EMPLOYMENT TRIBUNALS

Claimant: Mr D Sideris

Respondent: National Crime Agency

Heard at: Manchester **On:** 24-27 October 2022
30 October – 6 November 2023
8 and 14 November 2023
(in Chambers)

Before: Employment Judge McDonald
Ms F Crane
Mr I Taylor

REPRESENTATION:

Claimant: In person
Respondent: Miss V Brown of Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaints of direct sex discrimination fail and are dismissed.

2. The claimant's complaint of indirect sex discrimination fails and is dismissed.

3. The claimant's complaints that he was subjected to race related harassment fail and are dismissed.

4. The claimant's complaints that he was subjected to sex related harassment fail and are dismissed.

REASONS

Introduction

1. The claimant was appointed as an Officer Trainee on the respondent's Initial Operational Training Programme ("IOTP") from 2 December 2019. His contract was terminated on 28 January 2021. The claimant says that that decision to terminate his contract and the treatment he was subjected to while on the IOTP was discriminatory and amounted to harassment. The respondent denies the allegations. It says that the claimant's contract was terminated because he did not meet the standards required on the IOTP.

The hearing

2. The case had initially been listed to be heard over 5 days. Due to lack of judicial resources the hearing was initially reduced to 4 days. We dealt with preliminary matters at the start of Day 1 and spent the remainder of that day reading the witness statements and documents in the case.

3. At the start of Day 2 we dealt with a further preliminary matter which had arisen from our reading of the papers in the case. We started hearing the claimant's evidence late in the morning of Day 2.

4. On Day 3 we heard the remainder of the claimant's evidence. We sat beyond the length of the usual hearing day (finishing at around 5.00pm) to ensure that the claimant's evidence was completed on that day.

5. On Day 4 the claimant did not attend the Tribunal. Instead, he emailed to apply for an adjournment of the hearing on the basis that he was suffering from migraine. His email explained that this had resulted from the unplanned length of time his cross examination took. He said that that left him as a litigant in person unable to be present and continue with the cross examination of the respondent's witnesses which was due to start on Day 4. The respondent's position on the application was neutral - it neither objected nor consented to it. We decided that it was in accordance with the overriding objective to grant the request for an adjournment. We ordered the claimant to provide written details of his illness and its symptoms within 7 days together with any supporting medical evidence. He did so.

6. We listed the adjourned hearing for 4-6 January 2023. We listed a hearing in chambers on 7 March 2023 to allow time for deliberation. We listed a remedy hearing on 4 April 2023 if required.

7. On the respondent's application we ordered an updated Schedule of Loss to be provided by 2 December 2022. We also ordered that a witness from the respondent provide a statement regarding emails the claimant suggested was missing (see Preliminary Matters at para 19 onwards) by 18 November 2022.

8. The adjourned hearing on 4-6 January 2023 was postponed at the respondent's request due to Miss Brown's ill health. Unfortunately, difficulties in

finding a date when all parties and the Tribunal panel could reconvene meant that the final hearing did not restart until 30 October 2023.

9. On Days 5-7 (the first 3 days of the re-convened hearing starting on 30 October 2023) we heard the respondent's witnesses' evidence. On Day 5 we heard the evidence of Mark Spoors ("Mr Spoors") who conducted the probation review meeting at which the decision to dismiss the claimant was taken. On Day 6 and the morning of Day 6 we heard the evidence of Ian Craven ("Mr Craven"), the claimant 's direct line manager. On the afternoon of Day 6 we heard the evidence of Charles Lee ("Mr Lee") who was the claimant's senior line manager.

10. On Day 8 (Monday 6 November 2023) we read the written submissions provided by the parties and then heard their oral submissions.

11. The Tribunal met in chambers on 8 and 14 November 2023 to deliberate and make our decision. The Employment Judge apologises to the parties that other judicial work and his absences from the Tribunal have led to a delay in finalising this Judgment and sending it to the parties.

Issues

12. Employment Judge Benson had identified the issues with the parties at the preliminary hearing on 14 December 2021. At the start of this hearing the parties confirmed that the List of Issues was still accurate. It is included as an Annex to this Judgment.

13. During his oral submissions on Day 8 the claimant suggested that the decision to dismiss him was a way of penalising him for having brought forward accusations of discrimination. The Employment Judge explained to the claimant that that appeared to be a complaint of victimisation under s.27 of the Equality Act 2010 and that his current claim did not include such a complaint. If the claimant did want to pursue a complaint of victimisation under s.27 he would need to apply to amend his claim. Miss Brown accepted that there was no rule against a party applying to amend their claim even at a late stage in the proceedings.

14. The Employment Judge explained the law relating to permission to amend to the claimant. The Employment Judge explained that the central question was whether the prejudice to the claimant of not allowing the amendment outweighed the prejudice to the respondent of allowing it. The Employment Judge indicated that where an application to amend was made at a late stage in a case (and particularly after evidence had been given), the Tribunal would in particular need to ask itself whether there was prejudice to the respondent in allowing an application to amend which changed the basis of the claim against it.

15. The claimant finished his submissions on Day 8 at around 1.00pm. We decided to allow the claimant until 14:20 to put in writing any amendment he wanted to make to add a victimisation complaint. We explained that the claimant would need to identify the protected acts relied on in the victimisation claim and which unfavourable treatment the claimant said was because of a protected act or acts. The Employment Judge also referred the claimant to the guidance notes on amendments in the Presidential Guidance on General Case Management. We

indicated that we would reconvene at 14:30 and would then hear from Miss Brown whether the respondent was at that point in a position to deal with any application to amend by the claimant.

16. The claimant during the break emailed the Tribunal to confirm that he was not applying to amend. While believing that he did have a good case for victimisation, the claimant said he felt that he had provided all relevant evidence and he did not want to prolong the hearing further.

17. In the absence of any application to amend, therefore, the issues that we needed to deal with remained those set out in the List of Issues in the Annex.

Preliminary Matters

Redactions

18. On the morning of Day 1 of the hearing we considered an application by the respondent for redaction of the name of certain police operations referred to in the claimant's witness statement. After hearing from both parties, we ordered that the names of the operations be represented by an initial. We did so following the guidance given by the Employment Appeal Tribunal in the case of **Frewer v Google UK Limited & Others [2022] EAT 34**. We gave oral reasons for our decision at the hearing. Neither party requested them in writing.

Missing emails

19. At the start of Day 2 we raised with the parties an issue arising from the claimant's witness statement which we had read on Day 1. In it the claimant referred to a number of emails, some of which he quoted in his statement, which he said the respondent confirmed were not included in the Tribunal bundle. Miss Brown for the respondent explained that those emails could not be found. The Tribunal were concerned by this because the claimant's explanation was that he had cut and pasted those emails into his grievance which was lodged on 9 December 2020. The emails were therefore in existence at that point. Based on the extracts quoted in the claimant's witness statement, the Tribunal were satisfied that the documents were relevant in the sense that they were relied on by the claimant as part of his case.

20. Given our concerns we asked for further information on this and for the respondent to clarify what steps had been taken to seek to obtain the relevant emails. We asked for that information by the afternoon of Day 2.

21. In the meantime, we decided it was in accordance with the overriding objective to start hearing the claimant's oral evidence. Miss Brown confirmed that she would be able to start cross examining the claimant without needing to refer to the emails. She conceded that in the absence of the emails themselves she was not in a strong position to contradict what the claimant said was in them. She confirmed that the respondent was not suggesting that the claimant had made up any quotes from emails but was concerned that the claimant might have been selective in the extracts quoted. Miss Brown accepted that she would (in the absence of the emails themselves) have to rely on cross examination evidence or the evidence given by the respondent's own witnesses to challenge the claimant on that. We decided that

there was no prejudice to the claimant in proceeding since he was aware of the contents of the emails having quoted them in his timeline. The evidence we heard on Day 2 did not involve reference to any of the "missing" emails.

22. The further information we had requested about the steps taken by the respondent to obtain the "missing" emails was not provided on the afternoon of Day 2. However, on the morning of Day 3 the respondent provided a supplementary bundle. That consisted of 36 pages of emails, some of which were redacted. They accounted for some (but not all) of the emails which the claimant had referred to in his witness statement but which were missing from the main hearing bundle.

23. Having read the supplementary bundle, we considered whether we should proceed with the claimant's evidence on Day 3 in the absence of the explanation for why the emails in the supplementary bundle were not included in the main hearing bundle. We decided it was in accordance with the overriding objective to continue to hear the claimant's evidence. We decided there was no prejudice to the claimant because he was aware of the content of the relevant emails having quoted them. We decided that any issue about the impact on the credibility of the respondent's witnesses could be dealt with in cross examination of those witnesses. That would enable him the claimant to focus on giving his cross-examination evidence before turning to the question of the missing emails.

24. Mr Spoors provided a witness statement dealing with the issue of the "missing" emails on 18 November 2022. He was cross examined about that by the claimant as was Mr Craven. We set out our findings about the issue in the section on witness credibility at paragraph below.

Evidence

Documents

25. The final hearing bundle consisted of 928 pages. As we have explained above, on Day 3 of the hearing the respondent produced a supplementary bundle. Page numbers referred to in this Judgment are pages in the main hearing bundle. Page numbers referred to as "SB[number]" are pages in the supplementary bundle.

Findings on credibility

Claimant's credibility

26. For the respondent, Miss Brown submitted that the claimant's insistence on "prosecuting his case" damaged his credibility. She cautioned against the Tribunal taking the confidence of the claimant's recollection as indicative of the reliability of his evidence. We accept that the claimant's evidence was sincere in the sense that he clearly believed it. However, we also accept that the claimant's commitment to his narrative of events resulted in him being at times unable or unwilling to accept evidence which contradicted it or to accept interpretations of events which were more consistent with that evidence than with his narrative. That did damage the reliability of his evidence.

Credibility of the respondent's witnesses

27. As we explained in the preliminary matters section above, there was an issue in this case as to whether or not there had been a deliberate failure by some or all of the respondent's witnesses to disclose relevant emails. As we have recorded, a supplementary bundle of documents was provided on Day 3 of the hearing which included emails referred to by the claimant in his witness statement but not included in the main hearing bundle. Mr Spoors gave evidence on this issue in his second witness statement dated 18 November 2022 made in response to our Order of 27 October 2022.

28. We found Mr Spoors to be a credible witness and his evidence to be reliable. We accept his evidence that there are three levels of email storage across the respondent. The first is storage of emails in an individual's Outlook inbox. Individuals employed by the respondent are encouraged to regularly move emails from their Outlook account to other folders. Level 2 is called the Enterprise Vault. We accept Mr Spoors' evidence that after 12 weeks (or 4 weeks if emails are over 1 MB in size) emails are automatically archived to the Enterprise Vault. That means they are automatically deleted from the individual's inbox. However, staff and officers can search their own Enterprise Vault to retrieve previously deleted emails. Level 3 is "the Journal". That is intended to provide a long-term backup for information or material.

29. Mr Spoors' evidence, which we accept, was that as of April 2020 a two year marker had been placed on the Enterprise Vault which meant that after that date any email would no longer be available in an individual's Outlook account or the Enterprise Vault. It would instead only continue to exist on the Journal. Mr Spoors explained that he was now aware that emails could be retrieved from the Journal if they relate, for example, to a live operation or, of relevance to our case, a civil case against the respondent. A request to retrieve material from the Journal must be reviewed by a Grade 1 manager and if approved by them, the search is undertaken by the relevant department and emails are restored to the Outlook account of the person making the request.

30. We find that as a result of the Tribunal proceedings, on 25 October 2022 (Day2 2of the hearing) Mr Spoors contacted the respondent's Chief Data Office and the existence and process for retrieving items from the Journal was explained to him. We accept Mr Spoors' evidence that this was the first time he was aware of this. On balance we find that Mr Lee and Mr Craven were also not aware of the Journal or the process for retrieving otherwise deleted emails from it. We accept Mr Spoors' evidence that during the late afternoon of 25 October, having been authorised a search on the Journal, he was sent 102 pages of documents. He reviewed those with Miss Brown, counsel for the respondent, and removed duplicate documents already in the hearing bundle and two documents which were not relevant. That resulted in the 36 page supplementary bundle. The original version of that bundle was heavily redacted and a revised version was then provided. A further revised version (which we used at the hearing) was provided on Wednesday 26 October. That version was only different in one respect, namely that an operation name within the document which should have been redacted had not been.

31. We did find it surprising given the nature of the respondent's work that senior officers did not know about its own email retention policies. However, we accept Mr Spoors evidence that that was the case. We also accept that there is truth in the

points made at paragraph 18 of Mr Spoors' witness statement, which is that the outcome of any search of emails or other documents is only as good as the search terms used. We have ourselves during the course of this hearing found that emails referred to as being sent at certain times are captured as being at other times when received.

32. We also accept Miss Brown's submissions that it is inherently implausible that senior Law Enforcement Officers would risk their careers by deliberately deleting emails as part of a cover-up. We also accept her submission that the contents of the supplementary bundle are not entirely helpful to the claimant. In short, this is not a case where the supplementary bundle includes a "smoking gun" email which significantly impacts on our decision, e.g. by providing evidence sufficient to pass the burden of proof in relation to an allegation or by significantly altering the context of emails already in the main Tribunal bundle. On balance, while it was clearly unsatisfactory that some relevant emails were not included originally in the hearing bundle, we do not accept the claimant's submission that there was a deliberate attempt to conceal the emails.

33. In terms of the respondent's witnesses' credibility more generally, we found Mr Spoors to be a credible witness and his evidence to be reliable. We also found Mr Lee to be a credible witness and his evidence to be reliable. For the most part, with the exceptions we set out in our detailed findings of fact, we found Mr Craven to be a credible witness and his evidence reliable.

34. That means that, in general (but not always), where there is a conflict of evidence between the claimant and the respondent's witnesses, we preferred the evidence of the respondents' witnesses.

Findings of Fact

35. In this section we set out our findings of face based on the oral evidence we heard and the witness statement and documents we read. We have taken into account the parties' submissions on the evidence. We have not made findings of fact about all the matters about which we heard evidence, only those necessary to make decisions on the issues we are deciding.

Background

36. The respondent is a law enforcement agency. Its work primarily involves dealing with serious and organised crime. The claimant joined the respondent as a Trainee Investigator in December 2019. He was employed on the IOTP and based within the North West Hub ("the Hub") in Warrington. At the time of the events giving rise to the claimant's claim, all the trainees at the Hub had been incorporated into a newly formed "development zone".

37. At its height the development zone was made up of 36 trainees, six Grade 4 line managers and four or five experienced grade 5 investigators. Mr Craven was a Grade 4 supervisor. He reported to Mr Lee who was a grade 3 Operations Manager. The trainees in the development zone were split into "pods". Mr Craven's pod consisted of one experienced Grade 5 investigator and 5 trainees, including the claimant. There were 3 male and 2 female trainees in Mr Craven's pod.

38. The claimant is Greek and is a non-UK national. He is married and has 2 children. At the time of the events giving rise to the claim they were aged around 2 ½ and 7.

The IOTP, exams and assessment

39. The IOTP is designed to provide trainee investigators with the training and development required to achieve PIP2 accreditation. PIP is a national standard within policing. PIP2 is equivalent to a detective in a Police Force. It involves exams but also learning "on the job" by carrying out tasks assigned to the trainees on live operations. It lasts 24 months.

40. Mr Lee's team at the Hub was almost exclusively responsible for investigating referrals made by the UK Border Force at North-West ports. Those referrals ranged from offensive weapon possession offences to long-running money laundering investigations involving large numbers of suspects. That kind of work was regarded as perfect for trainee investigators because they were picking up more "reactive" cases that the respondent was mandated to take on such as investigating a seizure of evidence.

41. In broad terms, the work done by trainees was split into 2 categories. "Casework" was generally carried out in the office and could involve managing unused material for disclosure; reviewing the contents of seized electronic devices; compiling information into reports and collating statements, exhibits and unused material into a set standard to send to the CPS. "Casework" could also involve work out of the office such as delivering or collecting evidence or exhibits.

42. "Deployment" took place "out on the ground", and involved arresting and interviewing suspects, searching premises and conducting "outside enquiries" such as seizing CCTV and taking witness statements. Deployments could involve a trainee being required to stay beyond their normal shift or in some cases might require an overnight stay.

43. The first phase of the IOTP consisted of 2 exams. The first was the Specific Powers Exam ("SPE"). That was taken after 3 months. The second was usually the National Investigators Exam ("NIE") taken 3 months later. However, because of COVID the NIE that the claimant and his cohort was due to sit in June 2020 was postponed. In its place the respondent created a Partial Powers exam ("PP"). The the first 6 months of the IOTP were predominantly spent revising for the SPE and NIE while assisting the team with simpler tasks.

44. Trainees who passed the NIE would be designated with the appropriate powers to deploy, e.g. the powers of a constable. The trainees that passed the PP would gain partial police powers that would allow them to become involved in the evidential chain on a case. It expanded the range of tasks which they could be allocated.

45. To complete the IOTP successfully trainees had to demonstrate they had met a number of competencies through End Point Assessments ("EPAs"). Trainees were required to complete candidate reports which set out the tasks they had undertaken. Those reports built into a portfolio of evidence demonstrating their competence.

Passing the PP and the NIE so that the trainee could be deployed and be allocated an extended range of tasks was important because without doing so the trainees could not demonstrate the full range of competencies required to successfully complete the IOTP.

Contractual terms, working hours, Alternative Working Arrangements, Flexi and TOIL

46. The claimant's terms and conditions of employment were set out in a letter of appointment dated 22 August 2020 and his contract of employment of the same date (pp.219-234).

Terms of employment and working hours

47. The claimant's contract (clause 20.1) confirmed that his role as an Officer Trainee was temporary whilst he undertook the IOTP. It provided that if he failed to satisfactorily complete the IOTP within 24 months of commencing, subject to exceptional circumstances, his employment with the respondent would be terminated. The same clause provided that if his contract was due to be terminated, the respondent might, in its absolute discretion, offer him a suitable Grade 6 role as an alternative to termination.

48. As a trainee officer, the claimant was subject to a 12 month probationary period. That could be extended by the respondent if concerns regarding his performance were identified or if he was absent from work for extended periods for any reason. Clause 4.3 made it clear that an extension of the probationary period would not extend the IOTP which was limited to 24 months. The respondent could terminate the contract during the probationary period on one month's notice.

49. The claimant's contractual working hours were 37 hours per week excluding lunch breaks (increasing to 40 hours per week when the SPE and NIE were passed). The hours of work were to be directed by his manager. His letter of appointment confirmed his place of work as "Warrington".

Alternative Working Arrangements

50. Clause 8 of the claimant's contract dealt with flexible working. It confirmed that the respondent operated a Working Arrangements and Attendance Management Policy and an Alternative Working Arrangements Procedure ("the AWA Policy") which applied to all of the respondent's officers. Any application to work flexibly would be considered under that policy.

51. The AWA Policy (pp.194-212) was primarily concerned with formal requests for alternative working arrangements. It set out the procedure to be followed for making such a request with a link to the relevant application form and details of the process and timelines to be followed.

52. Para 1.9 of the AWA Policy provided that informal local arrangements outside of the formal process might be agreed between an officer and their line manager. It suggested that might be suitable, for example, where the requirement was temporary or occasional such as caring for a relative with a terminal or fluctuating medical condition, or where remote working takes place.

53. Paragraph 1.4 of the AWA Policy said that not all roles may be suitable for some arrangements. Although the claimant's appointment letter also confirmed that the respondent supported alternative working arrangements, it warned that the IOTP had been developed around standard working hours and a standard working week so that there was likely to be limited opportunity to accommodate AWA during the duration of the IOTP. The respondent accepts that it applied a PCP of not allowing formal alternative working patterns for those undertaking the IOTP.

Flex and TOIL

54. The claimant suggested that Mr Craven had refused to allow him to take flex leave or TOIL. We find that TOIL (time off in lieu) was only available to officers who were deployable, i.e. those who had passed the relevant exams and undergone the relevant training to enable them to be deployable. The reason for that was that TOIL was paid at an enhanced rate. We find that Mr Craven had (on checking the claimant's timesheets in March 2020) noted that the claimant had been accruing TOIL as opposed to flex leave. We accept that the claimant was not allowed to take TOIL but find that that was because he was not deployable. We find the lack of access to TOIL was nothing to do with the claimant's sex but reflected the respondent's standard procedure for non-deployable officers. His comparator, Ms Evans, became deployable before the claimant because she passed the relevant exams. That meant she had access to TOIL before the claimant but that was not because she was a woman but because of her deployable status.

55. When it comes to flex, we find that Mr Craven did allow the claimant to take flex. That is confirmed in the probation review entry for 12 March 2020 in the second quarterly review where Mr Craven confirms that he has adjusted the claimant's timesheet to show 1½ hours flexitime. We find in practice that the claimant would not have accrued significant flexitime because of the restrictions on his working hours arising from his childcare commitments. We do not find that Mr Craven in some way operated a blanket ban on the claimant taking flex leave. We do find that it was made clear to the claimant (for example in the email on 24 June 2020) that if he was going to work extra hours, he should run that past Mr Craven or Mr Lee. We find that a reasonable management instruction, and there was no evidence that it was related to or because of the claimant's sex.

56. We do find that one reason why Mr Craven raised concerns more than once about the claimant's habit of not filling in his duty sheets correctly or doing so retrospectively (putting in standard working hours rather than the hours actually worked) was that that would make it difficult for the claimant to keep track of his flexitime (and/or TOIL when deployable) in the future when he was working longer hours.

Management and supervisory structure

57. Mr Craven was the claimant's line manager and responsible for the day-to-day management of the claimant. That meant he was responsible for overseeing the claimant's duty sheets, start times, annual leave requirements and other administrative elements as well as supporting him through the IOTP.

58. The Operational Standards, Capability and Assessment Unit ("OSCAU") was a department responsible for driving up and maintaining standards across the respondent. Trainees were aligned to an OSCAU officer when they started on the IOTP. Their OSCAU was responsible for signing off each element of the trainee's portfolio and ultimately recommending that they be accredited as a PIP2 level investigator. The OSCAU would also review the candidate report alongside corroborating material to check that they demonstrated the competencies required. We find that the OSCAUs worked closely with the trainee and with the trainee's line management to identify gaps in a trainee's portfolio and identify the roles or tasks they needed to undertake to be able to demonstrate the required competencies in their EPAs.

