. Was the Claimant, at all material times, also a disabled person for the purposes of S.6 Equality Act 2010 ('EqA') due to the physical impairments of early menopause and bone spurs?

B. From what date did the Claimant suffer from the impairments?

C. Did the impairments have a more than trivial adverse effect on the Claimant's ability to carry out normal day to day activities?

D. Would the impairments have had such an effect in the absence of treatment?

E. In the period 3 September 2019 to 22 October 2019, had the impairments lasted for 12 months? If not, were they at that time, likely to last 12 months or likely to recur?

Direct discrimination

F. Has the Claimant established that the following conduct occurred as alleged?

a. Andy Lowe not taking the Claimant seriously when contacting the Claimant by telephone during her sickness absence in September and October 2019.

b. Andy Lowe and Chris Christoforou not taking the Claimant seriously during the home visit on 12th September 2019.

- c. By Andy Lowe saying 'once you come back and you see a police station you'll feel better' during a telephone conversation on 14 October 2019.
 - d. Andy Lowe inviting the Claimant to attend a case conference in October 2019.
- G. If the treatment occurred as alleged, was it less favourable treatment because of the Claimant's disability?
- a. Who is the relevant comparator? The Claimant relies on a named comparator, MO and a hypothetical comparator in the alternative.
 - b. Are there facts from which, in the absence of an explanation, a finding of discrimination could be made?
 - c. If so, has the Respondent established an explanation for the treatment which is nothing whatsoever to do with the Claimant's disability?

Discrimination arising from disability S.15 EqA

- H. What is the something (or each thing if more than one) 'arising from' the Claimant's disability that is relied upon?
- a. The Claimant's sickness absence from August 2019 onwards.
- I. It is conceded that at the material time, the Respondent knew that the Claimant was disabled due anxiety and depression and that her sickness absence arose from this disability.
- J. Has the Claimant established that the following conduct occurred as alleged?
- a. Andy Lowe contacting the Claimant by text message and telephone during her sickness absence between 1 October 2019 and 18 October 2019 demanding that the Claimant engage in communication with him.
- K. If so, was the conduct found to have occurred unfavourable treatment because of the 'something' arising from disability relied upon?
- L. Was the treatment justified as a proportionate means of achieving a legitimate aim? The Respondent will rely on the following legitimate aims:
- a. Ensuring fairness and consistency in the Respondent's management of staff and officer sickness absence;
 - b. Ensuring appropriate support is provided to officers who are absent due to sickness including ensuring that all

reasonable and appropriate steps are taken to enable officers to return to work;

- c. Ensuring the efficiency, effectiveness and resilience of the police service at a proportionate cost to the public and that there are adequate Officers on duty in order to discharge the Respondent's statutory duty to investigate crimes and to protect the public;

Harassment s.26 Equality Act

- M. Did the Respondent engage in unwanted conduct related to the Claimant's disability as alleged?
 - a. Chris Christoforou not taking the Claimant seriously when telephoning the Claimant on 26 September 2019.
 - b. Andy Lowe regularly contacting the Claimant by text message and telephone Claimant questions about when she might be able return to work during her sickness absence in the first week of October 2019.
- N. If so, did such conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Remedy

- O. If the Claimant succeeds in any of her claims for disability discrimination:
 - a. What is the appropriate award for injury to feelings?
 - b. Has the Claimant suffered any financial loss because of the discrimination that was found to have occurred? If so, what is the appropriate award of compensation?
 - c. What, if any, recommendations ought the Tribunal to make?

Finding of Facts

Early relationship with Mr Lowe

7. The claimant moved to the CID division around 1st April 2019. She explained that when she did so Andy Lowe, a detective sergeant, became her line manager. While she told us that Mr Lowe did not answer any introductory emails she sent to him prior to her joining his team, we were taken to an exchange of WhatsApp messages at page 184 and 185 of the bundle.

8. These show the claimant asking her line manager for leave at short notice connected with home circumstances, raising her concern about night work and requesting her release for an interview course. Her requests were accommodated. The claimant accepted that her relationship with Mr Lowe was a

reasonable one at this point. We find that she was able to communicate freely with Mr Lowe.

The claimant's medical issues

9. Unfortunately, the claimant was then off sick from 1 August 2019. Her doctor's sick notes specified the reason for her absence as "depression". The claimant explained that she had struggled with this since 2017 and it was in part caused by her ongoing pain due to her osteoarthritis and, from April 2019 onwards, from issues related to menopause symptoms.

10. The claimant also seeks to rely on bone spurs as a disability. In her evidence, she accepted, however, that these are connected to her spondylitis which is part of her osteoarthritis issues. This is not therefore pursued by the claimant as a separate physical impairment. The respondent concedes that the claimant's depression and osteoarthritis both amount to disabilities. The respondent does not accept that the claimant's menopause amounts to a disability.

11. On the 2nd of May 2019 the claimant was referred to the respondent's occupational health service. A report was produced following a consultation on 2 May. This made reference to the claimant's concerns about doing night shifts. The report records that the claimant told the medical practitioner that she was experiencing menopause symptoms which exacerbated her sleep pattern causing it to be disrupted. It was one of the multiple reasons given by the claimant for being unable to do night work. Her request to remain off night work was accommodated by Mr Lowe.

12. The bundle also contained copies of the claimant's GP medical records. Earlier that year, on the 21 January 2019 at page 479 the medical records show that the claimant had some concerns and was advised that the symptoms which she raised as a concern were confirmed by a blood test as being as a result of her going through menopause.

