EMPLOYMENT TRIBUNALS

At an Open Preliminary Hearing

Claimant: Mr D Hooper

Respondent: The Chief Constable of Nottinghamshire Police

Heard at: Midlands (East) Region by Cloud Video Platform
On: 5 May 2022
Reserved to: 6 May 2022

Before: Employment Judge P Britton (sitting alone)

Representation
Claimant: Mr O Thorne of Counsel
Respondent: Mr A Rathmell of Counsel

RESERVED JUDGMENT

1. The claim of victimisation pursuant to Section 27 of the Equality Act 2010 (the EqA) is dismissed, it having no prospect of success.

2. The claim of direct disability discrimination pursuant to Section 13 of the EqA is dismissed as having no reasonable prospect of success.

3. All heads of claim of harassment pursuant to Section 26 of the EqA are dismissed, save for that relating to the attendance support meeting and comments and notes thereto dated 17 - 21 July 2020. As regards that remaining head of claim, I do not make a deposit order as I cannot say the matter has only little reasonable prospect of success because it will be dependent upon findings following the hearing of evidence.

4. An Order as to the way forward is hereinafter set out.

RESERVED REASONS

Introduction

1. On 13 December 2021, I heard what was the third case management hearing in this matter; it was the second at which I had presided. Both Counsel as before

me today were representing on that occasion. The Respondent had by then made application that the claims should either be struck out or deposit orders made.

2. Against that background, I ordered this open preliminary hearing and I gave directions. These were that there should be before me today an agreed bundle (which has occurred); that if either party wanted to put statements in for me to consider, albeit that I would not be hearing live evidence, then they were permitted so to do.

3. Stopping there, the Claimant has put in a witness statement and there is also a statement for the Respondent from Detective Inspector Claire Gould (CG). As ordered by me, I have also been provided with a cast list and chronology. Finally, both Counsel have as directed provided opening written skeleton submissions and therein made reference to the seminal authorities on the issue of strike out and also whether or not to make a deposit order.

4. Then to assist the parties I refer back to the very detailed case management summary that I published following the second lengthy case management hearing that I heard on 24 September 2021. On that occasion, the Claimant was represented by a Solicitor, Ms R Townsend, and the Respondent by Ms G Roets, In-house Legal Executive.

5. As is clear, one of the issues that I made plain is that there a was lack of sufficient particularisation by the Claimant in particular relating to his choice of comparators, hence why I ordered further and better particulars. Those are in the bundle before me commencing at page 53. In terms of my reference to pages in the bundle hereinafter, I will be using the prefix Bp following by the page number.

6. During the hearing today, I was provided with four further sets of documents. These are not page numbered as such.

7. As to my power to strike out, suffice it to say that it is contained at Schedule 1, Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, namely at any stage of the proceedings, either on its own initiative or an the application of a party, a tribunal may strike out all or part of a claim or response on any of the following grounds and engaged in that respect is "*(a) … no reasonable prospect of success*;".

8. As to the making of deposit orders, this is set out at Rule 39(1):

> "***Deposit orders***
>
> ***39.***—*(1) Where at a preliminary hearing … the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*"

9. As to the jurisprudence relating to strike out, it is all set out in the two skeleton submissions. I will come back to this in due course, having set out the findings that I make as to facts, of course taking the Claimant's case at its highest but confining myself to the documentation, including the statements before me. me.

10. Much of the facts in this case are not in dispute, although there are some issues where they are. I will identify those in due course. Against that background, I am now going to set out the factual scenario as it is on the face of the papers before me and which are, as is perhaps now obvious, extensive.

Thus findings thereto

11. Matters focus in relation to the period commencing with the change in line management of the Claimant and in that context, what was a reorganisation. Thus, the Claimant is a long-serving police officer and had risen to the rank of sergeant. He has caring responsibilities for his wife who, on the face of it, is clearly disabled. The Respondent. collectively so to speak. had knowledge of the disability but that does not mean that CG at the commencement of her involvement in this case was herself so aware. I shall come to that shortly.

12. There had been in the past requests by the Claimant to have flexible working given his caring responsibilities for his wife, and those from time to time were granted.

13. There is no evidence as such in the bundle that, certainly by the time we come to the latter stages before material events, these arrangements had been formalised. That becomes important because circa 7 January 2019, the Claimant took up a role as a Complaints and Learning Sergeant (County Division) under the line management of Inspector Sam Wilson (SW). This was a somewhat arm's length arrangement in that the department, PSD, was managed it seems from the Police Headquarters. SW was not part of PSD.