59. Mr Andrew Brown ("Mr Brown") was appointed as the claimant's OSCAU officer. While it was Mr Craven's role to provide day-to-day management of the claimant, it was Mr Brown's role to independently assess the claimant on the technical and skills-based qualities required to progress along the IOTP.

60. We find it was part of Mr Craven's role to manage the allocation of tasks to trainees in his pod. We find he would be approached by investigators with tasks to be delegated. He would assess the task and check the availability of his team. We find that deciding who should be allocated the task involved balancing the needs of trainees against those of the respondent. A trainee might need to complete a particular kind of task to demonstrate a competency in an EPA. However, a task might come with a deadline attached. Failure to meet the deadline could be reputationally damaging for the respondent as well as potentially prejudicing the criminal proceedings to which it related. That meant the availability of trainees was also a relevant factor.

61. We find that once Mr Craven had decided that a task should be delegated to a particular trainee or trainees, it was not his role to actively supervise completion of that task. That was the role of the investigator who had delegated the task. Mr Craven might step in if asked to do that by the investigator or if his advice was sought by a trainee.

62. When investigators delegated tasks to a trainee it was that investigator's responsibility to provide instructions on completion of the task. They would also provide feedback to the trainee's line manager on how the person had completed the task. OSCAU officers would also provide feedback. We find that the majority of the feedback provided to the claimant by Mr Craven was feedback from other investigators or OSCAU officers rather than feedback on tasks the claimant had undertaken under Mr Craven's direct supervision. Mr Craven's role was to communicate that feedback to the claimant, whether it was positive or negative.

63. The Grade 4 supervisors, OSCAUs and Mr Lee had weekly discussions in which they discussed upcoming casework and deployments for trainees and trainee performance during the previous week. Every quarter Mr Lee, the Grade 4 supervisors and OSCAUs also discussed each trainee's performance and progress so far. That "quarterly sitrep" fed into the trainee's quarterly review The quarterly sitreps involved all those present being encouraged to give feedback on interactions they had had with a trainee, whether they were their allocated Grade 4 Supervisor or OSCAU or not. We find the aim was to ensure a collective approach to assessing

performance, recognising that a trainee might have completed tasks for a supervisor who was not their line report.

64. The quarterly reviews took place between the trainee, their Grade 4 supervisor and Mr Lee. They covered progress within the IOTP including exams, deployments, casework, training and adherence to the respondent's values. The reviews were recorded in a Trainee Probation Review Form. For each review meeting the manager would complete a "Progress log" section of that Form. Each such section allowed space for a summary of performance during the relevant period, manager's comments, trainee's comments and actions agreed. In the claimant's case, there were 2 quarterly reviews before the Performance Improvement Plan ("PIP") was implemented. That meant that only Progress Log 1 and Progress Log 2 were completed on his Trainee Probation Review Form (pp.446-481).

Findings of fact about the claimant's comparator

65. The claimant named another trainee, Jayne Evans, as his actual comparator for his direct sex discrimination complaints. We find that she had started the IOTP a few months before the claimant. She had children but they were older than the claimant's children (12-15 as opposed to 2 and 6). We heard no evidence that there were concerns about Ms Evans performance on the IOTP, in contrast to what we find to have been genuine concerns held by Mr Craven, Mr Brown and Mr Lee. She was not placed on a PIP and passed her probation.

66. It was part of the claimant's case that Ms Evans was afforded more flexibility in terms of adjustments to working patterns than he was. Ms Evans was line managed by Ms Greener rather than Mr Craven. We did not hear from Ms Greener. However, based on the evidence of Mr Craven and Mr Lee, we find that no formal alternative working arrangements were agreed for her while she was on the IOTP. We find that she was able to be more flexible in her availability than the claimant because of their different childcare demands. We find that when she did require flexibility (e.g. when her children tested positive for COVID) she used annual leave, TOIL or Flexi to cover her absence. She was able to use TOIL before the claimant because she passed her exam and became deployable before him (and so eligible to claim TOIL when deployed).

The impact of COVID and the need for alternative working arrangements

67. The events giving rise to the claimant's complaints happened when the COVID pandemic was happening and when various levels of lockdown or restrictions were in place.

68. Those working at the Hub (including trainees such as the claimant) were classed as key workers. From December 2019 the claimant and his cohort had been given study time in order to pass the SPE. At that point the trainees would usually come into the office around three days a week, studying at home for the remainder of the time. The intention was for them to learn "by osmosis" from the more experienced trainees and investigators, to get a feel for the office and settle down in a working environment.

69. However, from the onset of COVID in late March 2020 the vast majority of staff worked remotely unless they had to attend the office on deployments. We accept Mr Lee's evidence that the team continued to be extremely busy during the lockdowns. The trainees were still required to carry out tasks on a regular basis. During this time increased communication by email or telephone became important because of the lack of face-to-face contact. We find that was a particular concern in relation to trainees because of the risk of losing the benefits of the "learning by osmosis" that came from working alongside more experienced investigators.

70. The claimant's wife ("Dr Sideris") is a Clinical Psychologist with the NHS. Dr Sideris is a senior member of her department, and her role is a demanding one. She is responsible for safeguarding high risk individuals with severe mental health problems. Most of her clinical practice involved patients who are at significant risk of self-harm and/or are on suicide watch.

71. Because of her role, Dr Sideris was also a key worker. She continued with face-to-face treatments throughout lockdowns. Those lockdowns and the pandemic led to an increase in the volume of her work. That was both because of the increased anxiety they generated in her patients and because colleagues were drafted away to help in other parts of the NHS. We find that led to Dr Sideris working extended hours on some days, sometimes at short notice.

72. As we discuss from para 84 onwards below, from the end of March 2020 the impact of lockdown and the resulting limited availability of childcare provision meant that the claimant and his wife faced significant challenges in juggling the demands of childcare and their respective jobs. That was particularly the case because their children were young and could not be left unsupervised.

Events from December 2019 to early April 2020 – the first quarterly review and Mr Craven's concerns

The first quarterly review and Mr Craven's initial concerns

73. The claimant's first quarterly review was on 13 January 2020. At that point the claimant had been in his role for around 5 weeks. Mr Craven noted that the claimant had settled in well. There were no concerns identified with the claimant's performance other than one instance of use of inappropriate language in the team environment. That was raised and dealt with at the meeting. The claimant's main focus during this period was on studying for the SPE which he took and passed at the end of March 2020.

74. By the end of March 2020, however, we find Mr Craven did have concerns about some aspects of the claimant's performance. The claimant had made errors in completing his duty sheets and had failed to email Mr Craven his start and finish times as instructed (the claimant had only emailed his start times). He was also concerned about the difficulties the claimant had in using the VPN (Virtual Private Network). We find the claimant did not accept the criticism as entirely valid. He accepted he had made mistakes in relation to some things like the duty sheets but had corrected the mistakes when they were pointed out. We find that he felt the issue about accessing VPN had been used against him unfairly. He felt he had legitimately asked for help from peers and then Mr Craven and then been penalised

for doing so despite the whole issue being a one-off and very short term one. We find that Mr Craven's view was that the claimant appeared to struggle to understand simple and clear instructions. He felt that 4 months into the IOTP the claimant should have been able to pick up how to do things himself much faster than he was doing.

The early morning reporting requirement (complaint 20.10 in the List of Issues)

75. We find Mr Craven's concerns increased from the end of March and into early April 2020 when the onset of Covid 19 meant most of the respondent's employees worked remotely. That put an increased emphasis on good communication. In particular, it was imperative for Mr Lee and other senior managers to know which staff were available to be allocated tasks and to be deployed.

76. Senior management met daily at 8.15 a.m. to talk through staff availability, current tasks undertaken and any isolation issues. Mr Craven had to update a spreadsheet of staff availability every morning so that decisions at that meeting were based on up to date information. To enable him to do that, he had instructed his line reports to update him by 07:20 each morning on the work they had on for the day and whether their circumstances had changed due to Covid 19. The claimant accepted in an email exchange with Mr Craven on 3 April 2020 that he had failed to do comply with that requirement and apologised. He had misunderstood what was required and believed that unless there were any changes the requirement was to update only on Monday and Friday.

77. We find Mr Craven viewed this as another example of the claimant failing to understand straightforward instructions. In their email exchange of 3 April 2020 about the text message issue (pp.246-251) Mr Craven voiced his frustration that he was having to chase the claimant up. He also warned him that the job would get "100% harder" over the forthcoming months and of the importance of "getting the little things right at the beginning" to set him up for times when the claimant's flexibility and accuracy had to be completely relied on.

78. We find that that that 3 April 2020 exchange illustrates another issue which we find caused Mr Craven some frustration, namely an unwillingness on the claimant's part to accept feedback without feeling the need to challenge it (often in some detail). The claimant in that exchange challenged the suggestion that problems were "reoccurring" and set out why he disagreed. His view was that he had fixed any issues raised with him so they were not "reoccurring". We find that in Mr Craven's view that missed the point which was that the errors or misunderstandings should not have happened in the first place. He did not deny that errors were corrected when pointed out, but they were "reoccurring" in the sense that there was a pattern of a failure to understand and comply with what he viewed as straightforward instructions.

79. As a result of this exchange, it is accepted that the claimant started providing updates to the WhatsApp group daily at 6.30 a.m. It is also accepted that Mr Craven told him on the team WhatsApp not to send the updates so early because it disturbed colleagues who were sleeping. We accept Mr Craven's evidence that he had been contacted by Matt Davy ("Mr Davy"), an experienced Grade 5 investigator, to point out that he was on call and had his phone by his bed so the early messages from the claimant were disturbing him unnecessarily. We accept Mr Craven's

evidence that he would not have used the word "overzealous" as the claimant suggested nor do we find that Mr Craven was "mocking" the claimant by putting that message on the group WhatsApp. We find that was simply the most logical way of conveying the message to the claimant and the wider team.

80. The claimant raised this issue in his response to the comments provided at the second quarterly review (p.456) but we find he did not suggest that it was in any way related to his sex. At most, we find, he raised it as evidence of being unfairly criticised for what he saw as attempting to follow instructions given by Mr Craven.

April 2020 – Mr Craven's further concerns and the claimant's working arrangements

Concerns about the quality of the claimant's work

81. Mr Craven's concerns about the claimant's performance increased during April. On 16 April the claimant failed the PP. We find that Mr Craven's view was that the claimant had had in excess of the recommended 37 hours work study time to prepare for the exam.

82. We accept that by this time Mr Craven had genuine and serious concerns about the claimant's performance in relation to the Mackay Disclosure Task. That was a task relating to an urgent disclosure exercise for a court case involving the extradition of a subject from Europe to the UK. Because the task had tight deadlines the majority of the trainees became involved in it. Mr Hughes had made it clear in an email that if the disclosure tasks were not completed on time or correctly it could cause the respondent reputational damage. That email was relayed to all staff involved in the task so that they could have no doubt as to the significance and importance of what they were doing. Ms Mackay, who was an experienced Grade 5 investigator, and Ms Macintosh, a Grade 4 supervisor on the team, were also involved in the task, and they allocated the work to the trainees. They kept Mr Craven informed of progress on the work completed by his trainees. That included the claimant. Their feedback was that communication and updates from the claimant were minimal and the work he completed was of a poor standard.

83. Mr Craven was satisfied (we find genuinely) that when allocating that task Ms Mackay and Ms Macintosh had given all trainees comprehensive instructions on the work required and the deadlines. They had also made it clear they required regular updates on the progress of the work because of the urgency and importance of it. There was an expectation on trainees that they would ask questions to clarify any points if they were unsure about anything. The feedback Mr Craven received was that the claimant did not communicate with the team effectively and the work he produced was of such poor quality that the majority of it had to be redone. The claimant had said in response that he felt like he was "drowning in a puddle of water". Ms Mackay had offered the claimant support and guidance but was unsure if they helped him or frustrated him even more.

The claimant's working and childcare arrangements

84. We find that by April 2020 the claimant was struggling to maintain the quality and output of work required on the IOTP and revising for his exams. We find that a significant contributing factor was that he was by early April 2020 shouldering the

majority of the childcare needs of his family during the working week. His wife worked long days (until 10 p.m.) on Mondays and Wednesdays and a standard working day on Tuesday. She worked half days on Thursdays and did not work on Fridays. The claimant's children were young which meant it was very difficult for him to work effectively on those days when he was caring for one or both of them at home. There was sometimes nursery care available on Wednesdays but that was unpredictable because it depended on staff availability at the nursery. His mother in law was no longer able to look after the children on Monday because of the instructions to older people to self-isolate. In practice, that meant the claimant could not work Mondays or Wednesdays. He also needed to take time out from the working day for drop off and pick up from school on Tuesday and Thursday morning.

85. We find Mr Craven was aware of these issue from April 2020. His evidence, which we accept, was that he allocated the claimant what he saw as manageable tasks but that there were pressures which meant that it was not always possible for Mr Craven to be as flexible as the claimant might have wished. Requests for assistance could come in at any time and could be assessed as urgent or have longer deadlines. It was imperative to give all trainees the opportunity to carry out all sorts of tasks so that they could show the competencies required in their EPAs.

86. The impact of the claimant's childcare commitments on his ability to complete his tasks had been raised with the claimant by Mr Craven in the context of the Mackay Disclosure Task referred to above. Mr Craven was concerned about the claimant's lack of progress and lack of communication on the task and on 20 April 2020 had emailed the claimant to give him the option to work late on Mondays and Fridays. The following day Mr Craven had made it clear that the claimant would need to sort out his home arrangements and have discussions with his wife about how to juggle their jobs. We find Mr Craven made it clear that the respondent could not "write off" the 2 days a week when the claimant had childcare commitments.

87. We find that resulted in the claimant requesting a meeting with Mr Lee to seek his advice. That meeting happened by phone on 22 April 2020. We find that the claimant explained his situation and that Mr Lee encouraged him to work with Mr Craven and the claimant's wider family to find a solution. Mr Lee accepted that he suggested that the claimant use annual leave on Mondays and Wednesdays as a short-term solution, with the possibility of cancelling the leave on a Wednesday at short notice if childcare became available. We accept that at that point it was not clear how long the lockdown measures would be in place nor how the availability of childcare might change.

88. Those arrangements were confirmed by the claimant in his email to Mr Craven on 22 April (p.257) and Mr Craven's email on 27 April 2020 (p.256). The arrangement was to be reviewed every 3 weeks. In the meantime, the claimant was to update Mr Craven if his circumstances at home had changed, for example if they found that family could assist with childcare or if a childminder or nursery became available. Mr Craven also noted the times the claimant would be out of the house for school runs but said he could not guarantee he would be in a position to meet those.

89. It is a central element of the claimant's case that the respondent refused to allow him to work flexibly. In answer to the Employment Judge's question, the claimant's evidence was that the alternative working pattern which he would have

wanted (during the time when lockdown was in effect so that childcare provision either by pre or after school clubs or by grandparents was not available) was:

- That the claimant would start work at 8.00am (ideally from home);
- That the claimant would leave to take his children to school between 8.45am and 9.00am or thereabouts;
- That the claimant would then work (either from the office or at home) from 9.00am until around 3.30pm;
- The claimant would then collect his children from school from around 3.30pm-3.45pm (it was five minutes from home so this would depend on whether the claimant was working from home or in the office);
- The claimant would then be in a position to work, albeit having sole childcare responsibility, for an hour and a half until his wife returned from work when she would be able to take over. He would potentially be able to then work further.

90. We find that from April 2020 the claimant did work predominantly from home and did drop off and collect his children from school. There was no evidence that the claimant had missed a school run because of work demands. We find that in practice the suggested working pattern above would not work on Mondays and Wednesdays because the claimant's wife worked late on those days and was not in a position to take over the childcare at the end of the normal working day. We find that allowing the claimant to use his annual leave (including on a short notice basis on Wednesdays) was a way of giving the claimant more flexibility.

The PP and sickness absence

91. The claimant was due to re-sit the PP on 7 May. On 27 April 2020 Mr Craven told the claimant he could not let the claimant have all 9 days between then and the exam to study because the claimant had already had more than the recommended study time for the PP. He confirmed that he would endeavour to set the claimant tasks each day which should be manageable alongside his revision. On 7 May 2020 the claimant passed the PP.

92. The claimant was absent from work due to illness from 14 May until 29 May 2020.

Events from 1 to 11 June 2020 - the second quarterly review and the Professional Discussion with Mr Brown

93. Mr Craven conducted a return to work meeting with the claimant on 1 June 2020.

The second quarterly review

94. The claimant's second quarterly review meeting with Mr Craven and Mr Lee took place on the following day. Covid had led to quarterly review meetings being delayed. The review took place over the phone. Between February 2020 and June

2020 Mr Craven's evidence was that he had to raise a number of concerns with the claimant. We accept that he had raised concerns about failing to complete duty sheets either at all or correctly, missing meetings, not reading emails and instructions correctly and not following management instructions. There were also issues with communication and the fact that the quality of the claimant's work, such as that on the Mackay Disclosure Task, was well below the standard required. Mr Craven had kept handwritten notes of the issues as they arose (pages 252-254 and page 264). In advance of the meeting Mr Craven had prepared a log of the issues with the claimant's performance since the first quarterly review in January 2020. We do not find that (as suggested by Mr Unsworth at the probation review meeting on 27 January 2021) that Mr Craven had "stored up" criticisms of the claimant. We prefer Mr Craven's evidence that most of these were matters had been raised with the claimant.

95. We find that the claimant took the view that the previous three months had been pretty straightforward. We find that Mr Lee was genuinely alarmed about this, and that Mr Craven was also concerned that the claimant had not appreciated the concerns they had about his performance. At the meeting there was a discussion of the claimant's failure to fully understand instructions, his work not being of the required standard and that there had been reports that he lacked enthusiasm for the wider work of the team. The claimant's response was that learning under pressure was difficult for him. We find that was a concern for Mr Lee and Mr Craven because the IOTP did involve learning under pressure. Mr Lee told Mr Craven that without improvement he was concerned that the claimant would not pass the IOTP.

96. In terms of the concerns, in addition to those mentioned above, Mr Craven had concerns that the claimant lacked personal accountability and that there was a failing on his part to complete tasks in a timely manner.

97. Mr Lee and Mr Craven discussed areas the claimant should focus on and those were collated within the review form. The priorities identified were:

- Continue revision for the NIE/PP (in his own time due to the exam having been delayed).
- Fully comprehend instructions given in email and follow those instructions.
- Take a more positive approach to the tasks and ensure that they were completed in time.
- Submit work to the required standard.
- Take an active interest in the investigations on the team to improve his knowledge of processes and the role of an investigator.

The Professional Discussion with Mr Brown and Mr Blake

98. On 11 June 2020 the claimant and Mr Brown (his OSCAU) had a face-to-face meeting. Another OSCAU officer, Mike Blake ("Mr Blake") joined remotely. The

version of the notes of the meeting had been amended and signed by the claimant (p.279-285).

99. Based on those notes, we find the claimant told Mr Brown that he was struggling and that the pandemic had hit family life hard to the extent he felt like a single parent. He felt that he was being compared with those who did not have the same obstacles as he had.

100. They discussed the matters raised by Mr Craven and Mr Lee at the second quarterly review. The claimant accepted that certain points made were valid but felt that other points did not take into account the impact of COVID on the claimant's situation. We find that Mr Brown suggested that some of the issues which had arisen could have been alleviated by better communication with Mr Craven so that he knew what the claimant was doing and what work Mr Craven could expect to have been done. We find that Mr Brown himself had concerns about the claimant's ability to follow instructions, an example from his own knowledge being the claimant's inability to follow what Mr Brown saw as straightforward instructions about signing and processing the claimant's IOTP contract.

101. The claimant referred to feeling that he was being "micromanaged". Mr Blake emphasised that what the claimant saw as "micro-management" was a reflection of the expectations the respondent had of its officers and trainees. We find Mr Brown and Mr Blake genuinely shared the concerns Mr Craven and Mr Lee had about the claimant's ability to successfully complete the IOTP. We do not accept the claimant's suggestion that this was because Mr Craven and/or Mr Lee had in some way unfairly influenced Mr Brown. We accept that Mr Brown worked closely with Mr Craven and Mr Lee and regularly shared information with them, We find that was an integral part of monitoring trainee's progress. However, we find that Mr Brown genuinely shared the concerns about the claimant's performance based on his own experience of interacting with the claimant as well as on the feedback from Mr Craven and Mr Lee.

102. The recommendations from that meeting reflected those from the second quarterly review. They were:

1. The claimant to ensure working arrangements are maintained to allow him to participate in work on Team 5, show flexibility on the team and demonstrate a real active interest in the investigations being undertaken.

2. The claimant to ensure a material improvement in his perceived quality of work occurs before further future discussions.

3. Demonstrate an increased awareness of the need to maintain clear and sensible communication between himself and other officers, in particular Line management.

4. Whilst undertaking work ensure up to date revision/study for the NIE to be sat in September.

<u>Events from 11 June to the end of June 2020</u>

103. It is part of the claimant's case that a number of emails sent by Mr Craven and Mr Lee from 15 June 2020 onwards amounted to sex-related harassment. We found that the times set out in the List of Issues did not correlate with the emails in the Bundle. For the avoidance of doubt we have set out the page number of each email in these findings of fact and put the relevant number of the complaint in the List of Issues in brackets after it.

The email of 15 June 2020 (complaint 6.3.1 and 20.3.1)

104. This email is referred to as being timed at 13:53 in the List of Issues. We are satisfied that it refers to the email sent by Mr Craven at 13:29 on 15 June with the subject heading "AWA". In the email, Mr Craven asked the claimant to confirm the days when he was deployable given his current circumstances. In his email Mr Craven explained that he was trying to give the claimant as many opportunities to ensure that he got through his probation on time.

105. The email (p.277 and also at p.299) included a table with two columns. The first column was the days of the working week Monday to Friday. The second (for the claimant to complete) was headed "Deployable Yes/No". In the email Mr Craven explained that "deployable" meant that he could ask the claimant to complete a task and potentially get into work early and/or possibly stay on late. In the email he said that they had discussed the problems that the claimant had on a Monday and a Wednesday but he was genuinely unaware that he was having to drop and pick up his children on a Tuesday. He asked the claimant to complete the table and also to confirm if weekends presented a problem in case opportunities arose to be deployed. We do not accept the claimant's suggestion that Mr Craven deliberately constructed the table to make his availability look more restricted than it was. We find his focus was on understanding on what days the claimant could be deployed on what might be "open ended" tasks requiring late working or overnight stays.