13. There is no other entry in the medical records about the menopause until 18 September 2019 (at page 484) and then on 20 April 2020 (at page 489). Sometime after this last reference in the GP notes to menopause, the claimant saw a consultant for the symptoms and the bundle contained a letter 6 May 2020 reporting the outcome of this consultation. This identified a number of symptoms which the claimant attributed to this condition. This refers to night sweats occurring a year ago and to daily headaches for the last 2 years. Medication is prescribed in 2020 to address the symptoms and a further blood test is to be arranged.

14. The claimant did not give any evidence in her witness statement about the impact of the menopause on her physical or mental well-being, but the bundle contained the impact statement that had been prepared by the claimant for the purposes of these proceedings. This was at page 497 – 499. This notes that she had bad dizziness and foginess and was plagued with panic attacks from the time she was off sick. She also had bad headaches and was inclined to visible sweating and flushing. This latter being visible made the claimant anxious. These symptoms are attributed to menopause. No details were given as to the impact on the claimant's ability to carry out day-to-day activities caused by these

symptoms in the period up to her resignation. The only reference to any activity which is curtailed in part by this medical issue is the ability to do night work.

Respondent's sickness absence policy.

15. We were referred to the respondent's policy which at page 94 set out an overview of the reason for managing sickness. It was specified that the respondent wanted to support their people so that they were well enough to be in work and delivering their best for the public they served. The policy overview also specified that line managers would support people in the team who are absent, communicating with them to understand whether there is anything they can reasonably do to help someone return to work. It emphasised that each case would be dealt with on its own merits, recognising that the support individuals needed would be unique to them.

16. While the claimant had not seen a copy of this policy prior to the litigation, we accept that it was available to her as a police officer. It specifies that an individual needs to let their employer know as soon as possible when any unplanned sickness arises. After seven days or longer, then a fit note from a GP is required and it must be forwarded to a line manager without delay.

17. The policy requires the individual to update their line manager regularly and specifies that the line manager will telephone the individual as soon as possible once he /she had been notified that a direct report is off sick. It specifies that the line manager will then call weekly for the first four weeks of absence and visit in person if possible before the 29th day of absence. The policy specifies that they can arrange to meet in person at a mutually convenient location. The policy also specifies that the line manager will want to know whether there was anything they or the respondent could do in supporting an absent individual with a return to work, and what the individual is doing to help get themselves better.

18. The policy also specifies that after 40 days absence an individual be invited to attend a case conference to check on the progress they are making with their recovery and on the progress towards returning to work. That will normally be attended by the line manager, HR case manager (if required), occupational health (if required) and Police Federation, Trade Union representative, or any Met Colleague. Support Association representative that the individual would like to accompany them. The policy is not contractual, it is a guideline and there is no requirement that it be followed to the letter.

MO-the named comparator

19. In mid-May 2019 another individual who was line managed by Mr Lowe started a leave of absence following a diagnosis of breast cancer. The claimant told us that she considered Mr Lowe's contact with this individual to be excessive and to amount to harassment, in the same way that his contact with her was excessive and amounted to harassment.

20. We were taken to the log of contact and support provided which was at pages 293-295 of the bundle. This shows Mr Lowe sending a text message to the individual on 17 May, then texting the individual asking her to call on 20 May because there had been no response to the previous message. The call then took place on 23 May and the notes show that during this call Mr Lowe offered a home visit, but the individual didn't want any contact from team members at that time, but it also records that she was happy that a home visit with a named

Detective Inspector would be arranged in the next few weeks. There is then a call on the following day to arrange this future visit, but no date is agreed because M.O. is not available and then Mr Lowe is on annual leave.

21. The claimant considers this to be an example of Mr Lowe harassing MO by calling her about a home visit she has refused. The claimant was not party to these calls and so we accept the evidence of the log and that given by Mr Lowe that MO was happy for this contact. We also find that the claimant and MO are treated in the same way, contact is made, and a home visit is discussed.

22. The next call with MO is a week later, on 4 June. Again, a home visit is discussed, and this is to be arranged for a later date. The call is followed up the next day with a text giving the individual the counselling hotline number. There is a call again on 11 June when M.O. confirms that she has been signed off for a month and she does not require any further police or HR assistance at that time. The next contact is almost a month later when Mr Lowe telephoned the individual. On 6 July the individual came in for a meeting and at that point was signed off sick until the end of September.

23. Pages 299 – 301 show that contact continued at regular intervals thereafter. A home visit was carried out on 10th of February 2020. The last contact recorded is as 3 April 2020 because at that point a new manager took over.

24. We find that these records show Mr Lowe complying with the terms of the managing sickness absence policy, that is making weekly contact during the initial period of absence and thereafter fortnightly. There is no indication that the individual found the contact unwelcome and the notes of the calls and support provided show that Mr Lowe was addressing the points he was required to do in order to manage an individual's absence, provide support to them and identify how and when they will be able to return to work.

25. We find that there is no significant difference in treatment between the claimant and MO in relation to the amount of contact. Based on the logs, Mr Lowe contacted MO 10 times in 8 weeks of absence and the claimant 9 times in 7 weeks, including the home visit. We note that the log does not capture all contact but only substantive interactions, it does not for example capture multiple contacts on the same day where contact is made for admin purposes or checking availability for a call. We do not have this data for MO either. As the claimant makes her complaint based on the MO log, we have considered the contact with her on the same basis and as referred to above, on that basis there is no substantial difference in treatment.