14. Looking at the documentation and in particular that to be found in the email chain between SW and the Claimant commencing circa 23 November 2018 and running through to circa 26 March 2020, the Claimant had been allowed an informal flexible working arrangement whereby he split his shifts. What this meant was that he would it seems get up early in the morning and undertake his work in the PSD at home between around 06:00 to 07:30. Then he would stop to care for his wife first to help her get ready for her going to her job. These were what I might describe as good days. This included washing her hair for her and making sure she took her medication. Having done all that and having seen her off to her work, he would go back to his work. Then when she came home circa 15:30, he would stop again and undertake caring for her before resuming work. That was the ad hoc arrangement he had with SW. There is nothing in the documentation before me to the effect that was a formalised arrangement where there had been a written flexible working request, which had then been granted and logged with HR etc.

15. During the period, the Claimant had regularly worked overtime and that can be

seen in the various emails to which I have been referred and thence cross-referenced to the investigation report that in due course was to be undertaken in this matter by Detective Constable Laura Gooch under the instruction of Detective Chief Inspector Leigh Sanders and which investigation started 7 September 2020. DC Gooch completed her investigation report on 1 December 2020 and to which I shall return.

16. The overtime which the Claimant applied for and was authorised by SW was extensive, but, on the other hand, it was never queried as such by her and was always authorised. What is quite apparent from the investigation report is that there was a lack of recording of what work had been undertaken specifically in terms of any overtime duties. That becomes important in terms of why the investigation to which I have referred in due course took place.

17. The Claimant was at that stage spending a considerable amount of time home working, although obviously coming into the office as well. This could be accommodated for as part of the ad hoc arrangement.

18. Because of concerns at the way in which the complaints and learning sergeants (which the Claimant was one of it seems three) and its lack of linking up into the overall PSD and with the coming into force of the new Police Conduct Regulations 2020, by February 2020 the Respondent had decided that it would reorganise so that these peripatetic sergeants were brought back into the PSD team to be based at the same location, which I gather was Police Headquarters. In that respect, the line manager of the Claimant would now become CG who in turn was line managed by DCI Sanders.

19. I can detect that before the change, apart from the Claimant, these three Sergeants were Gerard Hazelwood (GH), David Egbokham (DE), but it is not at all clear from the documentation before me as to whether DE did transfer over. As per the original particulars of claim to the Claim (ET1), DE was a comparator for the purposes of the s.13 direct discrimination claim pursuant to the provisions of the EqA but he no longer is a comparator. The comparator in that respect now is, and has always been as per the pleading, GH.

20. As per the amended Claim (see Bp 61), there is a new comparator, Police Sergeant (PS) Kate Long. I will refer to her in due course, but she is not relevant to the scenario at this stage.

21. Dealing with another issue, which will become relevant, namely as to whether or not the Claimant knew that he ought to be keeping notes to show what it was that he was doing when he was undertaking the overtime, it is to be noted that SW did remind him, as example being the period 18-21 January 2019 (Bp 101 - 102), that he needed to log what he was doing, as an example in his day book and then respectively log it into the IT recording system and which is known as BOBO.

22. This is important in terms of whether or not the Claimant is correct to say that he was never told that he should make sure that he was keeping records and as part of his explanation in terms of the investigation by DC Gooch.

23. Turning to the period post the departmental change and the Claimant coming under the management of CG , she saw him and GH separately on 23 April 2020. I am not sure if these were face to face or virtual meetings. I say that because of course the country was at the height of the first round of the corona pandemic lockdowns and things such as homeworking for other than key workers. That matters because, before he transferred over from SW, the Claimant had circa 20 March made an application that he be permitted to work from home, a particular concern as an asthma sufferer being that he might otherwise be at risk. That request was accommodated (Bp 121). It meant that when the Claimant saw CG, he was homeworking and that seems to have continued to be the case until we get to 2 July 2020, to which I shall return.

24. The Claimant as his first issue so to speak says that there is evidence of clear animus from CG to him in terms of the different way in which he was spoken to in his meeting as opposed to GH. I look very closely at the record of those two meetings (Bp 120) and of course I have heard submissions from both Counsel. It can be taken short. GH flagged up no issues. He did not require that he did not move until the requisite 28 days notice had expired. He was prepared to move there and then. The shift pattern of course was not going to alter: 08:00 - 16:00 and they discussed the logistics of the move and where he would be sitting etc. Otherwise, CG commiserated with him in terms of him failing the inspector's exam for promotion and that she would support him if he was going to try again.