106. The claimant responded to that email at 13:54 on 15 June. The claimant in his response said that "deployable if I'm not mistaken is 'be on site'". He confirmed that he could work all days from home with the recent adjustments made. His reply went on to say that as regards being on site, he had completed the table but it was not a "yes or no" as on certain days he could be in the office at certain times. The table as completed showed the claimant as not deployable on Monday at all. On Tuesday and Wednesday he was deployable after 9.00am when he dropped off his eldest child and before 14:30 when he had to collect from school. On Thursday he was deployable after 9.00am when he dropped off his eldest at school with no collection (his wife being available to collect on that day). The claimant gave full details of his wife's working pattern. The claimant said that on weekends it would depend on a case by case basis as "I expect like every other officer".

107. There was, we find, a lack of clarity and possibly of understanding between the claimant and Mr Craven about what was meant by "deployable". The claimant appeared to primarily identify that as meaning being on site. Mr Craven replied on 15 June at 14:16 (page 295) to clarify that "deployable" means "I can contact you and ask whether you are available to come in at any time, be deployed anywhere, without at times not knowing what time you will be finished, on occasions this may also result in staying overnight".

108. In light of the claimant's response, he said that he would put him down as available for out of hours work "**only**" on a Friday but "potentially you can extend your shifts on Thursday if required".

109. Mr Craven went on to say that going forward regarding weekends if he passed his exams and asked to come in there was a "certain expectation" that whilst he was on the IOTP process the claimant would make himself available to give opportunities to tick off his EPA.

110. Mr Craven copied the email chain to Mr Lee. The claimant responded to Mr Craven by saying that hopefully when he had passed the exam and had all the required equipment and training most of the things which were posing the restrictions (i.e. the effect of lockdown and Covid) would be a non issue and deployment should be easier.

111. Mr Lee emailed the claimant (copying Mr Brown and Mr Craven) at 20:41 that day. He thanked the claimant for providing the information which would assist when planning future deployments. He acknowledged that the current situation was restrictive for all, especially those with young children. He did ask that the claimant explore all possibilities to allow him to be as flexible as possible in the current climate. That would enable the respondent to provide him with as many opportunities as possible to demonstrate competence against the EPAs.

112. Mr Lee pointed out that as discussed at the quarterly meeting he and Mr Craven were of the view that the claimant was not currently demonstrating the required standard. Therefore, affording himself as many opportunities as possible should be of critical importance to the claimant. Mr Lee said that as he had said at the review meeting, the claimant needed to demonstrate operational competence now, not for the NIE in September. He said that the restrictions that the claimant had outlined would make that difficult.

113. Mr Lee went on to underline the demanding nature of the IOTP and the role of an investigator post sign-off. He quoted the IOTP recruitment candidate pack which stated that the role would be demanding and require full flexibility and the ability to work long hours at short notice. He explained that was why formal AWAs were not possible for staff undertaking the IOTP. Mr Lee said that "we" have concerns that "full flexibility" would be "an issue for you regardless of the current situation" and asked whether those concerns were unfounded.

114. Mr Lee confirmed that notwithstanding what he had written, he would continue to ensure that the claimant was afforded as many opportunities as possible within the restrictions he had outlined. He finished by saying that he hoped that the claimant viewed the message in the way it was intended i.e. to provide constructive advice and support. He said that if the claimant wanted to discuss any of the points further he should let him or Mr Craven or Mr Brown know.

115. The claimant responded on 16 June at 16:26 (pages 290-292). He explained that he was feeling the restrictions perhaps more than others because his wife was also a keyworker and her working pattern required her to do long shifts. He explained he had provided the restrictions he was facing not only to make himself as available as possible but also to highlight the situation he was currently facing. He

stressed that there was currently no-one who could help with looking after the children, i.e. no grandparents, no breakfast club, no after school club, no childminders and no family or friends.

116. The claimant explained that his eldest child (who was 6) was allowed into school three days a week which was both a benefit and a restriction. The benefit was it had allowed the claimant to work more days from work, the restriction being that he had to drop him off and collect him. He said that was not something he was allowed a choice in.

117. The claimant suggested that the IOTP welcome pack had not been drafted with the current situation in mind i.e. saying that the situation was extraordinary. The claimant suggested that there "still needs to be consideration for that simple fact. Obstacles have been increased, restrictions are imposed to people and they are not a 'selection' that a person can make, and everyone and everything is affected. He said he was willing to make himself as available as possible and would never decline work if it was within his power to do so. He pointed out, however, that his wife faced the same challenges if not more, being a doctor, since her patients were often high risk. He said that his wife had made every possible effort to accommodate his needs with regards to his training with the respondent. He said that he got the "distinct feeling" that there was no actual understanding that "full flexibility" is no longer an option as it was described. That was because the support structures offering the full flexibility had been removed.

118. In response to the question from Mr Lee about the concerns about full flexibility going forward regardless of the situation being unfounded, the claimant said that he did not understand why there would be such concerns. He pointed out that prior to Covid he was fully flexible in five days a week, happy to stay late, to do exhibit runs that lasted hours and were in different cities or volunteer for any task that was given to him.

119. The claimant said that he was "happy to do all the tasks assigned to me within my power and to the best of my ability until the situation resolves itself. I have and will keep trying to help with everything that is asked of me, and every opportunity is very much appreciated".

120. The claimant concluded his email by thanking Mr Lee for the constructive criticism saying that he knew it was intended to help. He expressed confidence that he would be able to do the job successfully and that he would be able to demonstrate that in the coming months.

The email of 16 June 2020 (complaint 20.3.2)

121. The claimant's complaint related to the email sent to him by Mr Craven at 8.31am (page 285). The context for this email was a disclosure task which the claimant was completing for Mr Davy. The claimant was being allocated batches of items to process. On 11 June Mr Davy allocated 50 further items to be scheduled to the claimant. The claimant emailed him because he was having difficulty in copying, pasting and moving items from the document provided by Mr Davy.

122. Mr Craven emailed the claimant on Tuesday 16 June because he was concerned about the apparent lack of work the claimant was doing on the task. Mr Craven's email at 8:31 on 16 June said that he had checked the system and it appeared that the claimant had downloaded all the documents on Friday 12 June. He said that it appeared from the spreadsheet that 45 document titles were done on the Friday and some on Monday 15 June, but that none of the document descriptions were completed. He asked the claimant to advise what work the claimant had undertaken on Monday on that task and what other work he was involved in on Monday.

123. The claimant's response was not in the bundle but we accept the version of events set out in his grievance timeline (p.799) which is that he responded to say that he spent half the day doing that work and the remainder of his working hours filling in and responding to the comments on his review document. The claimant pointed out that Mr Craven's and Mr Lee's comments amounted to about 2,500 words so the claimant took time to respond extensively to all the remarks to provide more clarity on his feedback. The claimant in his document stated that he received "a sarcastic response" instructing him to fill in his duty sheet that he had "only done limited work that day" and spent his day writing notes. The claimant quoted the email (or at least part of it) as follows: "Please update your duty sheet to reflect that you spent a whole day on writing 49 document titles on the schedule and then preparing comments for your probation review".

124. The claimant did not suggest that what Mr Craven had written in that email was inaccurate. The claimant, however, attributed a "sarcastic" tone to that email.

The email of 19 June 2020 (complaints 6.3.2 and 20.3.3)

125. On the List of Issues this email is referred to as being sent on 19 June 2020 at 9.55am.

126. We find this relates to the email sent by Mr Lee at 9.56am (page 302).

127. This is a response to the claimant's email of 16 June referred to at para 115 above. It is an email from Mr Lee to the claimant in which he starts by apologising for the delay in responding. He thanks the claimant for "reassuring us that your restrictions are only due to the current situation and that they won't be an issue once your support mechanisms are back in place". Mr Lee goes on to ask the claimant to keep Mr Craven updated and say that they will continue to ensure the claimant has as many opportunities as possible to excel under the current situation.

The email of 22 June 2020 (complaints 6.3.3 and 20.3.4)

128. On the List of Issues this e-mail is referred to as having been sent on the 22nd of June at 18:04. We find it relates to the e-mail sent by Mr Craven to Mr. Brown and Mr Blake at 18:05 on that date (p.312). The context for that email was that a vehicle had been seized which required a thorough search. Mr Blake, who was an OSCAU Investigator, had identified this as an ideal opportunity for those officers with search powers but deployment limitations to put those powers to good use. He identified the claimant, Ms Evans (the claimant's comparator) and 2 other officers who he felt would benefit from taking part in the search. Mr Brown was to be the

OSCAU lead on the day and Mr Blake said they could "search the car at our leisure". He emailed the officers' line managers, including Mr Craven, asking them to confirm whether their officers were available (SB p.3).

129. Mr Craven forwarded Mr Blake's email to the claimant that day asking him if he was interested. He suggested that if the timing was outside the claimant's current work pattern he should see whether he could make alternative arrangements as it would be a reals haem to miss a valuable opportunity to get involved. The claimant confirmed he was interested but pointed out that the email did not say when the search was to take place.

130. Mr Craven emailed Mr Blake at 18:03 on 22 June to confirm the claimant was interested but could only be deployed at the times set out in the table (i.e. the table from the email exchange on 15 June. Mr Craven asked that the claimant be considered but said that "if the date and time do not fit in with operational need and the other Officers availability" then Mr Brown and Mr Blake "should not work around Dimi's current restrictive situation." The claimant was copied into that email (SB p.1).

131. Mr Craven followed that email up with the email at 18:05 to Mr Brown and Mr Blake. That email was not copied to the claimant. In it, Mr Craven said that his email of 18:03 meant "get a time, a date and how long its going to take and DON'T work around [the claimant's] restrictive timetable !!!!".

The email on 24 June 2020 (6.3.4 and 20.3.5)

132. This email sent at 8:53 (page 316) related to an opportunity for trainees to be involved in CCTV retrieval and statement writing. Mr Lee had circulated the opportunity to the supervisors and OSCAUs. Mr Craven's email was to the claimant and to Mr Brown. Mr Craven confirmed that this was a good opportunity and that he had accepted the action. He asked Mr Brown whether it was something that he could get involved in and if so asked him to liaise with the claimant, check his availability and take the lead. He said that if Mr Brown was busy and the action did not fit with the claimant's availability than Mr Brown should return the action to him so he could allocate it elsewhere. Within the email Mr Craven included the table of the claimant's deployability. He said he was unsure of the day or time that the CCTV needing retrieving and whether it was "within [the claimant's] restrictive working pattern as below". He was to check the date and time before it was allocated to the claimant.

The emails on 30 June 2020 (6.3.5 and 20.3.6)

133. The List of Issues refers to two emails on this date. Taking them in order of time, the first is the email referred at 20.3.6 of the List of Issues as having been sent at 8:13. This related to an incident on 25 June 2020 when the claimant failed to dial in to a case review meeting involving Mr Lee. We find that was the second such meeting the claimant had missed. Mr Craven emailed the claimant on 26 June 2020 to ask him to confirm why he did not manage to make the dial in and whether he had informed anyone he was unable to make it. Mr Craven was apologetic in the email for asking for the details and explained he had told Mr Lee that the claimant was in Leeds on an exhibit run. He suggested it was the second question (i.e. whether the

claimant had informed anyone he was unable to make the call) that needed answering.

134. The claimant replied to say that he had assumed the call would not take place. He said that had he known the call would take place he would have been happy to inform the required parties. He asked Mr Craven whether he should call Mr Lee to explain. Mr Craven suggested the claimant email Mr Lee to explain or email to set up a call.

135. The claimant did email Mr Lee on the same day, copying in the email he had sent Mr Craven, and confirming he was happy to call Mr Lee to provide an explanation but was conscious that he was on annual leave that day. Mr Lee responded on 29 June to say that there was only one meeting in the calendar which currently did not happen due to Covid, namely the full team meeting. He confirmed to avoid confusion he had removed that meeting from the calendar. He asked the claimant to keep an eye on the calendar for the next case review meeting, which was normally every Tuesday at 1.00pm.

136. Mr Craven then sent the email on 30 June at 8:13 to which the claimant's complaint relates. He copied in Ms Macintosh and Mr Lee and suggested to the claimant that he dial in to Ms Macintosh's team case review at 1.00pm. He emphasised that participating in the team case review was a good opportunity to understand how such reviews work and the detail needed to go through in analysing the progression of a case. He asked the claimant to inform Ms Macintosh or Mr Lee if he had any problems with that time or found himself in a position where he could not make the call. Mr Craven opened his email by saying, "Let's try third time lucky".

137. The claimant responded to confirm that that should not be a problem and to thank Mr Craven for arranging for him to attend Ms Macintosh's team review. He said that as there was no forensic run that day it should not be a problem. Mr Lee responded at 8:17 to say that the forensic run was not the problem, it was the lack of communication that did not sit well with Mr Lee.

138. The second email on 30 June 2020 at 9:46 relates to an opportunity to attend a new online cyber training course. On 29 June Mr Lee had circulated an opportunity for 2-3 of the Hub officers to take part in a new online cyber course. The training would have started on 13 July with two months to complete the training. His email made it clear that the aim was for all officers to complete the training, and this was just the first round. The claimant was keen to attend. We find that he discussed his taking part in the course with Mr Craven on 30 June. We find that Mr Craven was concerned that undertaking the course (which required 60 hours of study) would restrict the claimant's time to revise for the NIE and might restrict the opportunities which the claimant could undertake to carry out the assignments necessary to successfully complete the IOTP.

139. The claimant sent an email at 9:46 on 30 June setting out (at some length) his rationale for wanting to undertake the course. His view that he could undertake revision outside of normal working hours and that there therefore should be no overlap between the cyber training course and the revision for NIE and undertaking other tasks. However, the claimant acknowledged that he could understand where

Mr Craven was coming from with his advice to reconsider joining the course. He said that he valued Mr Craven's experience and acknowledged that he knew far more about what was ahead than the claimant did. He confirmed he wanted to do everything correctly to ensure he completed his probation successfully and that if Mr Craven's advice was not to join the course and to focus instead on current tasks he would follow it and not go ahead. Mr Craven acknowledged that email at 10:42 on 30 June.

Events in July – proposal of Performance Improvement Plan and informal alternative working arrangements

140. On 22 June 2020 Mr Lee had contacted the respondent's HR Business Partner for investigations to report that they were having performance issues with a trainee on their team. We find the trigger for that was the claimant having, in Mr Lee's eyes, rejected most of the criticisms put forward to him in the quarterly review. We find the claimant had sought to clarify or rebut the criticisms made in the performance review documents. He had spent half a day doing so. The comments were detailed and lengthy. We find that this had annoyed Mr Lee and Mr Craven and had also increased their concerns that the claimant was failing to take accountability for his actions and to accept feedback critical of his performance. Mr Lee told the HR Business Partner, Mr Ferres, in an email on 22 June that the difficulties were such that they had serious doubts as to whether the trainee would complete the IOTP. We find that was not done as a retaliation for the claimant's detailed comments but rather because the extent and nature of those comments led Mr Lee to conclude that matters needed to be stepped up if the claimant was to successfully complete the IOTP.

141. Mr Lee was advised to contact the complex casework team and on 30 June Mr Lee was allocated an HR officer in that team, Ms Anyimadu, to assist. They met on 9 July 2020, Ms Anyimadu in the meantime having had an opportunity of reviewing the claimant's probation review form. At that meeting they discussed and agreed that the appropriate way forward was a Performance Improvement Plan ("PIP").

Proposal for a team day on 7 July 2020

142. On 7 July 2020 Mr Craven emailed his team to suggest that they all work in the office for one day a week as a way of promoting team bonding and getting used to being in the office together. He suggested that they start the following week and initially proposed Tuesday of that week (14 July). The claimant was copied into the emails about this. The initial email at 14:37 (page 336) made reference to the claimant and others using rooms near the auditorium to revise on the day in the office. A few minutes later Mr Craven sent another email cancelling the Tuesday booking and asking that they make it Monday because he was double booked. Monday was a day when the claimant could not be in the office so he would not be able to attend.

143. Mr Craven sent an email the following morning to confirm that the "team bonding" would be on Monday because he was in Holyhead on Tuesday and then on annual leave for the rest of the week so Monday was the only day he could do. He

began his email by apologising to the claimant that he had forgotten about his circumstances.

144. We accept Mr Craven's explanation as to why he sought to move the meeting from Tuesday to Monday. We do not accept that his intention was to exclude the claimant. We also accept that the intention was that the team bonding day would be the first of a number of such days with the team regularly working together in the office. In the event (in Mr Craven's words) the idea "never took off". However, at the time Mr Craven made his decision to hold the meeting on the Monday we accept that his intention was that there would be a number of other such meetings and so a number of other opportunities for the claimant to be involved in subsequent team bonding days.

145. The claimant suggested that by saying that the team bonding day should be on a "certain day" every week Mr Craven meant the meeting to be on Monday every week, there by excluding him. We do not accept that is a plausible interpretation of that email. We find Mr Craven meant to designate the day each week in advance but it would move-otherwise we find he would have said "the same" day each week.

The Zoom meeting on 10 July 2020 – "Covid Crete" and "happy to help" comments

146. We find that on 10 July 2020 Mr Craven held a team meeting by Zoom. All the participants were working from home. We find that Mr Craven was due to go on holiday to Crete the following week. Mr Craven accepted that he had said he was "going to Covid Crete". His explanation in his Tribunal evidence was that he used the term to emphasise he was taking a risk in going on holiday at that time as a lot of Europe had been closed due to Covid-19 and travel corridors had only just opened. We find that is probably an "after the event" explanation. On balance, we find that this was a jokey, throwaway remark made by Mr Craven, triggered by the fact that he was actually going to Crete the following week. We do not find that he had it in mind when he made the remark that the claimant was Greek. We find that the claimant did not object to the comment during the meeting. However, we do find that the claimant had told other trainees at the meeting that he had been offended by the comment.

147. Two of those trainees approached Mr Craven after the zoom meeting to tell him that the claimant had felt offended. Mr Craven did not approach the claimant to apologise at the time (he did apologise for any offence at the probation/grievance meeting on 28 January 2021). Mr Craven's explanation in evidence about why he did not approach the claimant at the time was that he did not want to cause ill feeling amongst the team by the claimant becoming aware that his colleagues had come to Mr Craven to report the fact that the claimant had been offended. We do not find that wholly plausible. We find it more likely that Mr Craven simply wanted to "let sleeping dogs lie" and did not want to get into discussion with the claimant about the comment. We find that he may in hindsight have recognised that it could potentially be seen as offensive to the claimant. We find on balance that is probably why he referred to "Covid Conwy" and "Covid Canaries" in subsequent meetings. We find that to some extent that was an attempt to diminish what he now realised was the potentially offensive impact of having said "Covid Crete". That does not, however, mean that we find that the original remark was anything other than an off-hand attempt at humour with his team.

148. Mr Craven also accepted that during that same meeting he had responded to the claimant saying, “you know me, I’m always happy to help” by suggesting that the claimant could get a job at Tesco and saying something along the lines of, “You know Dimi, happy to help”. Mr Craven’s explanation was that he made the remark because his wife had just obtained a part-time job at Tesco and her uniform had a badge on it saying, “happy to help”. As with the “Covid Crete” remark, we find that this was meant to be a jokey remark. Unlike that remark it was specifically making fun of the claimant. The claimant included this remark in his grievance. However, there is no evidence that he reported to colleagues at the time that he was offended by it (unlike the evidence relating to the “Covid Crete” remark). Mr Craven’s evidence, which we accept, was that he did not purposely make the remark because the claimant was a non UK national. We accept his evidence that that was simply not in his mind at the time.

Review of the working arrangements

149. On 10 July Mr Craven held a meeting by phone with the claimant to discuss his working arrangements and progress. We find Mr Craven emphasised again the need for flexibility on the IOTP and beyond. Mr Craven attached guidance on childcare vouchers but, as he acknowledged, the issue was not vouchers but the availability of childcare support such as holiday clubs and after or before school clubs. It was agreed that the claimant would advise Mr Craven if his circumstances changed in terms of childcare but for the time being the current working arrangements would remain in place.

Initiation of the PIP

150. Mr Craven at that meeting informed the claimant that from Monday 13 July he would be placed on a PIP given the probation review and his reaction to it and his subsequent performance since it. Mr Craven informed the claimant that he and Mr Lee were disappointed by the claimant's comments after the probation review which were interpreted as the claimant failing to accept blame for the incidents highlighted or constructive feedback. Although Mr Craven acknowledged that the claimant appeared more engaged and keen to get things right, there were also still areas of concern. These related to two weeks of duty sheets not being completed during June, the lack of communication to Mr Lee about not dialling in on case reviews (i.e. the matters raised in the emails on 30 June, voicing his opinion that he thought he was being micromanaged by Mr Craven and receiving negative feedback from other officers for who he had done work. That feedback focussed on the claimant’s lack of initiative and his asking for help with what were regarded as the most simple of tasks.

151. On 9 July 2020 Ms Anyimadu had emailed Mr Lee and Mr Craven the template for a PIP together with some guidance notes. She provided further advice on 14 July. She stressed that the purpose of the PIP was to support the officer to achieve the required level of performance. She advised that there needed to be some exploration with the claimant of whether there were health or disability issues behind the performance issues so that an Occupational Health referral could be made if necessary. She advised that they should also consider if there were any adjustments which would help the claimant to improve his performance. She had suggested that the PIP should be for 2 months (the PIP template recommended a

maximum of 3 months). She noted that Mr Lee and Mr Craven had instead decided to implement a one month PIP. We find that Mr Lee felt that shorter period was dictated by the fact that the claimant's probation was due to come to an end in December 2020 so there was a need to tie in the PIP to that timeline. Ms Anyimadu advised that the PIP could be extended and that it might be necessary especially if it was recognised that adjustments were needed to help with performance.

152. On 14 July Mr Lee sent the proposed PIP to Ms Anyimadu for review. He copied in Mr Ferres to seek his observations on the proposed timescale. That was because Mr Ferres had requested a case conference before the end of August. Mr Lee's view was that the one month length of the PIP was appropriate given that the claimant had already been given details of where he needed to improve in the quarterly review on 2 June. Although the PIP formalised that it did not in Mr Lee's view contain any areas which had not been brought to his attention already. Mr Lee recognised, however, that annual leave over the summer could potentially lead to a delay (page 384).

153. Ms Anyimadu provided her observations on 21 July. She had only a few observations, namely ensuring that there was a clear explanation of how improvement would be measured and also what support the claimant's managers would be providing to achieve the required level under each objective in the PIP.