26. There is a difference between the interaction between Mr Lowe and MO and Mr Lowe and the claimant in that no home visit took place within the first 28 days. We find, however, that is because M.O asked for this to be delayed for various reasons and this was accepted. The claimant made no such request.

Conversation about MO

27. There was a further issue in relation to M.O. This involved Mr Christoforou. Both the claimant and Mr Christoforou described a particular conversation that had taken place at some point in May 2019. Both believe that two or three people were present, including Mr Lowe. Mr Lowe informed Mr Christoforou and others that M.O. had been diagnosed with breast cancer. M.O. had given permission for

this information to be shared. The claimant recalled Mr Christoforou's reaction was to say something like "Oh, but does she really have breast cancer".

28. The claimant believed that this comment showed Mr Christoforou was disputing the truth of M.O.'s condition. She was shocked and concerned by this but accepts that she raised no issues about it at the time. She did not feel that she was able to do so because she was new to the team. When she went home that evening, she related this incident to her partner who was also shocked. It made such an impression that, when Ms Holmes became aware of who was attending for the home visit, she recalled that Mr Christoforou had made this comment. Ms Holmes was reluctant to have Mr Christoforou in her home as part of a visit relating to the claimant's sickness absence because of this comment.

29. Mr Christoforou accepted that some comment was made but gave an entirely different context for this. He said that he never doubted that M0 was telling the truth but was asking whether she had been diagnosed or whether she was still being tested. This was based on experience he had with his own partner who has had a number of breast lumps which on examination and testing have come back negative for cancer. He was aware of the delay between being sent for tests and results. He was distinguishing between a diagnosis of cancer or a suspicion of the disease which was still to be verified following testing.

30. On balance we prefer Mr Christoforou's evidence as to what he meant by any such comment simply because he made the comment and is in the best position to explain any context. There would be no reason for him to doubt the reason MO was off work and the claimant did not suggest any motive.

The claimant's absence and contact with Mr Lowe

31. The claimant reported sick on 1 August 2019. At that point Mr Lowe was on sick leave himself from 29 July to 29th of August and was not aware of the claimant's absence until his return. On 29 August he texted the claimant (page 187) to say has only just returned to work today and asked her if she is about next week. The claimant says, "yes she is at home next week but has appointments on Monday".

32. On Tuesday, 3 September (avoiding the Monday when the claimant is busy), Mr Lowe then texted the claimant again, page 187 of the bundle. In this he apologises for not having been in touch previously and asks if the claimant is free for a call that day because he wants to catch up, see how she is and when she is likely to return. The claimant replies some 40 minutes after the text is sent saying that she is free for a call. Mr Lowe checks again whether he should call now and is told yes. We find that Mr Lowe's contacts with the claimant throughout always follows a similar pattern of checking if she is free to speak before he calls and he only does so when that is confirmed to him.

33. The claimant was startled by this text asking about her return to work and felt that this was putting immediate pressure on her and not understanding how she was feeling. She considered the first part of his text, about wanting to see how she was, as a mere pleasantry and not a genuine concern or part of the purpose of any catch up, but instead considered that he was asking about her return date. This feeling of pressure to come back to work was exacerbated by the fact that while Mr Lowe was himself off sick, the claimant had been contacted

about outstanding crime reports and, despite the claimant emailing asking that others deal with these, no one was doing so.

34. Mr Lowe was unaware that during his own sickness absence insufficient processes been put in place to take the claimant's work away from her. He also considered that his text should be read as expressing a genuine interest about seeing how the claimant was, as well as asking about the return date. He did not accept that the first part was a mere pleasantry. At this point he did not know why the claimant was off sick and he wished to explore this with her and find out. We find that a natural reading of the text is that it raises 2 topics equally as the subject of the proposed catch up, that is the claimant's' state of health and a prognosis for return. We also find that Mr Lowe could have no knowledge or influence on the fact the claimant already felt pressured because her work had not been re allocated and would not be aware of this or responsible for it.

35. A conversation then took place on 3 September and the call log at page 304 records that the claimant told Mr Lowe she been signed off work with stress and related anxiety until 16 September. He notes that she referred to ongoing issues with pain in her joints, going through the menopause and other daily events that had led to her position. In cross examination the claimant was adamant that she had not said stress but depression and anxiety that this note was incorrect, and its inaccuracy was because Mr Lowe did not on this occasion, or on many others, listen to her. This change of her diagnosis from depression to stress and anxiety was, the claimant contended, an example of Mr Lowe not taking her medical condition of depression seriously. The claimant also characterised this conversation as being more focused on getting her back to work rather than being concerned about how she was feeling.

36. The call log at page 304 does refer to the claimant stating she's been signed off work with stress and related anxiety. At this point Mr Lowe does not have the Fit Note with the reason for absence, he is relying on his conversation with the claimant. Mr Lowe said that he filled the log in relatively soon after the call and he would have recorded what he had been told. The claimant is relying on memory. On the balance of probabilities, we find that Mr Lowe recorded what he was told and did not deliberately ignore or "downgrade" the claimant's diagnosis from depression to stress. We make this finding because his recollection was supported by a contemporaneous note and there would be no reason to deliberately falsify this log. He notes that the claimant said it was accumulation of things, ongoing pain issues, menopause, and other daily events. The claimant explained to Mr Lowe that she had missed a work-related counsellor's call and as a follow-up Mr Lowe then texted the claimant a contact number for counselling.

37. There is nothing in the call log to indicate pressure being put on the claimant to return to work. It merely records the claimant's issues. There is no contemporaneous evidence to show that the claimant felt pressurised by this contact which was in accordance with the policy.