25. The meeting with the Claimant was on the face of it considerably longer. This was because when SW told the Claimant that the requirement was to move to the PSD establishment and in that sense work in the office, he of course first of all raised that he had been given the work from home authorisation to which I have referred. It is significant to note that she had: "*No issues*" and in fact considered, given covid-19 and his asthma, it would be appropriate for him to so work from home.

26. They then moved on to discussing the shift pattern and how it would not change; how he would now be based at HQ and be expected to work from the PSD and base himself there. This of course was subject to home working under the covid restrictions in the short term until the risk to him was removed.

27. However, what then happened is that the Claimant made plain the arrangement he had viz working from home also was because his wife had her disability, ie the fibromyalgia. He went on to explain his daily caring of her, much along the lines I have already described, and how therefore SW had allowed him to operate in that flexible way with the early start to his work and then the break etc.

28. It is quite obvious reading those notes that CG was not aware of the ad hoc arrangement he had enjoyed with SW. She stated:

> "*I advised him that he cannot continue this arrangement as he needed to be in the office. Sgt Hooper stated that would not suit him. I advised*

him that he therefore needed to complete and submit a flexible working pattern to me as a matter of urgency and this would then be considered. I advised him that this needed the approval of the Head of the Department and HR. …"

29. She also noted that she was concerned about the working arrangement he had in the sense that early starts at 06:30 were not reflected in "*his DMS booking*"[1].

30. She also was clearly aware of the extensive overtime to which I have referred. I can surmise because she is prima facie a very efficient manager and had obviously been familiarised at handover. I am also aware as a Judge having done many police cases that overtime is something which is invariably under scrutiny. In other words, the need to justify it and in terms of budgets. This is where the core issue begins to emerge. He advised he did overtime daily, and this was largely under 2 hours so self-paying via DMS. He advised that this was all necessary to stay on top of the workload of completing the amount of city LRs:

31. She then said:

> "*I then enquired as to his weekend working where largely he works most Saturdays and Sundays. Whilst I appreciate that this is not at enhanced cancelled RD pay of a minimum of 5 hours, I advised that I was concerned of the hours he was doing. This has incurred a large expense for Notts police and also the impact this has on a persons' well-being. Rest Days are important to completely switch off from work.*
>
> *He again stated it was authorised by Insp Wilson and that he needed to do this owing to the workload of LRs.*"

32. She then stated:

> "I *advised him that ALL overtime would need to be authorised by myself and that certainly weekend working would be ONLY authorised if I was entirely satisfied that this was an organisational necessity and that his needs and well-being were managed, especially in light of the significant complications he stated that his wife has been suffering with her ill health.*"

33. The Claimant alleges that in that meeting CG said to him and by reference to the overtime: "*You will be under more scrutiny now.*" That is the first claim brought under the allegation of harassment pursuant to s.26 of the EqA.

34. Part of the Claimant's case now is that this was the start of also less favourable treatment of him by reason of his association with his wife as a disabled person in contrast to the treatment of GH. So a claim based upon s13. This has become clearer today, but it is still not pleaded essentially that GH worked the same

[1] I gather DMS is the system for booking hours worked and also such as overtime and thus for payment purposes.

levels of overtime as the Claimant. However, I have not heard the Claimant say that GH might have had shortcomings in the way that he logged his overtime. Why that matters, and in a way I am darting back and forth but it gives the feel in this case, is that when the Claimant in the context of the Laura Gooch investigation and when interviewed with his Police Federation rep on 19 November 2020, he conceded that his paperwork was not very good and in particular because he was not "*good at computers and was also so busy*" (see investigation report of DC Gooch p 6. He accepted that this was with the benefit hindsight to be regretted. He never said that the same was true of GH. In the further and better particulars and in terms of reliance upon GH as the comparator, and as to the amendments see paragraph 52a at Bp 61:

> "*The named comparator, … has been identified as an officer holding the same rank, carrying out the same role and responsibilities and undertaking overtime. The Claimant avers that the comparator is not materially different to him save that they do not have the caring responsibilities for a disabled person.*"

35. It does not say 'undertaking the same level of overtime and with the same poor record keeping as to work done thereto'. In the run up to today, there has been no additional further and better particularisation and I learned that at no stage has the Claimant via his Solicitors requested the overtime details etc relating to GH and as to whether there was any analysis undertaken in relation to flagging up such as poor record keeping. I have already referred to the fact that there were certainly urging of the Claimant by SW that he should make sure that he was accurately recording what he was doing. There is no such documentation relating to GH.