154. Mr Lee made amendments to the PIP and also sent a timeline to Mr Craven and Mr Brown on 28 July. That envisaged that the PIP would begin on 14 August 2020 with the final review on 29 September 2020. He envisaged a first review on 27 August 2020 followed by a second review on 14 September 2020. His timeline took into account the fact that the claimant would be sitting the NIE on 8 September with the result of that due potentially on 22 September. The claimant suggested that the timetable was deliberately set up to minimise the time he would have to improve his performance whilst also revising for the NIE. We do not accept that. We find that Mr Lee's genuine view was that the timeline of the PIP had been extended to take into account the claimant's annual leave. The timeline showed that the PIP was due to run for six weeks rather than the original one month. We find that Mr Lee's genuine view was that this would provide sufficient time for the claimant to revise for his NIE and improve performance.

Events in August 2020 – the PIP and the email of 25 August 2020

155. The claimant was not issued with the PIP until 14 August 2020 because he was on leave. Mr Craven was continuing to gather feedback relating to the claimant's performance on tasks allocated to him. Some of that feedback was mixed with Mr Brown, for example, providing some positive and some negative feedback on 3 August 2020. Mr Craven in his response to Mr Brown noted those observations but did say that they had to bear in mind that the claimant was an inexperienced IOTP so would not expect everything to go smoothly when given a task of this nature. Mr Craven did note, however, that Mr Brown was reporting the similar communication and planning of workloads criteria which were outlined in the PIP. We find that the feedback was based on Mr Brown's direct observation of the claimant having carried out the task with him.

The Performance Improvement Plan ("PIP")

156. On 14 August 2020 when the claimant had returned from annual leave Mr Lee chaired a PIP meeting with the claimant, Mr Craven and the claimant's union representative, Mark Unsworth ("Mr Unsworth"). The Performance Improvement Plan (pages 402-427) had set a timeframe for improvement of 28 working days up to 29 September 2020. It identified three of the end point assessments within the IOTP where improvement was requirement, namely:

- Criteria 0.1 – carry out your responsibilities at work.
- Criteria 0.3 – maintain and develop your own knowledge, skills and competence.
- Criteria 0.4 – plan and manage your own workload.

157. These three headings were broken down into further headings, e.g. "communicate information" and "plan and be accountable for your work". Each such subheading was broken down into specific tasks, e.g. under "Communicate Information", "P1" was "actively focus on information that other people are communicating, questioning any points you are unsure about", and "P5" was "extract the main points you made from written material". The PIP also set out the measures to assess progress against the indicators and the support to be provided. That support focused on those delegating tasks to the claimant giving clear instructions, providing the claimant with examples of similar work that had been completed previously to a good standard and ensuring that he was given clear deadlines. The objectives did require the claimant to be proactive, for example in seeking advice or assistance.

158. We find that one of the objectives of the PIP was for the claimant to be more proactive and take more initiatives in solving any issues that arose for him. That included seeking advice from more experienced officers where that was appropriate but also taking more responsibility for working things out for himself rather than seeking help with the simplest matters.

159. At the meeting there was discussion of feedback received on recent deployment and of the progress the claimant was making in revising for the NIE. The claimant did not at that meeting raise any issues about having enough time to complete the NIE revision alongside carrying out the tasks required to demonstrate improvement for the PIP.

160. One of the criticisms the claimant made of the PIP was that Mr Lee and Mr Craven had not followed the recommendation from Ms Anyimadu to consider an Occupational Health referral and adjustments. The PIP, under the heading "Reasonable Adjustments", refers to the struggles the claimant had been having balancing work and childcare commitments. It referred to the informal working arrangement previously agreed, i.e. the claimant working from home, taking annual leave at short notice whenever he felt it necessary to do so and being around to do school pick ups and drop offs. In addition, it recorded the restrictions on the claimant's ability to attend the office or deploy as set out in the table in the email on

15 June 2020. It is accepted that the claimant was not at this point referred to Occupational Health. There is no indication that the claimant raised the possibility of any disability or Occupational Health matter at the PIP meeting on 14 August 2020 which might have triggered such a referral. Equally, there is no clear evidence that either Mr Craven or Mr Lee raised the possibility of there being a health or disability related reason for the claimant's performance failures.

The email of 25 August 2020 (20.3.7)

161. The claimant complains that an email sent at 18:09 on 25 August 2020 amounted to an act of sex-related harassment. The email was sent by a G5 investigator, Susan Barker, to the claimant allocating him tasks for completion by 28 August 2020. We find the email from Ms Barker explained the context and process for completing form MG16 (evidence of bad character) as well as providing practical guidance on the steps the claimant needed to take. The first of those was to contact Liverpool Crown Court and speak to their Listing Department to obtain information about their process for requesting certificates of conviction. The claimant followed up that task, but we find that after speaking to the court, he sent his subsequent email enquiry to a misspelt email address. That was corrected in his follow-up email which was sent on 10 September 2020. Ms Barker concluded her email by saying, "keep me updated and if you're unsure ASK".

Events in September 2020 – the email of 4 September 2020 and the PIP progress review

The email of 4 September at 14:39 (20.3.8)

162. This email related to a task which had been allocated to the claimant in July 2020. It involved chasing companies for bank statements and financial information. In relation to two of those companies, the claimant was still awaiting a substantive response. He was working on the task with another IOTP investigator, Sam Murphy. Mr Craven on 4 September asked for an update on the task because it was clear from the previous case review that there would be serious questions asked by Mr Lee at a meeting the following Tuesday about the results received and what progress had been made. Mr Craven stressed how badly it would look if they did not have the answers at the case review meeting when Mr Lee was present. The claimant provided an update later that day indicating that he had chased at fortnightly intervals but received no real response. Mr Craven replied at 14:38.52 to the claimant and to Sam Murphy. He advised that with the majority of companies a high degree of assertive persuasion was required to obtain the information. He said it was unfortunate the matter had not been resolved nearly two months after the initial request. He told them that within investigations they needed to be constantly chasing up enquiries to progress cases as information could go by the wayside if not progressed quickly enough.

163. Mr Craven went on to say in his email that he would inform Mr Lee of the lack of progress in obtaining the bank details at the meeting on Tuesday and would not personally take over the requests and send emails to the companies involved in the hope that they could progress matters before the relevant deadline.

164. We find that the claimant viewed the email as a reprimand, specifically the reference to a lack of progress. We find that there had been a lack of progress. There was no suggestion that the claimant had sought advice earlier or highlighted the delay to Mr Craven.

The first PIP review on 14 September 2020

165. The first PIP progress review took place on 14 September 2020. It was a face-to-face meeting involving the claimant, Mr Craven and Mr Lee. Mr Unsworth, the claimant's trade union representative, did not attend that meeting with the claimant.

166. By September, the claimant had been able to make alternative arrangements for school pick-ups for his children. That meant he was able to commit to working 8:45 until 16:45 Monday to Friday. That was recorded under the heading "Reasonable Adjustments" in the PIP log (page 413).

167. The review acknowledged that there had been improvements in some areas of the claimant's work with some of that work being seen as of high quality. The more general feedback was that the claimant was enthusiastic, provided regular updates and was professional throughout. There were, however, still some areas of concern about areas in the PIP which were not being addressed. Some of those related to what might be regarded as relatively minor matters such as failing to complete the correct process for payment for petrol expenses (Ms Greener's feedback which we deal with below in relation to complaint 20.15). A further example given was of the claimant's phone not being charged and not being able to access documents fast enough on a task which he had undertaken with Mr Brown. We find that Mr Brown had provided this feedback. Others reflected a continuing concern with the claimant failing to read instructions properly or to understand them. One of the items of poor performance by the claimant recorded was that included in an email dated 4 September 2020, which is alleged to be an act of sex-related harassment (10.3.8 on the List of Issues). It was in the context of these examples that the PIP log recorded an apparent lack of investigative mindset.

168. We find the claimant had prepared 20 pages of detailed notes on the PIP. He was given the opportunity to give his presentation. We find that the claimant was of the view that the feedback he had received demonstrated that he had made the progress required against the indicators in the PIP. We find that the claimant regarded the criticisms of the "little things" as just that, i.e. points of "little substance" rather than being of the essence.

169. We find that this was part of the problem so far as Mr Craven and Mr Lee were concerned. It was, so far as they were concerned, the "little things" as the claimant saw it which demonstrated a lack of initiative and preparedness. We do find that it was a constant feature of the criticism of the claimant that it was "the little things" which he was not good at getting right, i.e. that he did not have the attention to detail required by the respondent. The feedback at the meeting was also that the claimant asked too many questions that took too much time. The claimant challenged this by clarifying that he only asked questions when he does not know what to do and that the whole point of the learning zone was to learn. The feedback in relation to that was that most of the IOTP trainees were able to do the same

actions with much less feedback from supervisors. We do find that that genuinely reflected the feedback in relation to the trainees compared to the claimant. We do find that Mr Craven and Mr Lee had difficulty in articulating in a concrete way where the line between asking too many questions and the claimant not using his initiative to seek assistance when needed was to be found. What we also find, however, is that Mr Lee and Mr Craven (and other supervisors who had provided feedback) clearly saw the claimant as falling on the wrong side of the line in the sense of his having to seek more assistance than other trainees on simple tasks whilst on the other hand failing to use his initiative to identify those times when he needed to seek assistance rather than passively letting matters drift.

170. After the 14 September review Mr Lee updated the PIP. He crossed out a number of the criteria relating in particular to communication and feedback which had now been met. The updated PIP document acknowledged that progress had been made but that there were areas which still remained to be addressed and remained a concern. They included not following instructions, a lack of basic knowledge (the fuel card), a lack of communication (failing to dial in to a team review meeting on 17 August), and failure to complete tasks in a timely manner (this referred to the incident reported in the email on 4 September about getting details of bank information). The document also recorded the "apparent lack of investigative mindset". This related to a task which the claimant and three other team members had been given. It was noted that in comparison to less experienced staff on another pod, the claimant had failed to give the correct answers and misunderstood the task.

171. In summary, as of 14 September the PIP document said the claimant was capable of producing good quality work on occasions and that his communication had improved. It acknowledged he had provided prompt updates to the action allocators on progress of work. He appeared to be more receptive to feedback and accepted it in a positive manner, which was noted as being the standard expected of an IOTP trainee. However, it was noted the same problem seemed to crop up when performing what were often basic tasks. There was a consistent lack of understanding on the claimant's part despite detailed and repeated guidance. That led to substandard performance and a concern that the feedback the claimant was receiving was not being used constructively to improve his performance.

The work roster and the requirement for the claimant to attend the office 5 days a week (6.5 and 20.20)

172. On 25 September 2020 Mr Lee confirmed that the "working from home" policy would remain as it had been due to the prevalence of Covid. Mr Craven therefore proposed that he would have 3 or 4 people from his team in the office on any one day. He emailed his team on 25 September with a rota for the following week (page 376).

173. The attachment for that email was in the supplementary bundle (SB page 27). It showed the claimant as the only officer expected to be in the office on all five days of the week. Other officers were rota'd to be in the office up to three days a week, working from home on the remainder. Mr Craven's evidence was that the claimant was attending the office most days at that period because he was subject to the PIP

and so required both greater supervision and to have more monitoring of his progress on those tasks so that he could be assessed against the targets in the PIP.

174. The claimant suggested in evidence that there was no-one else rostered to work in the office at the same time as him so the supposed benefits suggested by Mr Craven did not exist. We find that contradicted by the roster itself which showed other staff in the pod (including Mr Craven himself) being in the office for either 2 or 3 days of that week. We find it implausible that officers from other pods would not also be in the office for similar numbers of days per week. On balance, we prefer Mr Craven's evidence and find that the requirement for the claimant to attend in the office was because he was subject to the PIP and being in the office was seen as a way potentially assist him in progressing against the objectives in the PIP.

Failing the NIE and welfare meeting

175. The claimant failed the NIE on 22 September 2020. We find that after the result Mr Craven and Mr Brown met with the claimant. We find this was intended as a supportive chat and "check-in" with the claimant. We accept the claimant did not view it as such. We do not accept it was a formal "welfare meeting" where a referral to Occupational Health was explored to any detailed extent. There were no notes of the meeting. We do find that there was a discussion of any stress or home related issues that Mr Craven or Mr Brown should be aware of. On balance, we find that the possibility of contacting the Employee Assistance Programme or seeking an OH referral was mentioned in passing but not explored in any depth. We find that the claimant did not say at that meeting that he was experiencing any stress. We find he confirmed that he would remain positive and would focus on revision. We find that consistent with his positive attitude throughout. That may have sometimes worked against him in that it led to a lack of exploration of options such an OH referral which might have been triggered if he had fully articulated the way he was feeling and the pressure he was feeling by that point.

23 September 2020 - the "best officer" comment

176. The claimant's evidence was that on 23 September 2020 he and Mr Craven were in the office. They were sitting at desks next to one another when Mr Craven received a phone call from Steve Bee, a Grade 4 officer. Mr Craven and Mr Bee were discussing a task to be allocated. The claimant says his attention was caught by Mr Craven starting to laugh during the call. Mr Craven then said 'Oh don't worry! I will assign my "best" officer to the task!'. A few second later the claimant said that Mr Craven turned to him and told him he needed him to do an action for Steve Bee, saying "The action is simple and 'even you' should be able to do it."

177. Unlike other comments Mr Craven was alleged to have made, the claimant's evidence on this incident was clear, detailed and tied to a specific date. Mr Craven did not deny making the comments (as he did in relation to, for example, the misogynistic comments about the claimant's wife) but said he could not recall making them. We bear in mind that by this point the claimant was on a PIP and, we find, Mr Craven had formed the view that he was not up to the standard required of a trainee. We have already found that by July 10 Mr Craven was making jokes at the claimant's expense. Taking all those matters into account, we prefer the claimant's version of this incident and find Mr Craven did make the comments alleged. We find

the “best officer” comment referred to the claimant and, given that he was sitting next to Mr Craven, that he was meant to overhear it. We accept the claimant found it demeaning to be talked to as if, to use his word, he were a “simpleton”.

Extension of the PIP

178. The PIP was due to end on 2 October 2020 (the end date having been extended from 29 September to take into account training commitments and annual leave that the claimant had). Ms Anyimadu contacted Mr Lee on 28 September to ask for an update given that the end of the PIP was imminent. On 5 October she provided feedback on the PIP document as revised. She noted that Mr Lee had provided an updated which noted areas of improvement. She also noted, however, that the claimant had not signed or commented on the review and the account of events given. She asked Mr Lee to confirm that the claimant had had sight of the document and been given the opportunity to comment on what had been documented. She picked up on the issue of the claimant voicing concerns or worried about asking questions for clarification and noted that the response he was given was that “reasonable expectation that someone with [the claimant’s] length of service would be aware of and/or proficient with certain tasks and processes”. She pointed out that as the PIP was meant to be an intervention plan, if the claimant had not received training to do those tasks or had not done them before there should be an intervention (i.e. training) to help bring them up to the level required. Mr Anyimadu said it might be difficult to justify an assumption that by virtue of his length of service he would know how to do something. She suggested that if the reality was that the claimant had been trained or instructed on a particular task then the PIP should say that he has rather than making a reference to his length of service.

179. Mr Lee confirmed the claimant had had sight of the PIP document and been given the opportunity to comment and noted what she had said about “reasonable expectation”. He confirmed that he did reference the disproportionate amount of instruction the claimant had received. He noted that should have been included on the form. We do find that this was a key concern for Mr Lee, i.e. that the claimant seemed unable to understand or follow instructions despite being given clear instructions on tasks by supervisors.

Events in October 2020 – Mr Fulcher’s feedback and the final PIP review

Feedback from Mr Fulcher

180. Mr Craven was continuing to receive feedback about the claimant and other trainees from those who had allocated tasks to them. On 7 October 2020 he received feedback from Luke Fulcher, a Grade 5 Operations Officer (“Mr Fulcher”). That task involved four of the respondent’s trainees including the claimant and Ms Evans. Mr Fulcher provided feedback on three of the trainees including the claimant but not on Ms Evans. That was because she had been on leave and so he wanted to check that she had completed the task before dip sampling her work to make sure he was not dip sampling partially completed work.

181. Mr Fulcher, we find, provided considered and detailed feedback. When it came to the two other trainees, he was largely positive although he picked up on an error in one of the other male trainee’s work. When it came to the claimant, Mr

Fulcher recorded that he had taken on a huge amount of statements and had ploughed through them, really throwing himself into the task. However, he said that he thought the claimant had applied the wrong mentality using haste and volume rather than thoroughness and accuracy. He reported that because the inaccuracies were too consistent he would not be able to rely on the work that the claimant had done, which meant that it would have to be redone.

182. On 8 October Mr Craven extracted the feedback which related to the claimant from the email providing feedback on all trainees. Having quoted what Mr Fulcher had said, Mr Craven ended his email by saying that from a positive point of view he could confirm that he observed the claimant giving that work his full attention and was more than willing to take on other people's work in an attempt to get the work done on time (page 390). There was no evidence that Mr Craven had sought to influence Mr Fulcher's feedback in relation to the claimant or the other trainees and we find he did not do so.

The second and final PIP review meeting

183. The final PIP meeting took place on 9 October 2020. This was attended by Mr Lee, Mr Craven, the claimant and by Mr Unsworth (by phone).

184. In summary, we find that Mr Lee and Mr Craven's genuinely held view was that although the claimant had made progress, he had not made sufficient progress. The position can be summarised by a quote from Mr Brown in his feedback (pages 398-399), namely that:

> "[The claimant] does seem to have frequent issues with aspects of the role which sometimes could be considered minor, however as they are frequent it 'adds up' as a whole."

185. We find that at the meeting the claimant was given an opportunity to present his progress. There was a discussion during that final PIP meeting of the claimant failing to pass the NIE on 8 September. The claimant had scored 44% with the pass mark being 56.5%. It was pointed out to the claimant that he was at least nine marks away from passing, which was a significant amount, so he needed to concentrate his efforts on revision.

186. It was noted that there had been an improvement in the claimant's communication with his supervisors. The claimant had also asked for detailed feedback. However, there were still areas of improvement. It was noted that the claimant was still failing to properly complete his duty sheets, putting down a standard 8:00 until 16:00 on the vast majority of days despite his arrival and departure times actually varying. The claimant's explanation was that he did his duty sheets on a Friday and could not remember the hours he had worked. Mr Lee said that his was unacceptable. When it came to the "apparent lack of investigative mindset", reference was made to the task completed by the claimant for Ms Greener. The claimant disputed the instructions he had been given by Ms Greener but when after the meeting her email of instruction was checked, it did include the specific instruction which the claimant denied having had. There was another incident where the claimant had not attached a label to an exhibit bag correctly. While acknowledged to be on the face of it apparently minor points, they were indicative of

substandard performance. Mr Fulcher's feedback was referred to as evidence of a failure to follow instructions.

187. In summary, Mr Craven said that there had again been improvements. However, Mr Lee confirmed that they would not be recommending confirmation of the claimant in post at the end of his probation period. That was as a result of the claimant not meeting the required standard, specifically in EPAs 0.1, 0.2 and 0.3. It was emphasised that the decision had not been taken lightly. We do find that there had been regular and consistent feedback to Mr Craven about poor performance by the claimant. It is the case that some of these were what might be regarded as "minor" matters, but the point that all supervisors made was that those minor matters added up. It was partly the claimant's failure to appreciate the importance of that details and "minor matters" which we find was a genuine concern for Mr Craven and Mr Lee in addition to the claimant's apparent inability to understand instructions and to learn. We do not find that Mr Lee or Mr Craven's would have been different if the claimant had been a woman in the same circumstances.

Completing the PIP document

188. After the meeting on 9 October Mr Lee, Mr Craven and Mr Brown completed their sections of the PIP to reflect the feedback set out above.

189. Mr Brown completed his part of the PIP document. He confirmed that the claimant's behaviour was "great" but they were not the issues with the claimant's performance that were causing concerns. He reported that the claimant had said that he had difficulty in grasping tasks which were new to him. Mr Brown accepted that officers learned at a different rate but noted that what the claimant stated was of concern. The claimant had confirmed that he did not have any learning difficulties or other issues which would prevent him from learning. In their review, Mr Brown reported that the claimant had said that he had tried his best but felt that people were not able to put themselves in his position and that he had more obstacles than others, yet he is compared to them. The claimant had referred to a discussion with Mr Craven when he had been told that "other people can do it". Mr Brown was confident that the claimant was held to the same standard as others. All IOTP officers were on the same pathway and expected to demonstrate behaviours and competencies in line with those standards. He noted that the claimant had complained about being micromanaged but noted that he would expect a level of "invasive" management when on a PIP. He noted that the claimant had viewed that negatively when his work and behaviour were being closely monitored for his betterment. Mr Brown noted that concerns about the claimant's honesty arising from his failure to complete his duty sheet properly. He stressed the importance of doing so otherwise he would be misrepresenting the times he was actually working.

190. Mr Brown identified the key issues from his discussions with the claimant and others as being lack of communication, lack of attention to detail and work not being of the required standard. Those he viewed as being related to basic aspects of the role which all officers were expected to show across all areas. In relation to the PIP, Mr Brown agreed there had been improvements, specifically in relation to the claimant's communication. The claimant was now informing him each week of the work courses and any meetings he might have for the upcoming or previous week.

However, the key issues identified were still being reflected in the feedback received from others.

191. Mr Brown concluded by saying that he was concerned with how the claimant would manage and perform with respect to the more challenging criteria which could directly impact cases, such as attention to detail on searches, planning and conducting interviews, working dynamically and independently, and thinking laterally within a serious and complex operational environment.

192. Mr Craven's conclusion in the PIP was that despite slight improvements in certain areas there were still significant shortfalls in the claimant's performance and the PIP has not been effective in bringing about the necessary improvement. He was therefore having to recommend, with regret, that his contract was terminated. Mr Lee also concluded that the claimant had not reached the required level of performance and therefore he was recommending that his contract be terminated.

193. On 19 October Mr Lee instructed Mr Craven that the probation review form and the PIP document were to be sent to the claimant and that he was to be given five working days to complete them. The PIP was signed off by Mr Lee and Mr Craven on 13 October 2020 and sent to the claimant on 3 November 2020.

194. On 5 November 2020 the claimant was signed off sick due to Post Traumatic Stress Disorder. He was signed off initially for a period of three weeks.