The home visit

38. The next text was on 11 September and Mr Lowe asked, "what are your movements this week – just seeing if you were about to visit." The claimant responded fairly promptly, thanking him for the text saying that she should be at home tomorrow and Friday, he should let her know what time suited him. There

was an exchange of texts in which the claimant provided her address and suggested a time. On the last of these texts Mr Lowe said that he will be accompanied by Chris C and makes the comment that Chris C has said he would like some cake inserting a smiley face emoji. The claimant responded to this “Ah, would he?! I’ll start baking!” and inserts a smiley face emoji.

39. The claimant did not in fact want Mr Lowe to attend at her home. She did not want Chris C to accompany Mr Lowe because of the comment she believed he had made about MO. She had a home visit on a previous occasion, but she was unaware of the wording of the attendance policy and did not know that she could request a meeting at a different venue or that she could refuse such a meeting. As she was suffering from depression, she felt that it was her line manager’s obligation to point out both these things to her and not to leave it to her to object to a home visit. The claimant also considered she could not object to any particular individual accompanying Mr Lowe since, when she returned to work, she would have to work with this individual as a colleague and it would be very awkward if she had raised an objection. This was an example of Mr Lowe not taking her depression seriously and considering how he should treat someone who was vulnerable.

40. Mr Lowe gave evidence that it was very much up to the individual where they wanted to meet and if they wanted to meet. Had the claimant objected he would not have done so. We have seen that when M.O. suggested alternative dates or times these were accepted. We find there is nothing on the face of the text exchange which would give any indication that the claimant was in fact unhappy, either about the visit taking place at all, or about the venue or who would be there. On the contrary the claimant engages in a light-hearted exchange about baking cakes. We find that there was nothing in the claimant’s communication to alert Mr Lowe that he needs to consider his approach more carefully. We would characterise her response with the bake a cake reference to be positive. We also find that when Mr Lowe is alerted that he needs to do so, as in the case of MO, he does so. His failure to set out the option of refusal to the claimant is not a failure to take her condition seriously.

41. On 12 September Mr Lowe makes a request for service to HR support. He and Mr Christoforou also visit the claimant’s house at about 7:30 that evening. The accounts of the meeting between the respondent’s witnesses and the claimant’s witnesses are very different.

42. Mr Christoforou had not been briefed by Mr Lowe as to the nature of the claimant’s illness that was causing her absence. He attended as he was asked to do so believing it was a welfare check up. He played no part in the conversation. On arrival (or possibly departure) he recalls hugging the claimant. While Ms Holmes disputed that he hugged her, it was not disputed that he hugged the claimant.

43. The claimant’s partner made tea and provided biscuits and he sat in front of the television which was on a low volume. He watched television for some part of the time and does not remember exactly what was said by anybody. He does, however, recall Mr Lowe talking to the claimant about whether there is anything that could be done to make it easy for her to return, asking her about returning to work but also expressing she should not have to come back to CID if she felt it would be better for her to go somewhere else less stressful.

44. He did not witness the claimant being uncomfortable, he was not aware of any silences, he was not aware that the claimant was close to tears or that she was shifting uneasily in her seat. He did notice that the claimant's partner interjected at one point to explain how she saw the claimant's state of mind from her perspective but did not recall Mr Lowe cutting off this conversation. He characterised the visit as friendly and said that he felt comfortable throughout. He did make a comment in his evidence that the claimant was "perhaps a bit formal" and he explained that he meant she was not as relaxed as she would have been had she been at home just with her partner. She was slightly more formal than that because this was a conversation with her line manager. Nonetheless, he felt that the conversation was appropriate. Mr Lowe's style and manner were appropriate and at no point did either the claimant or her partner raise any concerns about what was being said.

45. Mr Christoforou confirmed that he was unaware that the claimant was suffering from bone spurs, osteoarthritis or the symptoms of menopause. He does not recall these conditions being discussed during the home visit. He does remember stress being discussed.

46. Mr Lowe similarly recollected that this had been a good meeting. He did not witness the claimant evidencing any signs of distress or discomfort. He felt that she answered his questions. He did not consider that he had ignored or turned his back on the claimant's partner. He accepted that he asked the claimant about possible return and that she might want to consider returning to other roles and that he would look into this as an option. He was concerned to find out from the claimant what it was she wanted from the organisation and to alleviate any stress that she was experiencing at work. His impression of the meeting was that it was friendly, good-natured, and informal.

47. Mr Lowe agrees that he talked to the claimant about her attending Goring, a rehabilitation centre available to staff the respondent. Ms Holmes recollects that when the claimant pushed back on this idea Mr Lowe responded something like "I don't blame you, I wouldn't go either". Mr Lowe tells us he did not say this, he was due to attend Goring himself in the near future and so it would not be logical for him to make this statement. The claimant did not appreciate Mr Lowe's suggestion that she go to Goring, it would mean her leaving her home and her family for two or three weeks and was not something that the claimant could contemplate. She felt that she was forced to listen and pressurised to consider it, as if she could not be depressed if she were not prepared to consider going to Goring.

48. We find that Mr Lowe was unlikely to have been negative about Goring when he was due to attend, and conclude that his recollection of this conversation is likely to be more accurate. We accept that he was suggesting this as a positive step and from a desire to help the claimant, not because he was not taking her condition seriously.

49. The claimant describes the time these two individuals spent in her home as being like an interrogation when she felt extremely uncomfortable and unsupported. She accepted the conversation was polite but considered that the crux of the conversation was forcing her back to work when she was not ready as she could barely think beyond the next hour. Mr Lowe continue to make assumptions by using phrases such as "when you come back to work" which was pressurising her for her return being sooner rather than later.