36. It follows that as I move forward, I do not have any evidence at all in the documentation, because it has never been sought it seems, to show that the Claimant was treated less favourably in comparable circumstances, ie overtime and more important record keeping, than GH and this is without getting into the real reasons why the Clamant came under scrutiny, to which I shall come in due course.

37. Turn it around another way and there is no evidence before me and it has not been pleaded to any degree, that GH was undertaking the same levels of overtime and equally failing to record the same and so there should have been just the same concerns flagging up from 22 April in relation to him as opposed to the Claimant.

38. What it means is that on the face of the papers, given the substantial amount of overtime that came to light, that any reasonable manager would have been entitled to raise the same in that first meeting with the Claimant on 23 April. The second point is that as CG clearly did not know about the ad hoc arrangement with SW and learned about the Claimant's caring responsibilities only in that meeting, that as a responsible manager she would have been expected to discuss it with him.

39. The final point to make is taking the Claimant's case at its highest for CG to

have told the Claimant that he would be under scrutiny from now on, is on the face of it is a reasonable approach given the very high level of overtime which in due course was found to be "*inordinate*".

40. It may be that the Claimant felt aggrieved that this was being said to him but when it comes to harassment (and I will deal with the definition in due course) is to remembered that context is crucial. It follows that as I move forward, at this stage I make plain that I find that that element of this case in itself does not lend weight to an accusation of harassment as per s.26.

41. The next point to make is that if as alleged CG was adverse to him being in her team from the word go inter alia because of his caring commitments, then how is it that the Claimant having submitted his flexible working request whereby he would start at 08:30 and end at 16:30 CG immediately granted it as to which see Bp 125 – 127? I am with Counsel for the Respondent that it just does not square. The fact that the Claimant had decided to make a flexible working request limited to that change in his hours from the start time of 08:00 rather than seek the same ad hoc arrangement that he had with SW because he was reluctant to ask for more lest he be viewed unfavourably, is irrelevant. If he does not apply for it from CG, then how can she be said to be displaying, if that was to be inferred, an animosity towards him because of his caring responsibilities. To turn it around another way, her granting of that flexible working request is inconsistent with the allegation against her.

42. The next material thing that happened is that on 2 July 2020 CG wrote to the Claimant and important is she copied in her superior, Superintendent Donna Lawton. A core part of it read (Bp 137):

> "*…*
>
> *Ma'am Lawton has done a review of those in the Dept working from home. She has reviewed all the personal assessments that were completed in line with the wishes of the Chief and the further easing of the Government guidelines from 4th July.*
> *She has therefore asked that you return to working from the office from W/C 4th July.*
> *Your flexible pattern working 0830-16:30 is obviously still approved.*
>
> *…*"

It is to be noted that this was at the behest of the Superintendent obviously having discussed matters with the Chief Constable, and not of CG.

43. In the interim, the Claimant had raised concerns about his work levels circa 8 June 2020 and GC had replied in what is not an unsympathetic way and the Claimant had assured her he could cope. In any event, having had the requirement that he must now return to working in the office, the Claimant was signed off for one month with work-related stress. This was to be extended by a further sicknote and in fact the Claimant was not to return to work until 27 October 2020.

44. This brings me to the attendance support telephone meeting that CG had with the Claimant on 28 July 2020 in terms of keeping in touch with him in terms of his absence as per the Respondent's appropriate procedures. CG's note of that discussion commences at Bp 143. Most of it cannot be read because of the poor photocopying. The Claimant pleads, as per paragraph 31 of the amended Particulars of Claim (Bp 57):

> "*31. The notes include the following comment by Insp Gould 'Dave has been asked to reflect on how he can alter this situation and to consider if there are any roles that he feels able to complete around this caring angle. It is not considered that he can discharge his duties adequately with the distraction of caring'. …*"

45. Obviously, this must have been in the context of them discussing the reasons for the Claimant's absence, CG doubtless reminding herself of what the Claimant had said on 22 April and of his caring responsibilities and also her knowledge of the extensive amount of overtime he was doing, and I would detect as to whether all of this was having an impact upon his health in terms of the demands of the job, the doing of the extensive overtime and then of course his caring responsibilities, which also included daughter who was also now suffering from a similar complaint as that of his wife.