<u>Events in November – the claimant's sickness absence and recommendation to terminate his contract</u>

195. On 5 November 2020 the claimant was signed off work for a period of 3 weeks. The reason given on the fit note was post-traumatic stress disorder ("PTSD").

196. The claimant was due to re-sit the NIE on the 24 November 2020. We find that establishing whether he was fit enough to do so (and to attend the "crammer" training beforehand) was a priority for Mr Lee. A trainee who failed the NIE for a second time would be removed from IOTP. If Mr Sideris did not sit the NIE on 24 November 2020 his next opportunity to do so would be on 2 March 2021. Justification would be required if a postponement until March was required.

197. The claimant complained that he was "bombarded" with messages in response to his fit note to an extent which "bordered on harassment". We find that on the 5 November there was a WhatsApp exchange between the claimant and Mr Craven.

198. The initial exchange was Mr Craven asking whether the claimant was up for a chat with him and Mr Lee about the NIE (which was due to take place during the period for which the claimant was signed off). The claimant responded to say that he hoped to improve before the fit note expired and intended to sit the NIE on 21 November. There were further exchanges which were about a potential referral to Occupational Health ("OH"). There was some confusion and further exchanges because the claimant said he had already spoken to OH but it became apparent that the claimant had spoken to the Employee Assistance Programme. Mr Lee tried to ring the claimant to clarify but he was on the phone to Mr Unsworth. The following

day Mr Craven sent one message asking the claimant whether he had had a chance to consider his message of the previous day and wanted Mr Craven to submit the OH form.

199. We find that during the WhatsApp exchange Mr Craven asked the claimant how he would prefer to be contacted while off sick, i.e. whether he would prefer telephone, messages or email. He said that the respondent did not want to make things any worse for the claimant by contacting him in a way he was not comfortable with and confirmed they would keep contact to a minimum. The claimant responded to confirm he was happy to be contacted on the mobile phone he was using during the WhatsApp exchange. He did not during the exchange indicate he was unhappy about the number of messages he was receiving.

200. During the WhatsApp exchange Mr Craven had asked whether the claimant was happy for him to draft the OH referral or would prefer Mr Lee to do so. The claimant said he had no preference. However, the claimant was unhappy with the contents of the OH referral as drafted by Mr Craven. He felt that it set out matters from Mr Craven's point of view only. Mr Lee agreed to the referral form being amended, with the claimant removing the text he was unhappy with. It was also agreed following discussion with Mr Unsworth and the claimant that the OH report would be sent to Richie Davies ("Mr Davies"), Grade 2 Branch Commander rather than to Mr Craven or Mr Lee. Mr Lee reported to Mr Davies.

201. On 10 November 2020, Mr Unsworth wrote to Mr Lee on the claimant's behalf asking that any contact be through Mr Unsworth rather than direct to the claimant.

202. On 9 November 2020 Richard Davies recommended that the claimant's contract be terminated under the terms of his probation. On 12 November Mr Lee emailed the claimant (copying Mr Unsworth) to inform him of that decision and tell him that a probation review panel would be convened in due course chaired by Mr Spoors. He told the claimant that he would be notified in advance when and where that would take place.

203. The first OH Report dated 16 November 2020 (pp.519-521) advised that the claimant was not fit to return to work and not fit to sit the NIE or attend the "crammer" course. It noted the claimant was keen for the probationary review to proceed but advised that his concentration would be below his normal levels if that was within the following 3 weeks. It recommended that Mr Davies use email to contact the claimant but that he minimise the extent he did so over the following weeks so that the claimant could forget about work and concentrate on his recovery. It recommended a further OH review in 3 weeks.

204. On 18 November it was confirmed that the claimant had been booked to sit the NIE on 2 March 2021.

205. On 24 November 2020 Mr Davies wrote to the claimant to confirm that his probation, which had been due to end on 1 December 2020, would be extended by one month until 1 January 2021. That was to give the claimant time to get better and to attend the formal probation review meeting. He also advised that in light of the OH advice about the claimant's lower concentration levels, that probation review would

take place no earlier than 7 December 2020, i.e. 3 weeks after the OH appointment on the 16 November 2020.

206. On 26 November 2020 the claimant was signed off until 10 December 2020 by reason of PTSD.

Events in December – grievance, sickness absence and extensions of probation

Formal grievance

207. On 9 December 2020 the claimant filed a formal grievance. He completed the grievance booklet and attached a 27 page timeline. He sent it to Mr Unsworth who sent it to the respondent's HR Grievance Reporting email on his behalf. Mr Unsworth confirmed the claimant wanted him to act as his Trade Union representative.

208. In summary, the claimant said that the grievance concerned "bullying, discrimination based on race and sex, and a concerted effort to create obstacles that would eventually allow his dismissal by Mr Craven". In explaining how the protected characteristics were engaged the claimant said (page 545) that there were clear examples of his family and "in particular my two small children, being used as an excuse, to cover for unfair treatment and unattainable standards (doubly so as we're in the middle of a pandemic with extra restrictions)". The claimant said that there was a clear display of superiors being approached and made aware of these issues and them not only ignoring it but siding with the offending party (i.e. Mr Craven) as it is easier to remove a new starter rather than reprimand and sanction an experienced officer.

209. In terms of his expected outcome (page 546), the claimant said that he would like to request that he was allowed to change team and managers. The claimant said he would like to be allowed to fully revise without interruptions and attempts to "sabotage my revision by my management to be allowed two attempts of passing my NIE exam as every time I have done so I have been put in circumstances that make my revision and taking the exam impossible". He also asked that the officers involved be held accountable for their actions and sanctioned. The claimant said (and this is as of 9 December) that he "eventually had to take time off due to stress" and he was "bombarded and harassed with an abundance of messages, calls and emails" which led to him instructing management that they could only contact him via Mr Unsworth.

210. On 15 December 2020 the respondent's HR team acknowledged the grievance and confirmed that it would be sent to the grievance Gateway Panel ("the GGP") to review the content and decide on appropriate action.

211. The GGP was next due to meet on 22 December 2020. At that meeting, the GGP decided not to accept the grievance under the respondent's grievance process but instead to consider the matters raised in the grievance booklet at the formal probationary review meeting. The reasons given in the minutes were that as the issues raised were closely linked to those issues raised in the claimant's probation review, it seemed the most sensible option for the person chairing the probation meeting to hear the grievance alongside the concerns raised about the claimant's performance. There was no evidence to suggest those were not the genuine reasons

for the decision and we find on balance that they were. We find the situation was a novel one and the GGP took what it regarded as the pragmatic decision in the circumstances.

The second OH report and further probation extension

212. In the meantime, the second OH report was sent to Mr Davies on 11 December 2020. It resulted from an OH appointment conducted by telephone on 9 December 2020. It advised that the claimant was fit to return to work with adjustments, namely a graduated return to work from 17 December 2020 and the carrying out of a stress risk assessment. That was based on there having been an improvement in the claimant's condition as a result of treatment. The report recommended that there be a further OH review in the first week in January 2021. It did not provide any updated advice about the claimant's fitness to attend a formal probationary review, merely saying "advice given in previous report".

213. On 10 December the claimant filed a further fit note signing him off until 24 December 2020 by reason of PTSD. Mr Davies decided it was not appropriate to hold the formal review between Christmas and New Year. That resulted in the claimant's probation being extended by a further month to 1 February 2021. Mr Davies confirmed that in a letter to the claimant on 22 December 2020.

214. On 17 December 2020 Mr Sideris was deemed psychologically fit to carry out his current role by a Clinical Psychologist. We find that assessment was a routine assessment separate from (and apparently not informed by) the OH reports being produced about the claimant's ability to attend work at the time.

COVID and delay in returning to work

215. The claimant had intended starting his phased return to work on 29 December 2020. However, he and his family contracted COVID. He was signed off sick due to "COVID infection with severe fatigue" from 30 December 2020 until 13 January 2021.

Events in January – the third Occupational Health report, the challenge to the Grievance Gateway Panel decision and the probation review meeting

216. Mr Spoors was appointed to hear the formal probation review in November 2020.

The claimant's return to work and transfer of line management to Mr Lee

217. A third OH report was sent to Mr Davies following an OH appointment on 6 January 2021. It advised that since the claimant's COVID symptoms were improving the phased return to work should start when his current fit note expired on 13 January 2021. It repeated the recommendation to carry out a stress risk assessment with the claimant on his return to work. A further OH review in 4 weeks' time was recommended.

218. Mr Lee prepared for the claimant's return by preparing a draft Stress Risk Assessment which he sent to Ms Anyimadu for comments. On 13 January 2021 he emailed the claimant to confirm that he would be the claimant's line management

point of contact. He confirmed that everyone was working from home unless there was a specific operational need to attend the office.

219. In his email, Me Lee noted that the claimant would be returning to work on a phased basis, working half days for the next 4 weeks. He asked the claimant to confirm between which times the claimant would be working those hours so that Mr Lee could limit contact to between those times. He confirmed that there was no requirement on the claimant to check in with himself, Mr Craven or Mr Brown each morning. Mr Lee set out his expectations over the next 4 weeks which were limited to the claimant clearing his emails; catching up with admin; revising for his NIE; and preparing for the probation review panel. He told the claimant he was welcome to get involved in the 'lines of enquiry' training exercises with staff across the team if he liked but that was entirely up to the claimant.

220. In terms of contact with the wider team, Mr Lee said he would be guided by the claimant as to whether he wanted to get in touch with them individually or would want Mr Lee to nominate someone as a point of contact.

221. The claimant responded by email the following morning to confirm his working times would be 07:15-11:00 daily but told Mr Lee to feel free to contact him during all normal office hours if needed. He confirmed he had been keeping in contact with some colleagues during his absence so there was no need for a designated point of contact. He said he assumed that as Mr Lee was acting as his line manager temporarily any business needs updates would come via him so it seemed superfluous for there to be a second point of contact.

222. One of the claimant's complaints of sex-related harassment (20.8) was that he was temporarily moved teams pending the outcome of his grievance. We find he was not moved teams but that during his first month back after sick leave he reported direct to Mr Lee rather than to Mr Craven. At that point, Mr Lee had not seen the claimant's grievance. The claimant did not put forward any evidence to suggest that Mr Lee's decision was in any way related to his sex. We find it was a logical decision to remove direct contact between the claimant and Mr Craven while the claimant was undergoing a phased return to work. That was particularly given that Mr Lee's expectations for the claimant during those first 4 weeks did not involve the claimant being allocated any new operational tasks which might have required the "day to day" involvement of a manager at a lower level than Mr Lee.

The claimant's challenge to the GGP decision about his grievance

223. On 15 January, Mike Hulett ("Mr Hulett"), the chair of the GGP, wrote to the claimant to confirm the GGP's decision that his grievance would be considered at the same time as the probation review rather than through the respondent's formal grievance process. He explained the reasons for the decision were that the issues raised would be considered more quickly than via a separate grievance process and ensured no duplication of effort for the claimant or others. We find those were the reasons for the GGP's decision.

224. The claimant responded the same day asking the GGP to reconsider its decision. He emphasised the seriousness of the allegations of race and sex discrimination made in his grievance. He raised his concern that if they were dealt

with as part of his probation review, those allegations would be dealt with as an afterthought. He emphasised that allegedly discriminatory behaviour by managers was (or should be) of wider concern to the respondent and was not merely an aspect of whether his probation should be terminated or not.

225. The GGP discussed this at its next meeting on 19 January 2021. The claimant's concerns about the process were noted. The GGP decided to confirm its original decision. It noted the need to reassure the claimant that the issues raised in his grievance would be investigated and dealt with and the GGP would seek to ensure that the person hearing the review made a finding relating to the issues raised. The GGP assigned the claimant's grievance case to Emma Lowes ("Ms Lowes"), Senior Manager, Capabilities Team.

226. Ms Lowes emailed the claimant on 21 January 2021 to confirm the GGP's decision and to confirm it was final. She confirmed the claimant would have the opportunity to raise any significant issues for consideration as part of the probation review meeting. She reassured him that his issues would be considered fairly and that any issues raised would be considered as an integral part of the review.

227. On the same day, Ms Lowes spoke to and emailed Mr Spoors. She confirmed he would need to investigate the allegations in the grievance before moving on to consider the issues flagged in relation to the claimant's performance and make findings in relation to those issues. If bullying or discrimination was found to have occurred, Mr Spoors would then need to consider (a) to what extent this impacted on the process so far which had led to the probation review meeting/the validity of the performance issues raised and (b) whether the behaviour of the line managers needed to be referred to PSU for consideration as a potential disciplinary matter.

The probation review meeting on 28 January 2021

228. On 21 January 2021, Mr Spoors invited the claimant to attend the formal probation review on 28 January 2021. He confirmed that he would be considering the matters of concern raised by the claimant as a grievance at the meeting.

229. The claimant submitted a "Timeline Addendum". It included for the first time the allegation (20.18 in the List of Issues) that Mr Craven had said to the claimant during a call that 'if [the claimant] made any mistakes in the disclosure it would cause the respondent reputational damage so it was unacceptable" and that "If [the claimant] failed the PP he would be singled out as a failure compared to [his] peers and it can lead to an eventual dismissal if [the claimant] cannot do [his] work'. The claimant said that happened around 16 April 2020. He did not refer to the incident in his original timeline submitted with his formal grievance. There was no explanation for why that was the case. He also did not refer to it in his Tribunal witness statement. Mr Craven denied he had said what the claimant's alleged. We prefer Mr Craven's evidence on this point. We find he did not say what was alleged in complaint 20.18.

230. The probation review meeting was chaired by Mr Spoors who was assisted by Tracey Randall, a HR Business Partner and Kath Penney as note taker. The claimant attended with Mr Unsworth. Mr Lee attended throughout as an observer. Mr Davies attended as a witness to give his professional opinion on whether the

claimant would meet the required performance standard. Mr Brown and Mr Craven were called in as witnesses in relation to the claimant's allegations. It was agreed by the claimant that Mr Spoors would ask Mr Craven questions to avoid the claimant having to do so. The meeting lasted 5-6 hours.

231. The claimant was severely critical of the minutes of the probation review panel. In summary, he said that it misrepresented what had happened at the probation review hearing. As we understood it, his suggestion was that there should have been a full verbatim transcript of that hearing. Given the claimant's criticism of the typed minutes of the meeting, we have in making our findings about what happened at the meeting taken into account those typed minutes, the handwritten notes of the meeting in the final hearing bundle, what was said by the claimant in his appeal and the witnesses' evidence about what happened at the meeting.

232. We find that Mr Spoors did approach matters with an open mind.

233. We find that at the meeting, Mr Spoors went through the events of the claimant's probation period stage by stage, referring to the probation review form and the PIP as well as the claimant's timeline. We find that the claimant was given an opportunity to state his case and that Mr Unsworth was also given the opportunity to freely contribute to the meeting. The claimant did not suggest that Mr Spoors himself acted in a discriminatory way. Instead, his central criticism was that Mr Spoors took what Mr Craven and Mr Lee was telling him at face value.

234. The claimant also criticised Mr Spoors for having failed to call those witnesses said to have given negative feedback about the claimant, e.g. Ms Greener, to give evidence at the probation review. Mr Spoors' evidence, which we accept, was that in conducting the review he had followed the advice given to him by the respondent's HR team. We find, in any event, that it was reasonable for Mr Spoors to limit the witness evidence he heard to that of the main protagonists. More relevantly for the complaints being brought by the claimant, there was no evidence that Mr Spoors would have acted any differently had the claimant been female in the same circumstances.

235. We find that in reaching his decision Mr Spoors also took into account the evidence provided by Mr Brown who he saw as outside the claimant's direct line management chain and therefore bringing a level of impartiality to matters. We accept that the claimant disagreed with that because of his view that Mr Brown had been influenced by Mr Craven in the feedback he was giving. We did not find that Mr Brown was influenced in that way.

236. Mr Brown was asked by Mr Unsworth whether the claimant would have time to improve and achieve the required standards if he was given a six month extension given that it had been a difficult 12 months. Mr Brown's evidence was that he did not believe so based on what had been evidenced so far. Mr Brown also pointed out that the claimant was not the only trainee to have had personal issues as a result of Covid.

237. Mr Spoors accepted that the alternative working arrangement was noted not to be a primary contributing factor to the claimant's underperformance. We find that

reflected the view of Mr Lee and Mr Brown – that the issue was not the claimant's availability to carry out tasks but rather the quality of the tasks he carried out when he was available. We find that was genuinely Mr Spoors' view.

238. Mr Spoors questioned Mr Craven about the "Covid Crete" and "Tesco" comments and recorded Mr Craven's apology for any "unwitting offence" caused. Having considered all the information Mr Spoors did not uphold the allegations of bullying and discrimination based on sex and race and a concerted effort to create obstacles that would eventually allow dismissal.

239. After taking time to deliberate, Mr Spoors reconvened the meeting to inform the claimant he had decided that his probation would not be confirmed and that his contract would be terminated with immediate effect.

240. We find that in reaching his decision to terminate the claimant's contract Mr Spoors did take into account the impact of Covid and the childcare demands on the claimant. Even taking that into account, we find that his genuine view was that quality of the work which the claimant had done was not meeting IOTP standards and that giving further time was not likely to result in those standards being met. We find that was a genuine view based on the evidence before him and not one that was influenced by the claimant's sex. Mr Spoors reached his decision after retiring to consider the evidence that he had heard. We find that in reaching his conclusion he was very aware of the claimant's allegations against Mr Craven and the suggestion that Mr Craven was in some way biased against the claimant. The deliberation decision note records that the decision to dismiss was based on the opinion of several managers rather than solely that of Mr Craven.

Events after January 2021

241. The termination of the claimant's contract was confirmed in writing by a letter sent by post from Mr Spoors which the claimant received on 18 February 2021. On 19 February 2021 the claimant appealed against the decision to terminate his contract and the conclusion that he had not been bullied and discriminated against.

242. The claimant's appeal took place on 29 April 2021. It was chaired by Craig Naylor, Deputy Director of Investigations. The claimant claim does not include a complaint in relation to the appeal so we do not make detailed findings about it. In brief, Mr Naylor conducted an appeal by way of review of the original decision rather than a rehearing. The claimant was accompanied by Mr Unsworth. Mr Spoors attended as did a note taker and an HR representative. In summary the claimant argued that the original decisions had been "sped through" and had not taken into account the evidence he had provided. He also said that despite Mr Craven having acted unprofessionally and discriminated against him, his assessment of the claimant's performance had been relied on as the basis for the decision to terminate the claimant's probation. He also alleged he had been discriminated against in relation to his gender by not being given support or flexibility to care for his children.

243. 30 April 2021 the claimant was informed that his appeal had been unsuccessful. The appeal outcome was confirmed by a letter dated 4 May 2021. In summary, Mr Naylor found that the original decisions had been made after a 6-7 meeting following pre-reading by Mr Spoors in preparation for the meeting so had

not been rushed. He found that the evidence provided by the claimant consisted in the main of extracts from emails with commentary from the claimant which took a negative view of any email and that there was a lack of evidence to back up allegations made. Mr Naylor noted that two comments made by Mr Craven had been addressed at the probationary meeting. He found that the claimant had been afforded flexibility but that there was also an expectation that the claimant would complete tasks to continue to develop as an IOTP trainee. He concluded that the claimant had not taken responsibility for his inability to progress and showed no recognition that the respondent as an organisation needed to manage him and highlight where he needed to put in more effort or develop skills. He decided the claimant had not shown rationale for not being able to achieve what was required so there were no grounds for overturning the original decision and he upheld the probation review meeting decision.

Findings of fact about allegations not dealt with above

244. The claimant's complaints included allegations about a number of specific matters which were either not linked to a specific date or related to more than one date. Where we have not dealt with those as part of the narrative above we set out our findings of fact about those allegations in this section.

Threatening the claimant with the loss of his job if his "employment did not take precedent" [sic] (20.11)

245. There was no date given for this allegation. In his document provided for the probation review (p.665) the claimant referred to "continuously and systemically threatening [the claimant] with loss of employment". No details of those allegations were given. As we have recorded in our findings above, Mr Craven and Mr Lee did warn the claimant that there were concerns about his performance meeting the standard required to complete the IOTP. We find that reflected the genuine concerns they had that the claimant would not pass his probation. We do not find that is correctly interpreted as "threatening" the claimant with loss of employment.

246. When it comes to the specific remark attributed to Mr Craven in allegation 20.11, he denied making it. The claimant failed to provide evidence about when and in what context it was alleged to have been made. He did not We prefer Mr Craven's evidence and find he did not say what is alleged.

Making misogynistic comments about the claimant's wife and/or encouraging the claimant to "disregard his [childcare] responsibilities…[because] he is a man (20.12)

247. The only specific example of a misogynistic comment given in evidence by the claimant was to Mr Craven saying (in relation to childcare) "tell your wife to do it, its her job anyway)" (paragraph 7 of the claimant's witness statement). That comment is included in the claimant timeline for the probation review at a point which suggests it was made before the second quarterly review in June 2020. However, the claimant makes no reference to the comment at the time. Given its clearly sexist nature we find it implausible that the claimant would not raise a complaint about the comment having being made either at the time or (at the latest) in his detailed response to the quarterly review.

248. Mr Craven denied making that remark. He gave unchallenged evidence (which we accept) that when his daughters were younger he had on frequent occasions been the primary childcare because his wife worked as long-haul cabin crew. Given that context, we do find the remarks attributed to him to be implausible. We find his evidence on this point more reliable than the claimant's and find that he did not make the "tell your wife" comment.

249. The claimant did not refer to the "because you are a man" comment in his evidence. There was no detail about when it was alleged to have been made. Mr Craven denied making it. We prefer his evidence on this point. We find he did not make that remark. We find the claimant was encouraged to discuss with his wife how they could manage the childcare burden between them. We find that a perfectly sensible thing for Mr Craven to suggest. There was no evidence to suggest that he would not have adopted the same approach if a female trainee was facing similar childcare difficulties as the claimant was.

Providing feedback that "it is the little things" in performance managing the claimant (20.17)

250. The respondent accepted that this comment was made. We find that it was made more than once. Mr Craven made the comment in his email to the claimant on 3 April 2020, saying that the job "gets 100% harder over the forthcoming months so getting the little things right at the beginning will set you up for times when your flexibility and accuracy has to be completely relied on". We find that the same comment was made at the first PIP review meeting on 14 September 2020. Mr Brown also made similar comments.