50. The claimant recollected that Mr Lowe had questioned why she was depressed as if she should not be and she felt unable to answer his questions. Ms Holmes, who was also present at the meeting, gave similar evidence. From her knowledge of the claimant, she was able to say that the claimant was very uncomfortable, was shifting in her seat, did not know where to look on some occasions and was close to tears at one point. She also considered that Mr Lowe's questions, going backwards and forwards, talking about coming back but then saying only when you are ready, were a form of pressure.

51. At one-point Ms Holmes said she tried to intervene to explain to Mr Lowe how low the claimant's mood and depression was. Her recollection was that she started to explain but Mr Lowe effectively dismissed what she was saying, turned his back on her and continued to question the claimant. Ms Holmes also recalls Mr Lowe say in a tone that questioned how the claimant could have depression, why do you have depression? Both the claimant and Ms Holmes gave evidence that the meeting was extremely uncomfortable, and Mr Lowe focused on pressurising the claimant to return and was frustrated at one point in the meeting.

52. We find that Mr Lowe was attending this visit to carry out his line manager duties which were to support the claimant and to consider any reasonable steps to help a person back to work. In asking questions about a return, we find Mr Lowe was carrying out the policy as he was required to do. We prefer the respondent's evidence of this meeting because on the balance of probabilities we find it unlikely that Mr Lowe or Mr Christoforou both failed to notice signs of distress if they were as visible as Ms Holmes and the claimant now recount. We find both Mr Lowe and Mr Christoforou to be credible witnesses whose evidence is confirmed by the documentation. We find it more likely that politeness masked any such feelings, so they were not visible. Ms Holmes' knowledge of the claimant would have given her an insight not open to work colleagues.

After the home visit

53. Mr Lowe believed that the claimant had expressed some interest in Goring and as a follow-up to the meeting on 13 September he texted the claimant to ask for her personal email that he could send the form that you need to complete.

54. The text he sends says that it was good to see both the claimant and her partner the previous day. The claimant responds saying thank you and nice to see you too and she provides her personal email address and says that she will look into it. On the face of the text exchange this appears to be friendly and positive. There is no indication that the claimant in fact found this unwelcome or had not been Ok with the visit. There was no need to respond in kind with and acknowledgement it was nice to see Mr Lowe.

55. As noted above, on 12 September Mr Lowe had made a referral to HR. Ms Fee, an HR case manager, responded on 16 September asking Mr Lowe to provide an update about his contact visit. It also states that on his return from leave, if the claimant had not yet returned to work, he should arrange a case conference to cover what barriers the claimant felt there were to her return to work and what could be done to support her back.

56. On 19 September, the claimant let Mr Lowe know by text that her doctor has signed her off for another month. She asked when she should send in her

sick notes. He replied there was no rush as he was off for another week but said if there was anything he could do in the interim she should let him know.

Call on the 26th of September

57. On 26th of September, while Mr Lowe was still on annual leave, the claimant then received a telephone call from Mr Christoforou. It was agreed that this telephone call lasted one minute 41 seconds. Mr Christoforou explained that that day a Detective Inspector asked him to make the call to the claimant to confirm the dates she had been signed off sick. He understood that this was so that the electronic attendance management system could be updated. He did not question this instruction believing it to be a reasonable request and so contacted the claimant as asked.

58. Mr Christoforou could not recall the details of the conversation other than to recall that it was short. He thinks that he briefly asked the claimant how she was and asked the dates she been signed off, explaining the reason for his call. Once he had these dates, he put them on a Post-it note, took that note into the DI's office and left it for the D.I to fill in any further details. While he could not remember exactly what was said, his best recollection was that there had been no awkward silences, or any other evidence of the claimant being distressed or unwilling to have the conversation.

59. The claimant's account was that she was distraught by this call, she felt ganged up on and did not feel comfortable speaking about how she was feeling. She characterises the phone call as very uncomfortable. This is particularly because it was with Mr Christoforou. As she had already been signed off and told Mr Lowe this, she did not see the reason for the call. She felt this was a disguised "nothing to worry about call" which was really quizzing her about how long she been signed off.

60. We find Mr Christoforou was acting on instructions and his opening enquiry about her health was politeness. He was calling for specific requested information which it was reasonable for the respondent to request and which the claimant was obliged to give. The claimant had not at this point provided any fit notes to the respondent.

Contact in early October

61. The text exchange shows that on 1 October Mr Lowe also asked the claimant the actual date she was signed off so he could update the electronic system. The claimant replies that she is sorry she had not given him the date but tells him that she had spoken to Mr Christoforou about the governor updating the system and confirmed the doctor's note was until 16 October. The exchange on its face seems friendly and does not raise any complaints. It references the prior call but raises no complaint about it. It is about getting the information into the system to reflect the fit notes. We find it is no more than that and is not an enquiry about a return date but sorting an admin issue.

62. The claimant's witness statement though, says that she felt she was being harassed by this contact. Her concern increased when Mr Lowe sent a further text on 5 October asking how she was getting on and if she was free for a call. She explained that she felt numb with anxiety and depression when she realised that he was constantly contacting her. This put her under pressure to converse when she was not feeling well. The text from Mr Lowe on 5 October was sent at

11.51 and the claimant does not respond until 17.13. Her text response says that she has just seen the message. In fact, we were told that the claimant was deeply distressed by this initial contact and was in bed distraught and not able to reply for several hours.