46. Before I deal with that point, the Claimant therefore says that as per paragraph 32 that her having therefore requested him "… *to consider adjustment to his working day (part time) and also if another department/role would be more suited to his home situation.*" that in effect she was making a clear indication that she did not want him in her department. But, and it is a hallmark of the Claimant's case, this is not a correct presentation of what she actually did because in sending him the notes with her email of 22 July (Bp 142), she stated at para 2: "*I have also added for you to consider if more flexible working/part time/reduced hours or if a different role would suit you.*"

47. In other words, she is not ruling out his continuing to work in her PSD department as is obvious from the reference to flexible working. The Claimant cannot do part-time because he cannot afford to because his wife only works part-time, thus, he cannot take reduced hours. She is not ruling out that he could remain in the PSD undertaking the role with more flexible working.

48. So, what do I make of this particular point because it is the second allegation of harassment? Prima facie, to refer to: "*It is not considered that he can discharge his duties adequately with the distraction of caring*" is an unfortunate phrase, particularly given the word "*distraction*". Therefore, seen in isolation, there may be well a case to answer; certainly one that requires an explanation from the Respondent, ie via CG[2], as to why say that and is it harassment within s26 in the context? Although for reasons I shall come to, it has to be borne in mind that she was not ruling out he could make a further application for flexible working. In due course this he was to do, in effect whereby he would get back

[2] Her statement is silent on the issue.

the situation as it was under SW with that kind of shift pattern. As it is, that request never got dealt with for reasons I am not clear about, other than it may have been overtaken by investigation events and the fact that the Claimant then moved to a different Department, taking up a post in Ashfield at the beginning of 2021.

48. In any event, the Claimant took issue with what he perceived in terms of CG and the note of their discussion and so wrote a detailed email to her on 28 July 2020 (Bp 141). This is pleaded by the Claimant as being a protected act for the purposes of his victimisation claim pursuant to s.27. It is written in strong terms. Clearly the Claimant was upset, and I bear in mind that he was unwell by now suffering from stress, which was later to be further diagnosed as anxiety and depression, but inter alia he took up the point as he perceived it:

> "*…*
> *You add that this new role is busier due to the new police regulations and that due to the busier nature of this role you feel that I can not discharge my duties adequately with the distractions of caring, but I feel that this is a flawed argument as I was always working at capacity …*"

49. This was by now an issue which is obvious from the correspondence and goes to the issue of the Claimant being required to cease homeworking:

> *Secondly I also object to the use of word adamant, where you explain that I was adamant that I would not be returning to work after the end of the current sick note. I am currently off sick with stress/depression and I can not see a way forward at the moment. This shows a lack of understanding and empathy of the situation that I am experiencing.*
>
> *As I have highlighted I have spent the last 15 years trying to balance my work with my caring responsibilities and even with the introduction of the Equality Act 2010 I find that I am still having the same struggles with the same lack of empathy from Nottinghamshire Police, who as a public service is required to champion such legislation.*"

50. Just dealing with this chapter of events, the Claimant then followed that up at the request of CG with more detail in terms of his modus operandi and the working day and in the context of his caring responsibilities and he added to that by a second email on 5 August.

51. Taking it simply, the first of those emails (which is extensive) sets out first of all a good normal working day and the level of care that he still has to give his wife. Firstly in the morning (and I have already touched upon this) to get her up from bed, fed, assist her to go out for work (at the very least washing and drying her hair) and in the evening: "*cooking the family meal and the usual household chores*". He then gave details of what happened on a bad day and I have already referred to that. So that would mean that his wife would need longer to be able well enough to go to work and thus putting back a start time; that would thus: "… *push the above tasks back at least a couple of hours*".

He went on:

> "*Then there are the days that she is simply too ill to get out of bed and will require looking after throughout the day with medication, food and drink.*
>
> *…*
>
> *On top of this there are the caring responsibilities throughout the night, providing pain relief to both my wife and daughter on most nights, this point would make working on response unsuitable as well as the point of having to take unpaid leave on the bad days to care for either of them as there would be no facility to work from home whilst caring for my wife or daughter …*"

52. He then went on to refer to:

> "*Whilst working from home would be the ideal, and I have clearly demonstrated over the past 18 months that I am able to work from home with no issues for either the organisation or my caring responsibilities, I can see that with some adjustments I can continue to work in my current role. As I see it these adjustments would include the option of on a bad day, when either of my loved ones are too ill to leave the house, of working from home. Any hours that I can not complete throughout the remainder of that* (sic) *day can be either taken as toil or made up at another time. On the days that my wife attends work late then I could work from home whilst she recovers and then after the normal morning routine is completed is completed make my way to work, again any loss of hours could be taken as toil/A/L or made up on another day.*"

53. He then referred to how he could not work part-time because of the need for income and that his asthma was persistently moderate and therefore does not present him from working as such. At that stage on 21 August 2020 he made the second application for flexible working, to which I have referred. So, the third allegation of harassment is actually being asked to provide this information.