Seeking to influence feedback to be given to the claimant on or around 2 July 2020 and 11 September 2020 (20.15 in the List of Issues)

251. In terms of the feedback which the claimant said Mr Craven had sought to influence, he referred in particular to feedback given on 2 July 2020 and 11 September 2020.

252. The 2 July 2020 related to an action which the claimant had carried out for Callum Gracey. The claimant's case was that the interactions he had with Mr Gracey resulted in positive feedback and some constructive feedback about the phrasing of wording used by the claimant. This contrasted, the claimant said, with the email feedback which Mr Craven had received from Mr Gracey. Mr Gracey's email was at page 337 and was dated 8 July 2020. It was an email to Mr Brown and Mr Craven and opened by saying "Gents" and that he had been "asked to give a bit of feedback regarding [the claimant's] involvement with the task". Mr Gracey caveated his feedback with the comment that the task was not the most arduous and so his involvement with the claimant was minimal. He provided positive feedback on the claimant being keen and engaged and genuinely seemin to want to get matters right. However, he raised concerns about whether the claimant could get his "base level" high enough so that he would ever be able to effectively operate "single crewed", i.e. without supervision or help. That was based on the claimant seeming to Mr Gracey to lack initiative and appearing to come back to him as soon as there was any kind of stumbling block. There was no evidence in the email that Mr

Gracey had discussed his feedback in detail to any significant extent with either Mr Brown or Mr Craven before providing it in writing.

253. We find it plausible that the more detailed nature of the feedback resulted partly on his being asked to provide it by Mr Craven and/or Mr Brown. It was part and parcel of the IOTP for feedback on a trainee's work to be sought. We do not, therefore, find anything unusual in Mr Gracey being asked to provide feedback. We also do not find it attached the significance which the claimant did to the apparent inconsistency between his feedback to the claimant and his feedback to Mr Brown and Mr Craven. We find that it would be both easier for Mr Gracey to be critical of the claimant to his supervisors rather than directly to him. We also find that having been asked to provide feedback he would set that out in more detail and in a more nuanced way than he might in the brief interactions which the claimant accepted they had had in connection with the task. We do not find that the wording of the email or the feedback being produced at all amounts to evidence sufficient to support a finding that Mr Craven or Mr Brown were seeking to influence the feedback provided about the claimant by Mr Gracey.

254. When it comes to the feedback from Kate Greener, that was provided in an email dated 11 September 2020 (page 371). This was detailed feedback provided to the claimant and copied to Mr Craven. There was positive feedback about the claimant's enthusiasm and attitude and the provision of regular updates. There was concern, however, about the claimant's understanding of the task and his apparent lack of initiative when what Ms Greener referred to as "the smallest of hurdles" were encountered. Ms Greener was concerned given some of the claimant's actions that despite her detailed instructions and feedback the claimant had not truly understood the task. She also referred to confusion about the deadline, due to not reading an email correctly. Mr Greener concluded by saying that the lack of attention to detail, lack of understanding and initiative was something that she would strongly suggest required significant improvement. She said that the level of support the claimant had required was far more than she would ordinarily expect and be able to provide, and far more than other officers required for a task of that nature.

255. The claimant suggested that the use of phraseology such as "lack of attention of detail, lack of understanding and initiative" was indicative that Mr Craven was in the background seeking to influence the feedback being given about him to the extent of the same phrases appearing in feedback emails as used by Mr Craven in his feedback and in the performance review and PIP documents. We do not find that the evidence supports that finding. We find it more plausible that all the supervisors were aware of the competencies required of an IOTP and that the similarity in their feedback reflected a reality in terms of the claimant's performance.

256. In his evidence in support of this contention, when it came to the Kate Greener feedback, the claimant said that it was clear that Ms Greener had spoken to Mr Craven before providing her feedback. His reason for saying this was that she would not have known about an issue which had arisen with a fuel card unless Mr Craven had spoken to her about it. The claimant said that he had reported back to Mr Craven after the task. Mr Craven was in the office and the claimant said it was clear that he had then spoken to Ms Greener. As we have said above, we do not accept that the evidence shows that there was some untoward influencing of feedback. We accept that Mr Craven and Ms Greener may have discussed the task

completed by the claimant. We do not find that is the same as Mr Craven "influencing" the feedback. It was, in any event, relevant information for Ms Greener in assessing the claimant to know whether or not he had been told how to use the fuel card.

257. We do not accept that Mr Craven sought to influence the feedback provided on these occasions nor was there evidence of him doing so on other occasions.

Relevant Law

The Equality Act 2010

258. The complaints of direct and indirect sex discrimination, race-related and sex-related harassment were brought under the 2010 Act. Section 39(2)(d) prohibits discrimination against an employee by subjecting him to a detriment. Section 39(2)(c) prohibits discriminating against an employee by dismissing them. Section 40(1)(a) prohibits harassment of an employee. Conduct which constitutes harassment cannot also constitute a "detriment" (section 212(1)), meaning that it can only be pursued as a harassment complaint and not as an act of direct discrimination.

259. The 2010 Act provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> **"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

260. This means that it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the 2010 Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

261. In **Hewage v Grampian Health Board [2012] ICR 1054, SC**, the need to avoid an overly technical approach to the application of section 136 was emphasised. Lord Hope observed that the burden of proof provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

262. Where there is "room for doubt", the approach s.136 lays down provides a valuable tool for determining whether the inference of discrimination should be drawn. In **Field v Steve Pye & Co [2022] IRLR 948 EAT** HHJ Tayler emphasised that if there is evidence that could realistically suggest that there was discrimination it is not appropriate to just add that evidence into the balance and then conduct an

overall assessment, on the balance of probabilities, and make a positive finding that there was a non-discriminatory reason for the treatment.

263. HHJ Tayler said that "where there is evidence that could indicate discrimination there is much to be said for properly grappling with the evidence and deciding whether it is, or is not, sufficient to switch the burden of proof. That will avoid a claimant feeling that the evidence has been swept under the carpet. It is hard to see the disadvantage of stating that there was evidence that was sufficient to shift the burden of proof but that, despite the burden having been shifted, a non-discriminatory reason for the treatment has been made out." He also said that where a claimant contends that there is evidence that should result in a shift in the burden of proof they should state concisely what that evidence is in closing submissions.

264. As for what is required to discharge the burden at the first stage, that must be something more than a difference in the relevant protected characteristic and a difference in treatment; see **Madarassy v Nomura International plc [2007] ICR 867, CA**. That said, the something more required at the first stage need not be a great deal; see **Deman v EHRC [2010] EWCA Civ 1279**.

265. A finding that an employer has behaved unreasonably, or treated an employee badly, will not, however, be sufficient, of itself, to cause the burden of proof to shift; **Glasgow City Council v Zafar [1998] ICR 120**.

Direct sex discrimination

266. The definition of direct discrimination appears in section 13 of the 2010 Act and so far as material reads as follows:

> **"(1) A person (A) discriminates against another (B) if, because of a protected characteristic [in this case sex], A treats B less favourably than A treats or would treat others".**

267. The concept of treating someone "less favourably" inherently requires some form of comparison, and section 23(1) provides that:

> **"On a comparison of cases for the purposes of section 13 … there must be no material differences between the circumstances relating to each case".**

268. A protected characteristic need only have a material influence in detrimental treatment for direct discrimination to be established: **Nagarajan v London Regional Transport [2000] 1 AC 501**. It need not be the sole or principal reason or the treatment.

Harassment

269. The definition of harassment appears in section 26 of the 2010 Act which so far as material reads as follows:

> **"(1) A person (A) harasses another (B) if -**

> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…**
>
> **(4) In deciding whether conduct has the effect referred to sub-section (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."**

270. The Equality and Human Rights Commission gives more detail on the factors relevant in deciding whether conduct has the effect referred to in s.26(1)(b) at paragraph 7.18 of its Statutory Code of Practice on Employment ("the EHRC Code"):

> "7.18 In deciding whether conduct had that effect, each of the following must be taken into account:
>
> a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.
>
> b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.
>
> c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended."

271. Case-law has made it clear that the language used in s.26, i.e. "violation of dignity" and "intimidating, hostile, degrading, humiliating, or offensive" is significant:

> "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." (**per Elias LJ Grant v HM Land Registry [2011] EWCA Civ 769 at paragraph 47**)
>
> "The word 'violating' is a strong word. Offending against dignity, hurting it, is insufficient. 'Violating' may be a word the strength of which is sometimes overlooked. The same might be said of the words 'intimidating' etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence." (per Langstaff P **Betsi Cadwaladr University v Hughes UKEAT/0179/13 at paragraph 12**)".

272. The EAT gave guidance on when conduct is "related to" a protected characteristic in **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor 2020 IRLR 495.** It said that the question of whether conduct is 'related to' a protected characteristic is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it. The fact that the claimant considers that the conduct is related to that characteristic is not determinative. The broad nature of the "related to" concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim.

Indirect discrimination

273. S.19(1) of the 2010 Act provides that:

> **"A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's."**

274. S.19(2) sets out the four elements of an indirect discrimination complaint:

> "**(2) …a provision, criterion or practice is discriminatory in relation to a relevant 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."**

275. In this case, the relevant protected characteristic is sex.

276. The case law sets out the following relevant principles:

a. Although section 136 of the 2010 Act provides for a reversal of the burden of proof in discrimination cases, the onus is still on the claimant to prove facts from which a Tribunal could conclude that discrimination may have occurred. In the context of an indirect discrimination claim, before there can be any reversal of the burden of proof it would have to be established that:

   I. There was a PCP;

   II. That it disadvantaged [men] generally; and

   III. That what was a disadvantage to the general created a particular disadvantage to the individual who is claiming. Only then is the employer required to justify the PCP (**Dziedziak v Future Electronics Limited [2012] Eq LR 543**).

b. When it comes to proving particular disadvantage it is not necessary for the claimant to prove his case by provision of relevant statistics. Those, if they exist, will be important material but the claimant's own evidence or evidence of others sharing his relevant protected characteristic, or both, might suffice (**Games v University of Kent [2015] IRLR 202, paragraph 41**).

c. It is clear from section 19(2)(c) that the particular disadvantage to the relevant group must be shared by the individual bringing the claim. That is clear from the reference in that subsection to “that” disadvantage.

Discussion and Conclusions

277. In this section of our Judgment we set out our conclusions on each of the claimant’s complaints. The issues we had to decide are set out in the List of Issues in the Annex. We have not followed the order of complaints in the List of Issues in this section. The numbers in brackets in the headings in this section cross-refer to the numbering in the List of Issues.

278. The first reason for taking matters in a different order to the List of Issues order is that the time limit issues, which come first in the List of Issues, only arise if we find the respondent to have committed any acts of discrimination or harassment. That meant it made sense to deal with those substantive issues before the time limit points. In the event, we did not uphold any of the complaints of discrimination or harassment, so the time limit issues did not arise for decision.

279. The second reason is that a number of incidents were relied on as potential acts of direct discrimination and as potential acts of harassment. We have found it more convenient to set out our conclusions about all the potential complaints relating to an incident together in one place to reduce repetition.

280. The third reason is that complaint 6.1 (attempting to undermine the claimant during his probationary period) is, in essence, an overarching complaint about the respondent’s actions towards the claimant during his probationary period. It made sense to deal with that complaint after dealing with the more specific complaints.

281. The fourth reason is that we decided to set out our conclusions about the indirect complaint discrimination last after setting out our conclusions about the direct discrimination and harassment complaints.

282. The result is that we deal with matters in this order:

a. The direct sex discrimination complaints and the harassment complaints arising from incidents also alleged to be direct sex discrimination at paras; Complaint 6.1 is dealt with at the end of this section.

b. The remaining harassment complaints; and

c. The indirect discrimination complaint.

283. We have set out our conclusions in relation to each of the complaints below. The majority of the complaints are of direct sex discrimination or sex related harassment. We did not find that there was less favourable treatment because of sex, nor did we find that any of the alleged harassment was sex related. In reaching our decisions, we have considered each individual complaint but also stepped back to view the complaints in the round. We think it helpful to explain at this point why we have found an absence of sex discrimination or sex related harassment and our approach in assessing whether conduct had a harassing effect.

Conclusions on the burden of proof

284. In summary, we find the claimant did not discharge the burden on him of proving facts from which we could conclude that he was treated less favourably because of sex and/or that he was subjected to sex-related harassment.

285. Dealing firstly with the allegations of direct sex discrimination, the claimant relied on an actual comparator. However, we have found that she was not a valid comparator because she was not in the same material circumstances as the claimant as is required for an actual comparator under the Equality Act 2010. She was not managed by Mr Craven nor, more significantly, was there any evidence that concerns had been raised about her performance to the extent that we have found that concerns had been raised about the claimant's performance (or indeed to any extent). We had limited evidence about Ms Evans but the evidence we had was that she had passed her NIE and was deployable. She was not in the same material circumstances as the claimant. Even had the claimant shown less favourable treatment compared to Ms Evans, his claim would have failed because she was not a valid comparator for the purposes of the Equality Act 2010.

286. For the avoidance of doubt, our decision would not have been different had the claimant relied on a hypothetical comparator. What we found, in summary, was that the treatment of the claimant was not because of his sex. The claimant's argument as we understand it was that a woman with childcare responsibilities would have been afforded more support and flexibility than he was by Mr Craven and Mr Lee. The claimant has not, however, proved facts from which we could conclude that that was the case. The claimant was in reality asking us to assume that a woman with childcare responsibilities would be afforded more flexibility and given

more support than he was as a man with childcare responsibilities. We cannot make findings based on assertions. We are deciding how this particular employer would treat a woman in the same circumstances as the claimant. We have to make that decision based on the facts founded by the evidence before us. That includes the fact that the respondent's policy was that formal alternative working arrangements were not available on the IOTP regardless of the sex of the trainee. The claimant has not proved facts from which we could conclude that a woman in the same circumstances as the claimant, i.e. one whose managers had genuine concerns about the quality of her work and performance, would have been treated more favourably.

287. When it comes to the burden of proof, therefore, we find that the claimant has not established primary facts from which we could conclude that the alleged direct sex discrimination was less favourable because of sex.

288. When it comes to whether alleged acts of harassment were "sex related", the test we need to apply is different. The conduct does not have to be "because of" sex, although if it is then it will be sex related.

289. The claimant accepted in his cross examination evidence that a number of the specific acts of harassment relied on did not in themselves have sex related content. As we explain below, our findings are that none of them did. Our overall finding in this case is that almost all of the incidents relied on were legitimate expressions of criticism or, in some cases, merely the passing on of advice. That is not the case in relation to all incidents (e.g. the "best officer" remark at allegation 20.19). For the allegations to amount to harassment in breach of the Equality Act 2010, however, they would need to be sex related.

290. We accept that the absence of explicitly sex-related that does not necessarily mean that conduct is not sex-related. However, as **Aslam** makes clear, there needs to be some feature of the alleged harassment which properly leads to the conclusion that the conduct in question related to sex in the manner alleged by the claim.

291. The claimant's position was that the apparently non-sex related conduct had to be seen in the round. In summary his position was that Mr Carver had taken against him because he was a man with childcaring responsibilities. His behaviour towards the claimant was "sex-related" because it was rooted in that. The claimant has not, however, proved facts from which we could conclude that Mr Carver's conduct towards him was motivated by the claimant's sex. His claim rests on the same assumption as the direct sex discrimination claim, i.e that a woman who was facing childcare difficulties and was failing to perform to the required standard would have been given greater support and leeway. The claimant did not prove facts to support that assertion. We did not accept that Mr Craven made the alleged misogynistic comments alleged at 20.12. We did not find that Mr Craven's behaviour towards the claimant was motivated by his sex.

292. In the absence of sex-related content or evidence of sex-related motivation, our overall finding is that the alleged harassment was not sex-related.

"Harassing effect"

293. We did not find that the conduct complained of by the claimant was conduct with a harassing purpose. That meant the focus was on whether the conduct had a harassing effect.

294. We accept that the claimant sincerely felt that he was being "picked on" or unfairly criticised. The general point we make is that not all conduct which is viewed by a claimant as having a harassing effect meets the definition and threshold for harassment in the Equality Act 2010. There is also an objective element in assessing whether conduct has a harassing effect, i.e. the Tribunal has to ask whether it was reasonable for the conduct to have that effect. The second element is that not every thoughtless remark meets the threshold for harassment. That is made clear, for example, in **Grant**.

295. In reaching our conclusions on whether conduct had a harassing effect, we have taken into account that we must view the incidents of alleged harassment cumulatively rather than as individual incidents to ensure that we are not missing the wood by focussing too much on individual trees. We accept that a "drip drip" of what might be regarded as small acts of demeaning behaviour can cumulatively create an environment which it is reasonable for an employee to view as humiliating or offensive.

<u>The direct sex discrimination complaints and the harassment complaints arising from incidents also alleged to be direct sex discrimination</u>

<u>*Refusing to allow the claimant to work flexibly (6.2 and 20.13)*;</u>

296. There was no suggestion that the claimant made a request for a formal alternative working arrangement under the AWA Policy. The respondent accepted that it did not allow trainees on the IOTP to enter into formal alternative working arrangements regardless of their sex. There was no evidence that it had done so in the case of the claimant's comparator, Jayne Evans.

297. We find that Mr Craven did allow the claimant to take flex when he had legitimately accrued it. We find that he was not allowed to take TOIL until he was deployable but that was the rule which applied to all IOTP officers. Ms Evans had access to TOIL once she was deployable. That was not because she was a woman. When the claimant became deployable he was also entitled to claim TOIL when on deployment.

298. The claimant suggested that his comparator, Ms Evans, had been afforded informal flexible working arrangements which he was not allowed. As we have already made clear, we did not accept that Ms Evans was a valid comparator because she was not in the same material circumstances as the claimant. In any event, we found that the claimant was given more flexibility in terms of his working hours than Ms Evans. He was allowed to break up his day to undertake the school run and to limit his hours in the office or when he was available for deployment to a pattern which allowed him to dovetail his availability with that of his wife (i.e. the pattern set out in the email of 15 June 2020).

299. The claimant submitted that having to use his annual leave to cover Mondays and Wednesdays was not allowing flexible working. We disagree. The reality was

that by allowing the claimant to take leave at short notice for two days of the week, Mr Lee was allowing him to work flexibly. The evidence was that Ms Evans also took annual leave to fulfil her childcare commitments, e.g. when her children tested positive for COVID.

300. When it comes to the direct sex discrimination complaint (6.2) we find that the claimant was allowed to work flexibly so the alleged less favourable treatment did not happen so the complaint fails. In addition, the claimant had not proved facts from which we could conclude that he had been discriminated against. There was no evidence that had the claimant been a woman, he would have been afforded more flexibility.

301. The complaint of direct sex discrimination (6.2) fails.

302. When it comes to the sex-related harassment complaint (20.13) we find the claimant was allowed to work flexibly so the alleged unwanted conduct did not occur. If we are wrong, and there was unwanted conduct, we find it was not sex-related. As we have explained above, we do not find that the link to childcare and the claimant's assertion that a woman with his childcare issues would have been treated more favourably is sufficient basis for a finding that conduct was sex related.

303. The complaint of sex-related harassment (20.13) fails.

The email dated 15 June 2020 at 13:53 (6.3.1, 20.3.1 and 20.14)

304. Mr Craven's email asked the claimant to confirm when he was deployable. We find it was legitimate for Mr Craven as the claimant's manager to seek clarity on that. It was relevant for him to understand when the claimant would be available to be allocated tasks which he needed to undertake to complete his EPAs. We do understand the claimant's point that framing the deployment table as a binary "yes/no" on each working day potentially made the claimant look more restricted in terms of availability than he actually was. For example, he was available on Thursday, but only after 9 a.m. when he had dropped his child off at school. As we said in our findings, we do not accept that Mr Craven framed the table deliberately in that way to make the claimant's availability appear more restricted than it was.

305. The claimant said that sending the email was an act of direct sex discrimination, i.e. that Mr Craven treated him less favourably than he did or would a woman in the same material circumstances.

306. The actual comparator relied on by the claimant for his direct sex discrimination complaints was Jayne Evans. Ms Evans was not managed by Mr Craven. We found that her availability was not restricted by childcare issues to the same extent as the claimant as the claimant himself pointed out (SB p.15) her children were significantly older than his which meant they could be left on their own for longer periods. We find that Ms Evans was not in the same material circumstances as the claimant when it comes to this complaint. Her supervisor did not need to seek clarity about her weekly availability because of her less restrictive childcare demands. That means she was not an appropriate comparator.

307. We have considered whether the claimant had proved facts from which we could conclude that Mr Craven would have treated a female trainee in the same material circumstances as the claimant more favourably. We find he has not. We find the evidence suggests that flexibility was a key requirement of the trainee role as far as Mr Craven and Mr Lee (and the respondent more generally) were concerned. That was reflected in the policy of not allowing formal AWAs on the IOTP. We do not find that Mr Craven would have been any more sympathetic to a female trainee in the claimant's situation. We do not find that there is evidence from which we could conclude that the claimant was treated less favourably than a female trainee in the same circumstances would have been.

308. The complaint of direct sex discrimination (6.3.1) fails.

309. The claimant also said that "the terms" of the email amounted to sex-related harassment (20.3.1) and that it was phrased in such as way as to present the claimant as inflexible and/or unable to meet professional responsibilities (20.14). As we have said, we accept that the binary nature of the table in the email did have the potential to make the claimant look more restricted in his availability than he was. We do not, however, find that the email or its contents amounted to sex-related harassment. The email made no reference to his sex nor do we find it was otherwise "sex-related". The claimant's case appeared to be that he was being targeted because he was a man undertaking childcare but the email itself does not voice that criticism nor do we find enough in its contents to imply such a link to the claimant's sex.

310. We do not find that the email had a harassing purpose nor do we find evidence that it had a harassing effect. The claimant did not strongly submit that it had such a harassing effect but in any event we find it would not be reasonable for it to have that effect. It was a legitimate management request for clarity about availability worded in straightforward, non-abusive language. It did not on its face criticise the claimant.

311. The complaints of sex related harassment at 20.3.1 and 20.14 fail.

The email dated 19 June 2020 at 09:55 (6.3.2 and 20.3.3)

312. This email from Mr Lee responded to the claimant's confirmation in his email of 16 June 2020 that the then current restrictions on the claimant's availability were only due to the current situation. We do not find it amounted to a detriment. It was a polite email acknowledging what the claimant had said. We do not find that the reference to the claimant's "restrictions" could amount to a detriment. The fact was that the claimant's availability was restricted. We do not find the use of that word amounts to a criticism of the claimant - that is to give it too much weight. We find there was no detriment and no less favourable treatment. There was no evidence to on which to base a finding that Mr Lee would not have sent an email in the same terms to a female trainee in the same circumstances.