63. By the time she replied Mr Lowe had left work that day and therefore he asked if he could call tomorrow and on 6 October he asked if she was free that morning and the claimant replied, "yes give me a call now". She gave no indication of this distress. There was no reason for Mr Lowe to read anything into this delay which was explained in a natural way by the claimant.

64. Prior to making the call on 6 October Mr Lowe had received further information from Ms Fee in her email of 3 October at page 211. In this email she advises him to arrange a case conference with the claimant.

65. Mr Lowe logged the contents of the call 6 October in his contact record at page 305. This conversation appears to have covered a lot of things and the log also states that a case conference would be fruitful in her case, that the claimant was not in the appropriate frame of mind at present to return to work and with her other medical conditions Mr Lowe was uncertain what roles would be suitable for her when she did return. The claimant's evidence is that on 6 October Mr Lowe telephoned her to tell her the case conference would be happening and a letter will be coming out by post. She asks what this is about, and he tells her that it would be a meeting for us all to get together and discuss how she could get back to work. This is something that Mr Lowe thinks he did on 10 October. On balance we think it more likely that the claimant has confused two dates and we find that on 6 October the conversation is as set out in the log. As reflected in the log the call concludes that she is not in a frame of mind to return to work.

Case conference

66. Following this conversation 6 October Mr Lowe sent a further email to Ms Fee in which he again thinks that a case conference would be helpful. Ms Fee responds on the following day advising again that a case conference should be arranged. It concludes that the meeting is purely supportive it just needs to be between him and the claimant unless she wishes to have her rep present.

67. The text shows that Mr Lowe asked the claimant if she was free for a quick call on 9 October. Mr Lowe confirmed that he did not make a note of this conversation in the contact log. The claimant's recollection is that it was a repeat of what was said on 6 October and was therefore not only a pointless conversation but also harassment. She felt completely panicked. The claimant also recalls that she told Mr Lowe that she felt externally pressurised, did not know what to say and felt like she was under a microscope. The claimant also says that they discussed the format of the case conference and he replied that the conversation in the case conference would be just him and the governor, the letter was just generic. When she asked about long-term sickness what was considered to be long-term sickness, he replied we don't really put a time on these things. The claimant concludes that the omission of this call from the log was because Mr Lowe did not want to record the claimant's clear statement that she felt under a microscope. The inference is that this amounted to an indication he should stop the contact and the case management conference.

68. Mr Lowe cannot recollect the claimant making these comments to him, nor does he recollect the contents of this conversation. He was not aware that the claimant was distressed or felt pressurised by these calls or by the arranging of the case conference. It was his evidence that she could have said that she did not want to take part or for this to happen and those wishes would have been accommodated. We consider that if Mr Lowe wished to erase the record of the claimant's comment, he could have identified that a call occurred and omitted those words, and this is a more likely response than not recording anything. We find that he simply forgot to make the entry and there was no sinister agenda. If the claimant did say she felt under a microscope, this is not enough to amount to an instruction to cease contact and suspend the case conference and it would not reasonably be understood as such.

69. Mr Lowe explained that his motive for wanting to have a case conference was entirely to assist the claimant. He was asked why it was appropriate for the claimant with her diagnosis where it was not thought appropriate for M.O. Mr Lowe explained that he treated each case according to its own facts and there was nothing that could be done by the respondent to assist M.O. in returning to work at that particular point. She needed surgery and different treatment. In the claimant's case he was keen to find out if there was anything that he could do to assist the claimant to return. We note that the HR advice he had received was to carry out a stress assessment to identify any barriers to return, so there was a specific purpose best served by having such a meeting.

70. On 9th October Mr Lowe asks HR to confirm who will attend the case conference and Ms Fee passes the request to her colleague. Mr Ritchie.

71. Mr Lowe contacted the claimant again on 10 October by emailing her a copy of the letter about the case conference to take place on 25th of October and on 11 October she got a copy of the letter by post. The letter was based on an HR template (and so was generic) and said that the attendance management case conference was held for those who are long-term sick. It specified five objectives, ensuring individuals receive the right level of support from managers, highlighting services available, keeping up to date with individual progress and welfare, dealing with any concerns or queries and fears they may have and, in appropriate circumstances, discussing a return-to-work programme. The case conference was said to be attended by Mr Lowe, and a representative from HR and told the claimant she was able to invite the Federation or trade union staff support or a friend who was a serving member of the respondent if she wished to. The claimant considered that this letter was not as she believes he had described it to her on the 6th. It was not a chat between Mr Lowe, the governor and the claimant as she believed Mr Lowe had told her on the 6th, it included a representative from HR. She felt the case conference would be an ambush.

72. On 14 October Mr Lowe is advised at 13.56 that HR cannot attend. He therefore makes arrangements for a DI to join the meeting instead. He contacts the claimant after this and asked the claimant again if she is available for a call and this then took place. The record of contact has the claimant saying that she feels a bit apprehensive about the case conference and Mr Lowe trying to explain this to assist her return. She makes no more comment than that and we conclude that Mr Lowe could not reasonably be expected to understand that the claimant is really saying she does not want the conference to go ahead. He also notes that he told her that she could have a Federation rep present, but she declined at that time.

73. While the claimant believes Mr Lowe told her it would be him the gov and her on the 6th and the 9th of October, Mr Lowe did not know that until the 14th. Until then, as the letter said, he thought it would be him, HR and the claimant. He cannot have made this comment before the 14th. We conclude that until then the claimant thought she was facing a more formal meeting because of the inclusion of HR and the opportunity to bring a companion which may explain her anxiety.