54. But, in the context of CG on the face of the papers needing to deal in terms of the Claimant with a member of staff who was ill for the reasons I have given and who had already main plain that he had caring issues but was working extensive overtime, is it actually objectively harassment to ask for this information in order to be able to consider the way forward? The answer on the face of it is that it is not.

55. So, it means that we move forward in terms of my adjudication to the core issue and whether it could be said that these incidents, which I have now dealt with, in context form part of overall harassment. If they do not, then there is only one identifiable matter that might just constitute harassment and therefore could get over the fence of strike out and that would be the reference as per paragraph 31, to which I have referred.

56. Otherwise, encapsulated on the face of the papers there is no evidence that the Claimant was being treated in a discriminatory/harassing manner by CG. In fact, what the papers show is that she was endeavouring to accommodate for the Claimant's need for flexible working and had granted the first request and had in effect invited him if he wanted to, as well as other options, put in an application for further flexible working. She had been behaving in a professional way in terms of trying to find out what his issues were and the underlying reasons for his absence and whether in fact the Claimant was simply taking on too much and in that context so much overtime in the context of such extensive caring responsibilities. Looked at like that, this allegation of harassment is very weak, at best.

Limb two of this case - the investigation process

57. This brings in the procedures under the Police (Conduct) Regulations 2020. When the perceived excessive levels of overtime issue first flagged up in the PSD hierarchy at the transfer into it of the Claimant, it was not just CG who was concerned of what appeared to be inordinate levels of overtime. It is quite clear that this concern was either led by or shared by her superior, Detective Chief Inspector Leigh Sanders. What happened is that the matter was put forward for investigation under the Police (Conduct) Regulations 2020. Detective Chief Inspector Leigh Sanders was appointed the appropriate authority for the purposes of those Regulations. There was an investigation undertaken, as to who by I do not know from the papers.

58. The documents on this matter came in during the hearing over the lunchtime, it having become obviously material that they be considered. Suffice to say that there was a first investigation, to which I have referred, out of which is undertaken what is known as a 'severity assessment' as whether that established during the investigation is such as to warrant taking the matter further forward. This of course could involve such as disciplinary action.

59. Summarised, what that first investigation established, which I have now touched upon in any event, is that the Claimant had always asked for authorisation for the overtime which he then worked under the auspices of SW. But, because she was not in the same Department as him, in other words this was a loose supervisory arrangement, she would not in fact have the same budgetary concerns as might for instance CG and therefore a need for scrutiny as to the justification for the overtime.

60. The point then being is that it could not be said that the Claimant had undertaken unauthorised overtime and in that sense therefore cheated the system, so the matter was not pursued although it was noted that there was very little recording, if any, by the Claimant as to what work he had actually done in terms of a case when doing this overtime. Put at its simplest, therefore, the matter was left at that stage in terms of there not warranting a severity rating, but it is to be noted that DCI Sanders did reserve the right to review in the future; in other words if something additional emerged.

61. What then happened is that when the Claimant had given the details of his day

in a life so to speak to CG, when she looked at it she was concerned that this was incompatible with the level of overtime that the Claimant said he was working and also particularly as to working so much of it at weekends and given his caring responsibilities. That meant that via CG and DCI Sanders, the matter was re-referred and DCI Sanders was formally appointed as a review officer under the Police (Conduct) Regulations 2020. Under the protocol, once an investigation had been undertaken and a report completed, it is his function to then consider if further action is warranted and if so to decide what the outcome should be. The lowest form of outcome, other than of course it being found there is no case to answer, being the issuing to the police officer under investigation of what is known as a 'Practice Requiring Improvement' (PRI).

62. I agree with Counsel for the Respondent that as per the Regulations, which are before me, that this is not a disciplinary penalty; it is intended to be a mechanism by which a performance failing can be improved upon, although I will accept as per Counsel for the Claimant that the police rank and file may nevertheless perceive it to be a disciplinary sanction.