313. The complaint of direct sex discrimination (6.3.2) fails.

314. Even if the email amounted to unwanted conduct, we do not find that the email or its contents amounted to sex-related harassment. The email made no

reference to the claimant's sex nor do we find it was otherwise "sex-related". The fact that it referred to restrictions on the claimant's availability arising from childcare is not sufficient to make it "sex related". As we have said, there was no evidence to support a finding that the email would not have been sent to a female trainee in the same circumstances. We also do not find that the email had a harassing purpose nor do we find evidence that it had a harassing effect. It would not be reasonable for it to have that effect. It was a polite acknowledgement from a manager to an email worded in straightforward, non-abusive language. It did not on its face criticise the claimant.

315. The complaint of sex related harassment at 20.3.3 fails.

The email dated 22 June 2020 at 18:04 (6.3.3 and 20.3.4)

316. We found the context for this email was an opportunity for the claimant to be involved in a car search with other trainees. Mr Craven had forwarded the opportunity to the claimant. To that extent he had not obstructed the claimant's involvement in the opportunity. However, we do find that the follow-up email to Mr Brown and Mr Blake (but not the claimant) did amount to a detriment and unwanted conduct. We accept it did not dissuade them from including the claimant in the task per se. It did, however, clearly limit his opportunity to be involved in the task by making it very clear that the task should not be scheduled around his limited availability. We do accept that it was legitimate for Mr Craven to ensure that an opportunity was not jeopardised for others or an urgent task potentially compromised because of the claimant's unavailability. We do not accept the email was a professional one for a supposedly supportive manager to send.

317. The first question is whether it was an act of direct sex discrimination. We do find it was a detriment. We do not find that Ms Evans was a relevant comparator – there was no suggestion that her availability was restricted to the extent the claimant's was. We do not find that the detriment was less favourable treatment because of sex. We have explained above that we did not consider the link to the claimant's childcare responsibilities to be sufficient to establish that treatment was "because of" his sex. The claimant has not proven other facts from which we could conclude that the treatment was because of sex.

318. The complaint of direct sex discrimination (6.3.3) fails.

319. We also find that the email was not sex-related. There is no explicit refence to the claimant's sex in the email and we do not find that there is evidence from which we could conclude that the same email would not have been sent by Mr Craven in relation to a female trainee in the same circumstances, i.e. where that trainees restricted availability due to childcare might impact on the scheduling of a task involving multiple trainees.

320. The complaint of sex-related harassment (20.3.4) fails.

The email dated 24 June 2020 at 08:53 (6.3.4 and 20.3.5)

321. The context for this email was Mr Craven accepting an opportunity to undertake a task with the claimant and asking Mr Brown to liaise with him. We

understand the claimant's complaint to be that the reference to the "claimant's restrictive working hours" was seeking to undermine the opportunity while seeming to offer it. We do not find that a plausible interpretation. We find that it was perfectly reasonable for Mr Craven to alert Mr Brown to the claimant's limited availability. As we have said previously it seems to us to attach to much weight to the word "restrictive" to see it as a criticism of the claimant.

322. We do not find that this email amounted to a detriment. If we are wrong about that, we do not find it was less favourable treatment related to sex for the same reasons as we gave in relation to complaint 6.3.3.

323. The complaint of direct sex discrimination (6.3.4) fails.

324. When it comes to the harassment complaint about this email, we do not find that the email was sex-related conduct for the same reasons as given in relation to complaint 20.3.4.

325. The complaint of sex related harassment (20.3.5) fails.

The emails dated 30 June 2020 at 09:46 (6.3.5 and 20.3.6)

326. The email in question is one sent by the claimant. It could not amount to less favourable treatment by the respondent nor to unwanted conduct.

327. To the extent that the complaint is about Mr Craven advising the claimant not to undertake the cyber training course, we find that was a perfectly reasonable thing for him to do given the concerns that the claimant needed to focus on other things in order to ensure he could meet the IOTP requirements.

328. There was no basis for a finding that he would have advised a female trainee in the same circumstances any differently. We find that there was no less favourbale treatment because of sex.

329. The complaint of direct discrimination (6.3.5) fails.

330. When it comes to the harassment complaint, we find the conduct was not sex-related. Based on the claimant's own email, Mr Craven's advice was based on the need for the claimant to focus on other things rather than anything to do with his sex or even childcare arrangements.

331. The complaint of sex related harassment (20.3.6) fails.

Trying to dissuade established officers from working with the claimant/ Seeking to dissuade others from working with the claimant because of his childcare responsibilities? (6.4 and 20.16)

332. In support of this complaint the claimant referred to the emails already discussed at 6.3.3 and 6.3.4, either explicitly telling other officers not to work around the claimant's restrictive schedule or referring to the claimant's "restrictive" working hours. As we have said in relation to the email on 22 June 2020, we do not accept that Mr Craven was actively seeking to "dissuade" officers from working with the claimant because of the claimant's childcare responsibilities (as alleged in 20.16).

We accept that he needed to inform other officers managing tasks of the limits on the claimant's availability. We also find that those limitations could not dictate when tasks were done where there was a deadline to be met. We remind ourselves that the tasks allocated to trainees were "real-world" tasks with "real world" deadlines attached rather than training exercises. We do accept that Mr Craven might have been more proactive or positive in the way he framed his emails, encouraging officers to fit within the claimant's availability if possible. We do not think his failure to do so amounts to "dissuading" officers from working with the claimant. We found that he actively accepted tasks to be allocated to the claimant (including that referred to in the email at 6.3.4).

333. On balance, we find that this complaint fails because the alleged unfavourable treatment/unwanted conduct of "dissuading" officers did not happen.

334. If we are wrong about that and the references to the claimant having restricted working hours did amount to Mr Craven "dissuading" officers from working with the claimant, we find that that was not less favourable treatment because of sex (in relation to complaint 6.4), nor do we find that it was sex related (in relation to complaint 20.16). We do not find that Mr Craven would have adopted a different approach if there was a female trainee with restricted availability because of childcare. We do not find that the link back to the claimant's childcare responsibilities as the reason for the restrictions on his hours is sufficient to make any less favourable treatment arising from those restrictions "because of sex" or to make the unwanted conduct "sex related".

335. The complaint of direct sex discrimination (6.4) and of sex-related harassment (20.16) fail.

Requiring the claimant to attend the office each day; (6.5)

336. For the majority of the time with which we are concerned the claimant was not required to attend the office five days a week. We accept, based on the roster produced as part of the supplementary bundle, that from the end of September/start of October 2020 the claimant was rostered to attend the office five days a week.

337. The claimant's complaint is that this was direct sex discrimination. We do accept that the claimant was the only trainee shown on the roster as being required to attend the office five days a week. Other trainees, whether male and female, were not required to do so. There was no evidence about whether Ms Evans, the claimant's actual comparator, was required to attend five days a week. As we have previously said, however, we do not accept that she was in the same material circumstances as the claimant. In particular, when it comes to this complaint, by September the claimant was subject to a PIP which Ms Evans never was.

338. We found that the Mr Craven took the view that it would benefit the claimant to attend the office five days a week to maximise the contact with other officers including more senior investigators. That was both in terms of them increasing the quality of communications when tasks were allocated and so that those officers could provide feedback on the claimant for use in monitoring progress against the PIP. We did not find that Mr Craven's decision was influenced by the claimant's sex.

339. The claimant, we find, has not proven facts from which we could conclude that this was less favourable because of sex. There was nothing to suggest that a female trainee who was on a PIP would not also be required to attend the office five days a week by Mr Craven. In those circumstances we do not find that the requirement was less favourable treatment because of sex.

340. This complaint of direct sex discrimination (6.5) fails.

Conducting the Performance Improvement Plan unprofessionally (6.6 and 20.6)

341. The claimant made a number of points in support of this complaint. He submitted that the timeline for the PIP was too short, both because it was contrary to the advice given to Mr Lee by HR and because it failed to take into account his need to sit and revise for the NIE. As we record in relation to complaint 6.7, we found that Mr Lee did take into account the NIE in setting the timescale for the PIP. We also found that the timeline for the PIP was, to Mr Lee's mind, dictated in part by the fact that the claimant's probation was due to end in December 2020. The outcome of the PIP would need to be known in order to make a decision about whether the claimant passed his probation. We do not accept that it was "unprofessional" to set the timeline for the PIP which Mr Lee decided on. We note that the PIP document suggests a "maximum of three months PIP". That suggests that a PIP is meant to be a relatively short-term measure to secure improvement. We accept that the claimant's view was that the timeline for the PIP did not give him a fair chance to show improvement and that it failed to take into account the challenges he was still at that point facing due to childcare (we accept that those challenges alleviated to a limited extent from September when schools reopened). We do not find, however, that the fact that more time could have been given means that the decision about the timeline was unprofessional. We find that Mr Lee set the timeline which he thought an IOTP trainee should be able to comply with. It was not unprofessional to do so.

342. The claimant also said the PIP was conducted unprofessionally because Mr Craven and Mr Lee sought to influence the feedback given to him. We deal with that in relation to complaint 20.15 below. In addition to the incidents covered by 20.15 the claimant suggested that Mr Craven had influenced the feedback given by Mr Fulcher in October 2020. We have found that he did not do so. We also found that Mr Craven did not withhold positive feedback. We also do not accept the claimant's submission that there was a refusal on the part of Mr Lee and on Mr Craven to acknowledge progress made between the various PIP reviews. We find that there was progress recorded. We accept the claimant was of the view that he had made more progress. We find, however, that the PIP did genuinely reflect Mr Lee, Mr Brown and Mr Craven's views of the claimant's progress and that the overall view was that he had failed to meet the standards required on the IOTP. We do not accept the claimant's submission that this was solely down to the impact of his childcare demands on his availability and ability to complete tasks. We accept that Mr Lee's assessment was that for those tasks which the claimant did complete the feedback showed that he had failed to meet the required standard.

343. We do not find that the failure to refer the claimant to occupational health is a valid criticism given our findings about the meeting on the 22 September 2020. The claimant did not at that point raise issues which could have triggered such a referral.

344. We think that there are some valid criticisms of the PIP process. We do accept that it could be argued that more could have been done to proactively help the claimant by designating a specific buddy other than Mr Craven, for example. We did form the view that there was an element of "sink or swim" when it came to trainees on the IOTP with an emphasis on trainees showing initiative to resolve difficulties they faced themselves. We find that reflected the pressurised nature of the IOTP and the high standards required of trainees (particularly given the sort of work they would subsequently be involved in once they qualified). We do not, however, find that those failings render the way that the PIP was conducted "unprofessional". We find the alleged less favourable treatment and unwanted conduct did not occur.

345. If we are wrong about that, and the failings that we have referred to did amount to a detriment, we find that it was not less favourable treatment because of sex. Ms Evans, the claimant's actual comparator, was never placed on a PIP and so is not an appropriate comparator for this complaint. The claimant has not proven facts from which we could conclude that any failings in the way the PIP was conducted were because of sex. We find it no evidence that Mr Craven and Mr Lee would not have applied the same standards to a female trainee who was in their genuine belief failing to meet the performance standard required on the IOTP to the extent that the claimant was. Even if the claimant was not treated fairly when it came to the PIP, we do not find that he was treated less favourably because of sex. As we have said in relation to other complaints, we do not find any link back to his childcare requirements to be sufficient to make this sex discrimination.

346. This complaint of direct sex discrimination (6.6) fails.

347. When it comes to the harassment complaint about this issue, if we are wrong, and there was unwanted conduct, then we find that that was not sex related. As said in relation to other alleged incidents of harassment, we do not find that the issue of childcare and the demands it placed on the claimant is sufficient to make the conduct sex related.

348. The complaint of sex related harassment (20.6) fails.

Placing the claimant on a Performance Improvement Plan prior to the National Investigators Exam (6.7 and 20.5)

349. It is accepted that the respondent was placed on the PIP prior to the NIE. We understand the claimant's complaint to be that that was done deliberately to engineer his termination, either by ensuring he did not have enough time to revise for the NIE or enough time to address the PIP. We find that the original intention was that the PIP would be implemented in July. Mr Lee initiated the process by contacting HR in June. We find the delays in initiating the PIP were due to a combination of delays due to seeking HR feedback and annual leave (including the claimant's). We find the original timeline of a month took into account the fact the claimant's probation was due to end in December 2020 and attempted to dovetail with that timeline. We find that the PIP timeline was extended from a month to 6 weeks and that in doing so Mr Lee took into account that the claimant was taking the NIE and had annual leave. We do not accept the timeline was one that was setting the claimant up to fail.

350. When it comes to the complaint of direct sex discrimination, we do not find that there was less favourable treatment because of sex. Even if the claimant is correct that the timeline was too short, there was no facts from which we could conclude that Mr Lee would have set a longer timescale for a female trainee subject to a PIP.

351. The complaint of direct sex discrimination (6.7) fails.

352. We also do not find this was an act of sex-related harassment. We accept that it was unwanted conduct but do not find that it is in any way sex-related.

353. The complaint of sex-related harassment (20.5) fails.

Not upholding the claimant's grievance (6.8)

354. Mr Spoors considered the claimant's grievance as part of the probation review hearing on 28 January 2021. We find that Mr Spoors made his decision having considered the evidence with an open mind. The claimant's complaint in relation to this matter is really that Mr Spoors preferred Mr Craven and Mr Lee's version of events rather than his.

355. Ms Evans was not an appropriate comparator for this complaint because, so far as we are aware, she never brought a grievance. In any event, the claimant did not prove facts from which we could conclude that the decision not to uphold his grievance was an act of sex discrimination. There was nothing to suggest that the outcome would have been the same had the claimant been a female trainee bringing a complaint in the same circumstances. We have explained already why we do not find that the childcare issues faced by the claimant were sufficient to pass the burden of proof.

356. The complaint of direct sex discrimination (6.8) fails.

Dismissing the claimant (6.9)

357. This decision was made by Mr Spoors at the probation review meeting. The claimant did not suggest that Mr Spoors himself was motivated by sex discrimination against him as a man. Instead, the claimant's complaint was that the decision was based on the recommendations put forward by Mr Craven and Mr Lee, and that those recommendations were "tainted" by sex discrimination.

358. We found that Mr Spoors made his decision having assessed all the evidence including that from Mr Brown who we found was not influenced by Mr Craven and Mr Lee in his assessment of the claimant. We found that others (for example Ms Greener) had also given feedback critical of the claimant's performance. We found that consideration was given to extending the claimant's probation but that Mr Spoors' conclusion was that an extension would not enable the claimant to meet the required standard. We find that Mr Spoors took into account what the claimant had said about the pressures of his childcare situation. We find that he focussed on the performance of the claimant when he was able to undertake tasks and found that that performance did not meet the required standard. We do not find that the decision was based on failings in the claimant's performance arising from his limited availability because of childcare commitments.

359. The claimant did not establish facts from which we could conclude that a female trainee in the same circumstances would have been treated more favourably. We find that Mr Spoors' decision would have been the same in the case of a female trainee where the evidence from multiple sources was that that trainee was failing to meet the required performance standards and would be unable to meet those standards even if an extension of probation was granted.

360. In those circumstances we find that the decision to dismiss the claimant was not less favourable treatment because of sex.

361. The complaint of direct sex discrimination (6.9) fails

Attempting to undermine the claimant during his probationary period (6.1)

362. We find this did not happen. This complaint is in some ways an overarching complaint taking in the more specific allegations made by the claimant. As we have said in our findings in relation to those other complaints, we do not accept that the respondent refused to allow the claimant to work flexibly. We also do not accept that Mr Craven and/or Mr Lee sought to influence feedback provided about the claimant or sought to dissuade senior officers from working with him. We do not for one moment diminish the extremely challenging circumstances in which the claimant found himself when his childcare support disappeared due to Covid. We accept that other employers might have been more supportive. We find that he nature of the respondent's work gave it less leeway in terms of being able to extend deadlines or adjust the requirements of employees. The standards required to qualify as an officer could not be reduced to take into account the pandemic, and deadlines for tasks were driven by external factors such as the timelines of police operations or court proceedings. We do find that Mr Craven took into account the claimant's limited availability in deciding what tasks could be allocated to him. We found that he also alerted other officers allocating tasks to the claimant's limited availability. We did not find that amounted to Mr Craven seeking to dissuade officers from working with or allocating tasks to the claimant.

363. On balance we do not find that Mr Craven, Mr Lee or the respondent in general sought to undermine the claimant's ability to successfully complete his probation. This complaint fails on that basis. If we are wrong and there was less favourable treatment, the claimant did not prove facts from which we could conclude that any such "undermining" was because of sex for the reasons already set out above.

364. This complaint of direct sex discrimination (6.1) fails.

Harassment (race and sex) (section 26 Equality Act 2010)

Mr Craven saying he was "going to Covid Crete" (20.1) (race-related harassment)?

365. The claimant's complaint is that this remark amounted to race-related harassment, the relevant race being the claimant's Greek heritage. We accept the comment was unwanted conduct. We also accept that the reference to "Crete" does make the unwanted comment race related. Although the comment is about a place rather than people, we find that there is a sufficient link with nationality for the remark

to be race-related. We do not accept that the remark had a harassing purpose. We accepted Mr Craven's evidence that the remark was made inadvertently. The claimant's case is that Mr Craven knew that he was Greek and made the remark on purpose. Based on Mr Craven's actions during the incidents to which this case relates, we find that he could be oblivious to the impact of his decisions on others, e.g. not immediately realising that moving the team bonding day to a Monday would mean that the claimant was not able to attend. On balance, we prefer his evidence that the remark was not made with a harassing purpose.

366. When it comes to whether it had a harassing effect, we do find that the claimant found the remark offensive. We remind ourselves that the case law stressed that not every remark which causes offence meets the threshold of having a harassing effect. There is evidence that the claimant was offended by the remark because he reported it as such to colleagues. We note he was not sufficiently offended by it to raise it with Mr Craven either during the meeting or subsequently (until his grievance in December 2020).

367. On balance, we find that the claimant did find the remark to have a harassing effect. However, in deciding whether the remark had a harassing effect we need to take into account the other circumstances of the case and whether it was reasonable for it to have a harassing effect. When it comes to the former, we accept that by the time the meting on 10 July took place the claimant had been told that his performance on the IOTP was not satisfactory and that he felt unfairly criticised by Mr Craven. On the other hand, there was no suggestion that either before or after 10 July 2020 Mr Craven made any remark or engaged in any conduct which was race related. We also take into account that the remark was a one-off remark in the context of Mr Craven talking about his actually going to holiday in Crete. As to whether or not it was reasonable for the remark to have a harassing effect, we again remind ourselves that a harassing effect requires violation of the claimant's dignity or the creation of an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Although offensive, we do not find that the one-off remark made in this case was something which it was reasonable to see as violating the claimant's dignity. We also do not find that it was sufficient to create a harassing environment. It was certainly thoughtless given the claimant's Greek heritage, but we do not find that it met the threshold necessary to have a harassing effect.

368. This complaint of race related harassment (20.1) fails.

Mr Craven stating that, "You do know that you are not working for Tesco's right? That's Dimi. Happy to help. I will get you a T-shirt that says 'happy to help' and a plastic name tag to wear, since you are always 'happy to help'. If you want, we can get you a job there, you know?" (20.2) (race related harassment)

369. The relevant "race" in this case was the claimant being a non UK national. We do find that the conduct in this case was unwanted. We do not accept that it was race related. The claimant's submission is that the comment was made because the claimant was a non UK national. As we understand it, the claimant's suggestion is that Mr Craven was making a link between people who work in Tesco and non UK nationals. We do not accept that there is a sufficiently strong link to justify a finding that the unwanted conduct was race related.

370. If we are wrong about that, we accept that Mr Craven did not have a harassing purpose. We do accept that he was talking to the claimant in a jokey way and, to some extent, making fun of him. We do not accept, however, that he had the purpose of either violating the claimant's dignity or creating a harassing environment for him. We also do not accept that the conduct had a harassing effect. We find that Mr Craven was attempting to engage in humour, triggered by the claimant's comment that he was "happy to help". We find that the comment was made in a jokey way and that it was not reasonable for the claimant to see it as being sufficient to violate his dignity. We have considered whether the comment could create a humiliating environment for the claimant. On balance, we find that that one remark was not sufficient to create such an environment, especially given the warnings in the case-law about not setting the bar for a harassing effect too low. Our finding is supported by the fact that the claimant did not complain about this remark to his colleagues at the time nor did he raise it at all until the grievance which he lodged in December 2020.

371. This complaint of race related harassment (20.2) fails.

The terms of the email dated 16 June 2020 at 08:31 (20.3.2)

372. We accept the respondent's submission that the email at p.285 was a legitimate one for a manager to send. We accept it may have been unwanted, in that the claimant may have seen it as Mr Craven checking up on him. We do not accept it was sex-related. We also do not find it had either a harassing purpose or effect.

373. This complaint of sex-related harassment (20.3.2) fails.

The terms of the email dated 30 June 2020 at 08:13 (20.3.6)

374. This email was the "third time lucky" email sent by Mr Craven after the claimant had missed 2 case review meetings.

375. Even if it amounts to unwanted conduct (because the claimant saw that initial comment as patronising or rude), we find no basis on which its contents could be said to be sex related. We also do not find it had a harassing purpose or meets the threshold of having a harassing effect.

376. This complaint of sex related harassment (20.3.6) fails.

The terms of the email dated 25 August 2020 at 18:09 (20.3.7)

377. This email (SB16-17) was from Susan Barker explaining to the claimant how to carry out the process of completing the Bad Character Evidence form MG16 which had been allocated to him. The only aspect of the terms of the email which we find could in any way be objectionable is the use of capitals in the final sentence ("if you're unsure ASK"). Even if it amounts to unwanted conduct (because the claimant saw it the use of capitals as patronising), we find no basis on which its contents could be said to be sex related. We also do not find it had a harassing purpose or meets the threshold of having a harassing effect.

378. This complaint of sex related harassment (20.3.7) fails.

The terms of the email dated 4 September 2020 at 14:39 (20.3.8)

379. This email related to the lack of progress in chasing up bank statements and other information on a task the claimant was undertaking with another IOTP Investigator. We find it was entirely legitimate for Mr Craven to send the email in the terms it was written. There had been little progress on the matter and it was now becoming urgent. He was going to have to report the lack of progress to Mr Lee. He took the task on himself so it could be completed.