74. The claimant explained to us today that she believed that a case conference was informal management action and would only be taken where there was a concern about inappropriate attendance levels. Mr Lowe said that the policy was a guidance only. The case conference was not any form of management action. Informal and then possibly formal action is taken where there are concerns about whether an individual needs to be absent as much as they are and is effectively used where there is a conduct issue tied into attendance. That was not the case for the claimant, this was a meeting to discuss how the respondent could assist her.

75. We read the policy this way. There is a section headed sickness absence management which sets out steps that include the case conference. There is another section headed Unsatisfactory attendance and this sets out formal and informal management action. This aligns with Mr Lowe's account and we accept his evidence supported by the policy that there was no management action taken or planned against the claimant.

Comment on the 14th October

76. The claimant recollects that on 14th October Mr Lowe also said that she will feel better as soon as she walked into a police station, the first day was always hard and always awkward then she would get into a routine again. The claimant considers that this was an inappropriate and insensitive thing to say to her. In likening return from depression to return from holiday is trivialising and belittling her condition. Mr Lowe's perspective was that he simply meant that it can be daunting to return to work after any period of leave and he was saying things he would say to anybody and is intending to be supportive. We accept he thought it was supportive.

77. On the same day, 14 October, Mr Lowe also asks the claimant to resend the emails that she had from the HR representative in relation to her night duties. These were documents that had previously been copied to Mr Lowe. The claimant duly sent them on but believes that the only reason that an hour after his first call that Mr Lowe will be looking for this documentation, which she already had provided, was to act in an intimidating way. We accept his evidence that he asked to ensure he had the right documents. There is no evidence of any motive to intimidate, the claimant simply makes an assertion of a negative motive.

78. On 18 October the claimant sends in a further fit note which signs her off until 27 November but then on 22 October the claimant handed in her resignation letter. This set out the events referred to above and explained that she had been made to feel helpless and as if her job was at risk because of these contacts. She felt treated differently from her work colleagues who had been unwell and was distraught about the way she been treated when she had wanted to invest in her career at the respondent. The situation had destroyed her confidence and she was devastated by the treatment. She felt was punished by pressurised calls one after the other.

79. The claimant's resignation was accepted, and her resignation process was dealt with by another manager. Mr Lowe was shocked and surprised by the claimant's resignation and the way she had characterised the contact that he had had with her.

80. We have set out above a relatively detailed account of the interaction between the claimant and Mr Lowe which forms the basis of the complaints. In summary, we find that on the face of the exchanges between the claimant and Mr Lowe based on the text messages there is nothing to indicate that the claimant was concerned or wished to push back. For example, our attention has been directed to the lack of emoji's in the texts as time goes on, but we do not conclude that the lack of these on text messages would reasonably put a line manger on notice of any feeling of pressure or a change in willingness to communicate. No negative emojis were used. We have found the respondent's witnesses to be credible and their testimony is supported by the documentary evidence. While we do not doubt that the claimant did feel as anxious and distressed as she says, we find that she did not indicate this and there were no signs from which a manager could reasonably have deduced the true state of her feelings.

Relevant Law

Disability

81. The EqA defines a 'disabled person' as a person who has a 'disability' — S.6(2). A person has a disability if he or she has 'a physical or mental impairment' which has a 'substantial and long-term adverse effect on [his or her] ability to carry out normal day-to-day activities' — S.6(1).

82. Under para 2(1) of Schedule 1 to the EqA, the effect of an impairment is long term if it:

- has lasted for at least 12 months
- is likely to last for at least 12 months, or
- is likely to last for the rest of the life of the person affected.

83. The time at which to assess the disability (i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act — *Cruickshank v VAW Motorcast Ltd 2002 ICR 729, EAT*.

84. The burden of proof is on the claimant to show that he or she satisfies this definition.

Direct discrimination

85. Direct discrimination is defined as

“(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.

.....

(3)If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.”

Discrimination arising from disability

86. S15 of the equality Act provides as follows

(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.

87. S26 defines harrassment as

(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.

.....

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.

Burden of proof

88. In Igen v Wong Ltd [2005] EWCA Civ 142, [2005] ICR 931, CA. remains the leading case in this area. There, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove — again on the balance of probabilities — that the treatment in question was 'in no sense whatsoever' on the protected ground.

89. The Court of Appeal explicitly endorsed guidelines previously set down by the EAT in Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR

1205, EAT, albeit with some adjustments, and confirmed that they apply across all strands of discrimination.

90. We reminded ourselves that the Court of Appeal confirmed in *Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867, [2007] IRLR 246, that a claimant must establish more than a difference in status and a difference in treatment before a tribunal will be in a position where it 'could conclude' that an act of discrimination had been committed.

Conclusion

91. We have considered the relevant law and applied this to our findings of fact. Taking the issues list as our guide we have first addressed the question of whether the claimant was at all material times a disabled person due to the physical impairments of early menopause. The respondent conceded that the claimant suffered from menopause at the material time and at that time she was not having any treatment so the effect of any such treatment does not arise. The disputed issue was whether the claimant suffered from any impairments which had more than a trivial adverse effect on her ability to carry out day to day duties.

92. We have found that the claimant has provided no evidence of any adverse effect on her ability to carry out day to day duties, not just an effect that is more than trivial. We conclude that an ability to work at night is not a day to day activity and in any event it is unclear to what extent the menopause, rather than the claimant's other conditions, impacted on this. We conclude therefore that the claimant was not disabled at the material time because of menopause.