63. All that needs to be said is that the investigation was undertaken by Detective Constable Laura Gooch. That report is in the additional bundle of documents provided to me today in what I will refer to as document 3 and between pages 1-12. It was clearly a very thorough investigation. In the context of it, the Claimant was interviewed in the presence of his Police Federation rep, although not by Detective Constable Gooch as she was unwell on that occasion. He had also prior thereto put in written representations. What DC Gooch concluded against the background of the already established extensive overtime as authorised by SW prior to the taking over of management of the Claimant by CG and with little regard to budgetary constraints or assessment as to the actual need for the overtime, was that most importantly there was now the issue of whether the Claimant had perhaps not worked that overtime because he had in fact been caring for his wife at the material time or having been unable to complete his duties in his normal working hours because of the burden of caring for his wife and daughter, he therefore by inference cheated on the system by instead working at weekends and claiming overtime to clear up work he ought to have done during his normal working week.

64. The Claimant gave a full explanation that he had always been able to juggle his caring responsibilities with undertaking his work, and that the overtime had always been genuine because the team was hard pressed in dealing with all the complaint investigations and therefore, being a man short, that is why he had worked the overtime.

65. The only issue to him was that he had not properly recorded it. The Claimant says that this is down to shortcomings in the system. That does not really square with what he said during the interview or indeed his meeting with DCI Sanders on 25 January 2021 when he was given the PRI.

66. Boiled down, it was as I have already stated an acceptance that he ought to have made sure his worked was recorded and in a way capable of scrutiny if necessary, and which really fits with what I have already noticed in the emails

back in 2019. That was what he was reminded so to speak to do by Inspector Sam Wilson (SW). But he blamed it on his not being "*good at computers*" and not particularly good at paperwork and in that context being "*too busy*".

67. DC Gooch's conclusions summarised were :

    67.1 Overtime was always authorised even, if it was through an inefficient or insufficient supervisory line management.

    67.2 No evidence that it was not undertaken.

    67.3 The concern however about the Claimant's lack of keeping records of exactly what work he had been doing obviously therefore to justify on audit the expenditure on the substantial overtime and not undermine the integrity of an overtime claim, needed to be addressed with him.

68. That therefore led to the decision of DCI Sanders dated 6 December 2020 commencing Bp 151. These are very thorough conclusions by him. On a balance of probabilities, he ruled out that there was a case of misconduct to answer. However, he was concerned at what had been disclosed regarding the shortcomings in record keeping and time management, hence the justification for issuing a PRI for the reasons I have gone to.

69. Read closely, and it is quite clear that DCI Sanders was giving the Claimant the benefit of the doubt in terms of that he had actually done this work because there was no evidence to establish that he had not. On the other hand, it could be observed that there was little or no evidence that he had actually done the work apart from what he said but of course he was a long-serving officer of the rank of sergeant.[3] Hence the decision.

70. The final point to make is that it is said by the Claimant that he ought never to have been issued with the PRI by DCI Sanders; instead, it should have been his direct line manager, which by now was Mark Dixon at Ashfield. But, in the meeting with the Claimant, him having his Police Federation rep present, and at which DCI Sanders gave his outcome and thence issued the PRI and in a meeting which clearly went back and forth in terms of "challenges", he justified why he was giving the Claimant the PRI as follows:

    "*Informed by time briefed Insp Dixon of the issues, facts, complexities - PSD centric, to save time and also* ***embarrassment***[4] *to DH. DCI LS would deliver the PRI. …*"

71. It is to be noted that the Police Federation rep did not object. The Claimant, as per his statement and in terms of providing in a sense more particularisation to the amended Particulars of Claim on this topic, is saying that even if the Regulations do provide that DCI Sanders could give the PRI as an officer of at

[3] Due to his long serve he has now taken retirement.
[4] My emphasis

least a rank above the Claimant rather than his own line manager, nevertheless there is a custom and practice that this will not occur. I have no details of that today. However, I again observe in terms of assessing the strength of this case that on the face of it, as the Claimant was going to be starting a new role in Ashfield and given his exemplary service, it would make obvious sense for him to be given his PRI by DCI Sanders because that way it could be kept from the knowledge of Mark Dixon, hence saving the Claimant embarrassment. I fail to see how in the context of the Equality Act 2010 it follows that this can be an actionable head of claim. How can it be detrimental?

Factoring back in the direct discrimination claim

72. That brings me to the second comparator relied on by the Claimant in terms of his s13 direct discrimination claim. The Claimant relies upon Sergeant Kate Long on the basis that she received her PRI (incidentally for an entirely different concern unrelated to PSD) from her line manager. I know no more. Given my findings on the face of the papers I fail to see how a comparator in the same circumstances and by now transferred and with the long service of the Claimant would have been treated any differently in terms of keeping the new line manager out of the loop and because it avoided such as embarrassment. Turn it round another way, if that didn't happen in the case of Sgnt Long, then the Claimant has been treated more favourably. I had already made that observation to the Claimant through his Counsel.