380. Taking into account the circumstances, i.e. legitimate concerns about lack of progress on a piece of work, the contents of the email were reasonable. The terms were not abusive or explicitly critical of the claimant but advisory. It was addressed to both the claimant and to Sam Murphy. Even if the email amounted to unwanted conduct (because the claimant saw the criticism of lack of progress as unfair), we find no basis on which its contents could be said to be sex related. We also do not find it had a harassing purpose or meets the threshold of having a harassing effect. It was, as the respondent submitted, a proper act of management oversight.

381. This complaint of sex related harassment (20.3.8) fails.

Organising a team bonding day on a date the claimant could not attend (20.4)

382. The respondent accepted that Mr Craven arranged the first "team bonding" day to take place in the office on Monday (13 July 2020). It is accepted that was a day which the claimant could not attend due to his childcare commitments. We do not accept that action was related to the claimant's sex. We do not find that his unavailability on Mondays being due to his childcare commitment is enough to make it sex related. There is nothing in the terms of the emails which refers to the claimant's sex.

383. We do not accept that Mr Craven had a harassing purpose in moving the meeting. We found that he had originally intended the bonding day to be on Tuesday of that week but moved it to Monday because he was double booked on Tuesday and on leave for the rest of the week.

384. We also do not find that the action had a harassing effect. Even if the claimant felt the action to have a harassing effect we find it was not reasonable for it to have had that effect. Although Mr Craven could be criticised for not recognising immediately that moving the meeting to Monday meant the claimant would not be able to attend, it was apparent from the initial email Mr Craven sent setting up the meeting that he had wanted to include the claimant. He explained in his subsequent emails why he had to move the date to Monday, giving legitimate reasons for that. He apologised to the claimant for forgetting that his circumstances meant he would not be able to attend on Monday. Although the claimant might feel put out that he could not attend, we do not feel that reaches the threshold required for something to have a harassing effect.

385. This complaint of sex related harassment (20.4) fails.

Querying whether the claimant had an investigative mindset (20.7)

386. The respondent accepted that Mr Lee and Mr Craven had done this. We accept it was unwanted conduct. We do not find it was sex-related conduct.

387. This complaint of sex-related harassment (20.7) fails.

Temporarily moving the claimant to another team pending investigation of his grievance (20.8)

388. The claimant's line management was moved to Mr Lee when the claimant returned to work in January 2021 after his sickness absence. There was no move to another team. As put, the allegation fails because it did not happen.

389. In fairness to the claimant, we have considered whether the actual allegation is that the claimant was "removed" in the sense of being isolated or excluded from his team as a way of pre-empting an inevitable termination of his contract at the probation review. Even on that basis, we find that the alleged conduct did not happen. When Mr Lee wrote to the claimant on 13 January 2021 he specifically asked the claimant whether he wanted to nominate a point of contact with the team. The claimant confirmed he had been keeping in contact with some colleagues during his absence. It was the claimant who said that it seemed superfluous for there to be a second point of contact. Mr Lee also made it clear that the claimant could, if he wanted, join in with the "lines of enquiry" training ongoing with staff at the time. He disability not seek to isolate the claimant.

390. We remind ourselves that this was during the claimant's initial phased return to work after a lengthy absence. Mr Lee being his direct line manager. had made it clear to the claimant that he did not expect him to be picking up tasks as he had prior to his illness.

391. This complaint fails because we find the alleged unwanted conduct did not happen. If we are wrong about that the complaint would have failed because the alleged conduct was not sex-related.

392. The complaint of sex-related harassment (20.8) fails.

Considering the claimant's grievance alongside his probation review (20.9)

393. It is accepted this decision was made. It was made by the Grievance Gateway Panel on 22 December 2020 and confirmed on 19 January 2021 after the claimant asked for the decision to be reconsidered. We accept that decision amounted to unwanted conduct. We do not find it was sex related. The claimant put forward no evidence to support a finding that the GGP's decisions were influenced by the fact he was a man or by the fact that his grievance alleged sex discrimination among other things. We find their decision was a purely pragmatic one to avoid the same issues having to be dealt with in two parallel processes leading to duplication of process. The complaint fails because the unwanted conduct was not sex related.

394. For completion, we record we do not find that the decision was made with a harassing purpose nor do we find it had a harassing effect. We accept that the claimant genuinely felt that approach was unfair and risked his grievance being treated as an afterthought. We do not accept that he regarded the decision as having a harassing effect as defined by the Equality Act 2010. He did not make any such

allegation when asking the GGP to reconsider. Even if he did feel that, we find it was not reasonable for the conduct to have that effect. The GGP explained the pragmatic reasons why it reached its decision. The claimant was reassured that he would be given the opportunity to raise the issues in his grievance at the probation review.

395. This complaint of sexual harassment (20.9) fails.

Asking the claimant to limit WhatsApp updates to after 7.15am (20.10)

396. It is accepted that Mr Craven did this. We accept his explanation for why he did so, which was so as not to disturb colleagues who were on call. We do not accept that Mr Craven did so on the group WhatsApp in order to "mock" the claimant. We accept the claimant might have felt embarrassed by being picked up on the group WhatsApp for messaging too early so the conduct was unwanted. We do not find it was sex-related. We also do not find that there was a harassing purpose nor that the conduct had a harassing effect. We find it would not have been reasonable for it to have had that effect.

397. This complaint of sex-related harassment (20.10) fails.

Threatening the claimant with the loss of his job if his "employment did not take precedent" [sic] (20.11)

398. We found that Mr Craven did not say this. The allegation fails for that reason.

399. This complaint of sex-related harassment (20.11) fails.

Making misogynistic comments about the claimant's wife and/or encouraging the claimant to "disregard his [childcare] responsibilities…[because] he is a man (20.12)

400. We found that Mr Craven did not make the one specific misogynistic comment referred to by the claimant in his evidence (the "tell your wife" comment). There was no specific evidence provided of other such comments. We found that Mr Craven did not make the "because he is a man" comment alleged. This allegation (20.11) fails on the facts.

401. For the avoidance of doubt, we do not find that suggesting to the claimant that he discuss with his wife how they could juggle childcare between them amounts to "misogynistic comments" or encouraging the claimant to "disregard his childcare responsibilities because he is a man". It seems to us that it was a sensible suggestion to try and see whether there was a practical solution which could relieve the pressure which the claimant was facing in juggling childcare and work demands. Given our findings about Mr Craven's own experience of childcare demands when his children were younger we do not infer from the suggestion a view on Mr Craven's part that the discussion should result in the claimant's wife taking a greater share of the childcare burden because she was a woman.

402. This complaint of sex-related harassment (20.12) fails.

Seeking to influence feedback to be given to the claimant on or around 2 July 2020 and 11 September 2020 (20.15)

403. We do not find that the evidence supports any attempts by Mr Craven to influence the feedback to be given to the claimant. This allegation fails on the facts.

404. If we are incorrect in that, then we do not find that the conduct was in any way sex related. As we have said in relation to other complaints, we do not find that the claimant's belief that his treatment was motivated by the fact that he was a male officer with childcaring responsibilities sufficient to render this conduct sex related.

405. This complaint of sex related harassment (20.15) fails.

Providing feedback that "it is the little things" in performance managing the claimant? (20.17)

406. The respondent accepted that this comment was made. We do not find, as pleaded, that the comment could amount to harassment. It was merely advice given to the claimant (on more than one occasion) about the need for greater attention to detail and getting the little things right so that when the job became more pressurised those "little things" did not have to be worried about. The claimant in his submissions seemed to submit that the use of that phraseology was connected with the phraseology used by Mr Gracey in his feedback. To the extent that the claimant says that this is evidence of Mr Craven influencing others' feedback, we have dealt with that at 20.15 above. We find the most plausible explanation is that more than one supervisor or manager who worked with the claimant found that he was not good at the "little things", whether that was completing his duty sheets correctly or ensuring that his phone was charged when on a task. We do not find that this was sex related. In addition, we do not find that it had a harassing purpose nor was it reasonable for it to have a harassing effect even if the claimant saw it as such.

407. This complaint of sex-related harassment (20.17) fails.

Saying "if you fail the [Partial Powers] exam, you will stand out as a failure among your peers" (20.18)

408. We found that Mr Craven did not say this. The allegation fails for that reason.

409. This complaint of sex-related harassment (20.18) fails.

Saying to another supervisor, Steve Bee, on 23 September 2020, "Oh don't worry! I will assign my 'best' officer to the task!" (20.19)

410. We found that Mr Craven did say this and that he also said to the claimant as part of the same incident "The action is simple and 'even you' should be able to do it". We find that the conduct was unwanted and that it was said with a harassing purpose in the sense it was said with the purpose of creating a humiliating environment for the claimant. If we are wrong about that, we would have found it had a harassing purpose. The claimant found it humiliating and we find it was reasonable for it to have that effect, particularly in circumstances where the claimant was subject to a PIP being partly supervised by Mr Craven. We also take into account this was not the first time that Mr Craven had made a joke at the claimant's expense, the "Tesco" incident being the other example. We think the remark was unprofessional

particularly from an officer supposedly supporting a trainee officer to overcome issues with his performance which could lead to him losing his job.

411. We do not, however, find that the conduct was sex related. The content was not sex specific nor do we find any other link to the claimant's sex. If the contention is that this comment could in some way ultimately be traced back to the claimant's childcare issues, we find that supposed link far too tenuous to render this incident sex related. The complaint fails for that reason.

412. The complaint of sex-related harassment (20.19) fails.

Implementing weekly rosters from 25 September 2020 (20.20)

Providing Work Rosters

413. The work rosters applied to the whole of Mr Craven's "pod" not just the claimant. We found that the rosters were drawn up by Mr Craven as a way of ensuring that all trainees were in the office at least some days a week. This was a way of "phasing back" from homeworking. It applied to the whole team. There is a different issue (at complaint 6.5) about the requirement for the claimant to be in the office five days a week. That requirement was not applied to other trainees.

414. In relation to this complaint, however, we do not find that it was sex related unwanted conduct. The roster was applied to female and male trainees in Mr Craven's pod. The imposition of the rosters was not, we find, sex related. This complaint fails for that reason. If necessary to do so, we would have also found that it was not unwanted conduct with a harassing purpose or harassing effect. We do not find that the introduction of work rosters per se could reasonably be seen as amounting to conduct having a harassing effect and we do not find it was done with a harassing purpose.

415. This complaint of sex related harassment (20.20) fails.

Withholding positive feedback from the claimant during the performance management process (20.21)

416. We find that Mr Craven did not do this. The unwanted conduct did not occur. If it did, we find that it was not sex related.

417. This complaint of sex related harassment (20.21) fails.

Too frequently contacting the claimant during sick leave (20.22)

418. We understand this complaint to related to what the claimant referred to as being "bombarded" with messages, emails and calls when he filed his sick note in November 2020. We found there was a WhatsApp dialogue between the claimant and Mr Craven on 5 November (with one message on 6 November). We accept there were also calls and emails relating to the completion of the OH referral. The claimant indicated via Mr Unsworth on the 10 November that he did not want to be contacted direct. However, during the WhatsApp exchange he confirmed he was happy to be contacted on his mobile phone. That was in response to Mr Craven

asking what his preferred method of communication was and making clear that the respondent did not want to make matters worse by the way they contacted the claimant.

419. We find Mr Craven was attempting to follow good practice by referring the claimant to OH. We do find he could have communicated in a more structured and less piecemeal way by including all matters he wanted to cover with the claimant in one message or in an email. On the other hand, we accept that the exchange was prolonged in part because the claimant mistakenly thought he had contacted OH when he had in fact contacted Employee Assistance Programme and that led to confusion which needed to be clarified so that an OH referral could be put in place. We find it was reasonable for the respondent to seek an OH referral particularly with the claimant being due to sit the NIE during the period when he was signed off sick.

420. On balance, we accept that the contact was unwanted conduct. The claimant did not want to be referred to OH and we accept he did not want to engage in a prolonged exchange with Mr Craven. We do not find, however, that the unwanted conduct was related to sex. To the extent that the relation to sex is alleged to be the claimant's childcare issues we find the link between that and this incident too tenuous. We do not find that Mr Craven or Mr Lee would have acted any differently if the claimant had been a female trainee who had sent in a fit note and was due to sit the NIE imminently. We do not find that the claimant's sex played any part in his conduct.

421. We also do not find the conduct had a harassing purpose nor that it had a harassing effect. The evidence about whether the claimant found the conduct to have a harassing effect (in the sense defined by s.26 of the Equality Act 2010) is not strong – he himself referred to it as "borderline harassment". Even if the claimant did find it to have a harassing effect we find it was not reasonable for it to have that effect given the circumstances.

422. This complaint of sex related harassment (20.22) fails.

Indirect Discrimination (sex) (section 19 EqA 2010) (12-19 on the List of Issues)

423. The respondent accepted that it applied a provision, criterion or practice ("PCP") of not allowing formal alternative working patterns for those undertaking the IOTP.

424. At the end of his evidence the Employment Judge asked the claimant to clarify whether he was seeking to put forward any evidence in support of the indirect discrimination claim. The Employment Judge explained that for that claim to succeed the claimant would need to satisfy the Tribunal that a PCP of not having alternative working arrangements particularly disadvantaged men as a group. The Employment Judge indicated that the common understanding is that a lack of availability of flexible working particularly disadvantages women as a group because they are the primary child carers. The claimant indicated that he felt that he had been badly treated because he was a man with childcaring responsibilities. The Employment Judge explained that if he was saying that he had been less favourably treated than a woman in the same circumstances then that would be a claim of direct discrimination. The Employment Judge suggested that the claimant consider the

Statutory Code of Practice on Employment produced by the Equality and Human Rights Commission which provides examples and gives an explanation of what indirect discrimination involves. The Employment Judge said that if on consideration the claimant decided that he no longer wished to pursue the indirect discrimination part of his claim that would not affect his ability to pursue the remainder of his claim. The claimant confirmed that the heart of his case was that he had been treated differently because he was a man with childcaring responsibilities. He did not withdraw his indirect discrimination complaint and we set out our conclusions on it below.

425. The burden was on the claimant to establish that that PCP put, or would put, men as a group at a particular disadvantage when compared with women as a group. The claimant did not put forward any evidence of such group disadvantage for men. As the respondent submitted, judicial notice is regularly taken that the opposite is true, i.e. that a PCP which involves a lack of flexible working particularly disadvantages women as a group rather than men as a group because women are still more likely than men to be the primary child carer.

426. To be clear, we are not diminishing the childcare burden which the claimant undertook in his particular case. Nor are we suggesting that women should be the primary child carer. That is not what we are deciding. What we have to decide is whether the PCP of a not allowing formal AWAs causes men as a group a particular disadvantage compared to women. The claimant has not put forward any evidence to support such a finding. We cannot extrapolate group disadvantage from his individual circumstances. The answer to question 16 in the List of Issues is that the PCP did not put men at a particular disadvantage compared to women so the complaint of indirect discrimination fails.

427. In his submissions, the claimant suggested that while ostensibly neutral, the PCP was applied to him but not to his comparator in the direct sex discrimination complaint, Jayne Evans. We have not found that to be the case. Even if we had, however, that would not amount to indirect discrimination, which relies on the same PCP being applied to men and women. Instead, it would be a complaint that the claimant had been treated less favourably than his female comparator. That is a complaint of direct sex discrimination which we have dealt with above in relation to complaint 6.2.

Time Limits (2-4 on the List of Issues

428. This issue does not arise because none of the claimant's complaints succeed.

Remedy (24 on the list of Issues)

429. If the claim succeeds, in full or in part, to what monetary remedy is the claimant entitled?

430. This issue does not arise because the claim failed.

Employment Judge McDonald

Date: 30 May 2024

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

30 May 2024

FOR THE TRIBUNAL OFFICE

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

Annex

Complaints and Issues

Introduction

1. The claimant brings claims of:

    1.1 Direct discrimination (section 13 Equality Act 2010 ("EqA 2010"): sex;

    1.2 Indirect discrimination (section 19 EqA 2010): sex; and

    1.3 Harassment (section 26 EqA 2010): race and sex.

Jurisdiction

2. Are any of the claimant's discrimination claims out of time per section 123 EqA 2010?

    2.1 The claimant's ET1 is dated 13 April 2021. ACAS EC ran between 11 March 2021 and 12 April 2021.

    2.2 The respondent will say any allegation before 14 January 2021 is prima facie out of time.

3. For any claims outside the primary limitation period, do they form party of conduct extending over a period of time ending with a discriminatory act that is in time?

4. For any claims not in time, is it just and equitable to extend time?

Direct Discrimination (sex) (section 13 EqA 2010)

5. The claimant relies on his sex (male).

6. Did the respondent do the following:

    6.1 Attempt to undermine the claimant during his probationary period;

    6.2 Refuse to allow the claimant to work flexibly;

    6.3 Send emails of:

        6.3.1 15 June 2020 at 13:53;

        6.3.2 19 June 2020 at 09:55;

        6.3.3 22 June 2020 at 18:04;

        6.3.4 24 June 2020 at 08:53; and

        6.3.5 30 June 2020 at 09:46?

    6.4 Try to dissuade established officers from working with the claimant;

6.5 Require the claimant to attend the office each day;

6.6 Conduct the Performance Improvement Plan unprofessionally;

6.7 Place the claimant on a Performance Improvement Plan prior to the National Investigators Exam;

6.8 Not uphold the claimant's grievance; and

6.9 Dismiss the claimant?

7. The respondent accepts the allegations at 6.3 and 6.7-6.9 occurred but denies those at 6.1-6.2 and 6.4-6.6.

8. For any proven treatment, has the respondent treated the claimant less favourably, in circumstances with no material difference, than the respondent treated or would treat others?

9. The claimant relies on an actual comparator, namely Jayne Fenton (known to the respondent as Jayne Evans).

10. Has the claimant proved primary facts from which the Tribunal would decide, in the absence of any other explanation, that the difference in treatment was because of the claimant's nationality and/or sex, such that section 136 EqA 2010 applies?

11. If so, has the respondent proved a non-discriminatory reason for any proven treatment?

Indirect Discrimination (sex) (section 19 EqA 2010)

12. The claimant relies on his sex (male).

13. Did the respondent apply a provision, criterion or practice ("PCP") of:

13.1 Not allowing formal alternative working patterns for those undertaking the IOTP?

14. The respondent admits 13.1.

15. If so, did or would the respondent apply the PCP to women?

16. Did the PCP put, or would it put, men at a particular disadvantage when compared with women?

17. The particular disadvantage relied upon is:

17.1 [Dismissal]

18. Did or would the PCP put the claimant at that disadvantage?

19. Can the respondent show the PCP to be a proportionate means of achieving a legitimate aim? The respondent relies upon the following legitimate aims:

19.1 to ensure that trainee investigators are appropriately trained and able to meet the demands of the role of an Investigator with regards to being deployed to work long hours at short notice; and/or

19.2 to ensure that trainee investigators have sufficient opportunities to demonstrate competence and provide them with the best change of successfully completing the IOTP; and/or

19.3 to ensure there is an adequate number of Investigators who are able to be deployed, sometimes at short notice and for unpredictable periods of time, to investigate serious and organized crimes and to protect the public; and/or

19.4 to maintain an efficient and resilient Investigator cohort that enables the respondent to provide the best possible service to the public.

Harassment (race and sex) (section 26 EqA 2010)

20. Did Ian Craven engage in unwanted conduct related to the claimant's race i.e. being Greek and/or a non-UK national and/or sex (male) on 10 July 2020 by reason of:

20.1 Commenting that Ian Craven was *"going to Covid Crete"*?

20.2 Stating that, *"You do know that you are not working for Tesco's right? That's Dimi. Happy to help. I will get you a T-shirt that says 'happy to help' and a plastic name tag to wear, since you are always 'happy to help'. If you want, we can get you a job there, you know*?"

20.3 The terms of the emails dated:

20.3.1 15 June 2020 at 13:53;

20.3.2 16 June 2020 at 08:31;

20.3.3 19 June 2020 at 09:55;

20.3.4 22 June 2020 at 18:04;

20.3.5 24 June 2020 at 08:53;

20.3.6 30 June 2020 at 08:13 & 09:46;

20.3.7 25 August 2020 at 18:09; and

20.3.8 4 September 2020 at 14:39?

20.4 Organising a team bonding day on a date the claimant could not attend?

20.5 Placing the claimant on a Performance Improvement Plan prior to the National Investigators Exam?

20.6 Conducting the Performance Improvement Plan unprofessionally?

20.7 Querying whether the claimant had an investigative mindset?

20.8 Temporarily moving the claimant to another team pending investigation of his grievance?

20.9 Considering the claimant's grievance alongside his probation review?

20.10 Asking the claimant to limit WhatsApp updates to after 7.15am?

20.11 Threatening the claimant with the loss of his job if his "employment did not take precedent" [sic]?

20.12 Making misogynistic comments about the claimant's wife and/or encouraging the claimant to "disregard his [childcare] responsibilities…[because] he is a man?

20.13 Refusing to allow the claimant to work flexibly?

20.14 Phrasing an email of 15 June 2020 at 13:53 in such a way as to present the claimant as inflexible and/or unable to meet his professional responsibilities?

20.15 Seeking to influence feedback to be given to the claimant on or around 2 July 2020 and 11 September 2020?

20.16 Seeking to dissuade others from working with the claimant because of his childcare responsibilities?

20.17 Providing feedback that *"it is the little things"* in performance managing the claimant?

20.18 Saying *"if you fail the [Partial Powers] exam, you will stand out as a failure among your peers"*?

20.19 Saying to another supervisor, Steve Bee, on 23 September 2020, *"Oh don't worry! I will assign my 'best' officer to the task!"*?

20.20 Implementing weekly rosters from 25 September 2020?

20.21 Withholding positive feedback from the claimant during the performance management process?

20.22 Too frequently contacting the claimant during sick leave?

21. Paragraph 20.1 relates to the claimant being Greek; 20.2 to the claimant being a non-UK national; and the remainder to the claimant's sex.

22. The respondent accepts the allegations at 20.1-20.5 and 20.7-20.10 happened, but denies those at 20.6 and 20.11-20.22.

23. Did the alleged conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

Remedy

24. If the claim succeeds, in full or in part, to what monetary remedy is the claimant entitled?