93. Considering next the complaints of discrimination. We accept that the claimant felt as she has expressed in her resignation letter, it would be an extraordinary thing to throw up a job for which one has trained, taken exams and worked hard without feeling there is no other choice. However, we have also found that there is nothing in Mr Lowe's interactions, or Mr Christoforou's conduct that would reasonably create such concern.

94. The claimant relies on 4 matters to establish that direct discrimination occurred and because of her depression and /or osteoarthritis she was treated less favourably than either MO or a hypothetical comparator. The first is a complaint that Mr Lowe did not take the claimant seriously when contacting her by telephone during her sickness absence of September and October 2019. We have found no evidence that Mr Lowe did not take the claimant seriously, He contacted her frequently (the amount of the contact being a complaint made during these proceedings but not an agreed issue) and we can see that he was exercising his duties as a manager and acting in accordance with the respondent's policy. The claimant has failed to establish that the conduct occurred as alleged.

95. The second complaint is that Mr Lowe and Mr Christoforou failed to take the claimant seriously during the home visit on 30 September 2019. Mr Christoforou played almost no part in the home visit. Mr Lowe attended at the claimant's home, again in pursuit of his management obligations to support the claimant and manage absence. We have found no evidence that either one or both failed to treat the Claimant seriously on 12 th September. The claimant has failed to establish that the conduct occurred as alleged.

96. The third complaint is about Mr Lowe's comment made on 14 October about her feeling better when she came back and saw police station. It is accepted that this comment was made. We find that the comment was not made because of the claimant's disability either because of her depression or because of her osteoarthritis. It was intended to be a supportive comment recognising the difficulty all individuals can feel after an absence from the workplace. The complaint of direct discrimination on this ground fails.

97. The fourth allegation is that the claimant was invited to a case conference. This also occurred. The claimant relies on a named comparator M.O. On our findings of fact, M.O. was treated in the same way as the claimant and cannot therefore be a comparator. A hypothetical comparator would need to be relied upon. We conclude that any individual who was off sick for whatever reason would have been invited to attend a case conference where there was something useful that could be discussed, as was advised by HR in the claimant's case. We conclude that any hypothetical comparator would have been treated the same way; there was no difference in treatment. We also find that an invitation to such a meeting is a supportive step with no detriment and is not less favourable treatment in any event.

98. While we do not need to consider this, as we have found that the claims of direct discrimination fail for other reasons, we would have found that the respondent established an explanation for all the events that occurred which had nothing whatsoever to do with the claimant's disability. It was in pursuit of managing attendance.

99. Turning then to discrimination arising from disability. The claimant accepts that the something arising was sickness absence from August 2019 onwards which was certified as being for depression. The complaint is that Mr Lowe demanded the claimant engage in communication between 1 – 18th October, that this was unfavourable treatment and was because of the absence.

100. It is common ground that Mr Lowe contacted the claimant between 1 October and 18 October by text message and telephone. We conclude that he did not, however, "demand" the claimant engage in communication with him. He always asked the claimant whether she was available and made contact only when the claimant had agreed. The claimant has failed to establish that the conduct occurred as alleged.

101. Even if that were not the case, we would find that this contact was in pursuit of the absence management policy, that Mr Lowe dealt with the matter in an entirely appropriate way and that the contact was justified as a proportionate means of achieving a legitimate aim. We accept the legitimate aims set out by the respondent.

102. Finally, considering the claim for harassment, 2 matters are relied on. The first is a call on 26th September by Mr Christoforou. We have found no evidence that Mr Christoforou failed to take the claimant seriously when telephoning on 26 September 2019. He did so in response to a reasonable instruction by a more senior manager. He did so in pursuit of information which the respondent was entitled to have and which the claimant was obliged to give. The claimant has failed to establish that the conduct occurred as alleged and the claim cannot succeed on that basis.

103. The second ground relates to Mr Lowe's contact with her by text or telephone during the first week of October 2019 with questions about when she might be able to return to work. We are unclear exactly what period the claimant means and so have considered the first 2 weeks. The first week in October is from Tuesday the 1st through to the 7th during which there were two contacts. The second week being the 7th to the 14th and there were three contacts.

104. The first week the contact was to provide sick notes and arrange a catch up when there had not been one for a few weeks. We have found that this contact did not consist of questions about when the claimant could return to work but admin on fit notes and a catch up. This was also not about a return, but notes the claimant is not in the frame of mind at present to return to work. The claimant has failed to establish that the conduct occurred as alleged in week 1.

105. The contact the next week was to arrange a case conference. Any questions were about that and how it would be constituted and when it would occur. Its purpose, as the invitation letter specified, encompassed five aims, one of which, if appropriate, was to consider a return to work. We have accepted Mr Lowe's account that the meeting was intended to be supportive. Contact in this week was not to question about return. The claimant has failed to establish that the conduct occurred as alleged and the claim cannot succeed on that basis.

106. We also conclude that in any event, even if the contact had been to question the claimant about return, it would have been reasonable for the respondent to ask this. If the complaint is about the regularity of the contact (which is not specified as an issue), while the policy set out contact should be every 2 weeks at this point, we accept that it is a policy, not a set of rules and conclude that it was reasonable and in pursuit of the respondent's policy on managing absence to make the contacts that occurred. Finally, it is not reasonable for the claimant to perceive such conduct has the effect of creating an intimidating or hostile environment that could amount to harassment

107. For all of these reasons the claims fail in their entirety.

Employment Judge McLaren
Date: 13 January 2021