73. I have already dealt with why reliance on GH as a comparator does not work. It follows that the direct discrimination claim is struck out as having no prospect of success.

Back to harassment

74. As to the other heads of claim on this topic it is alleged that the issue of the Regulation 17 notice constitutes a further act of harassment. This is the notice that is served upon the officer at the first stage following the initial assessment of the concerns on the basis that it meets the severity threshold for further investigation. This is at Bp 149-150 dated 2 December 2020. Set out is what the allegations were, stemming from the DC Gooch investigation, essentially revolving around the overtime, which incidentally was claimed on 125 occasions between 1 August 2019 and 19 April 2020. Essentially that:

> "*The written representations you made to your line manager on 29/07/2020, around your caring responsibilities , do not correlate with the fact that you have worked so much overtime. The long hours you have worked previously is not commensurate with the difficulties and demands that you portray as being evident in your home environment, particularly when you cite that you could use TOIL/AL to make up the deficit in hours, when in fact you have been working a significant amount of overtime rather than having to use 'time off' to ensure your caring obligations are met.*"

75. So, the boxes were ticked as to this being potential 'Misconduct' therefore

requiring that it would need to go forward to a misconduct meeting but it is to be noted that this document is clearly headed: "*NOTICE OF THE ALLEGED BREACH OF THE STANDARDS OF PROFESSIONAL BEHAVIOUR*". I stress the word used is 'allegation'.

76. The Claimant sees this as harassment in that thereby his integrity and honesty are called into question. Of course, it may be apropos the definition of harassment that this would be unwanted treatment and clearly in the mind of the Claimant and his perception that it was at least humiliating, but again is back to the crucial point about harassment, which is the importance of the context and third whether or not it is objectively reasonable for the conduct complained of to have that effect ie of constituting harassment as defined. I will come back to the definition.

77. To turn it around another way, there was prima facie evidence to warrant an investigation. Objectively this police force, or any other such establishment, would be failing in its duty to the public if there was no investigation, given the high level of overtime, the lack of any real records that this actually had been worked and now this evidence coming to light via the Claimant setting out that which in a day needed to be devoted to his caring responsibilities and if therefore that could square with the overtime claimed and when it was worked.

78. The point then becomes that the investigation itself cannot be faulted; there is nothing wrong with it and the outcome results only in a PRI where the Claimant himself had accepted that his record keeping/noting of what he was doing was not as it should have been and which with the benefit of hindsight he regretted. Those are clearly matters that would therefore need to be addressed, as was made clear by DCI Sanders and it was not really opposed by the Police Federation rep. It follows that it is very difficult to see how that chain of events would constitute harassment.

Summary overall viz harassment

79. In summary therefore what I have in relation to the harassment, really leaves only one issue which has any triable substance to it, namely did CG say on 17 July 2020 or in her note of 21 July 2020: "*It is not considered that he can discharge his duties adequately with the distraction of caring*". In itself, and I shall now come to the definition, that could constitute harassment but of course it is very much in isolation given the rest of my findings.

80. Therefore, that brings me to the definition of harassment - s.26 Equality Act 2010:

26 Harassment

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

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

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

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

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

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

81. I remind myself of the importance of context and the Judgment of Mr Justice Underhill (as he then was) in ***Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 236 EAT***. Given the circumstances and the issues that warranted investigation and which are so obvious on the papers, then despite the perception of the Claimant, taking the other circumstances and thence coming to limb (c), which is an objective test, was it reasonable for this conduct in the context to have the effect thus it is harassment? For reasons which I hope are now abundantly clear, even taking the Claimant's case at its highest but going on the face of the papers, in all respects, save for the remark of CG that I have referred to, I conclude this case has no reasonable prospect of success.

82. That brings me therefore in that context to the case law summarised on strike out. It is accurately set out by both Counsel but I will in particular refer to Mr Rathmell's skeleton submissions and commencing at paragraph 9 and his reference to ***Malik v Birmingham City Council [2019] 5 WLUK 707 (EAT)*** per Choudhury J at paragraphs 30 to 32.

83. Therein, the Judge of course sets out that striking out of a discrimination based claim is a draconian step and should only be taken in the clearest of cases. He then recites the well-known principles of the Court of Appeal in ***Mechkarov v Citibank N. A. [2016] ICR 1121*** and inter alia 31(4):

"*(4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out …*"

84. Furthermore, at paragraph 32:

"… 'the time and resources of the ET's ought not be taken up by having to hear evidence in cases that are bound to fail'."

86. Taking the correspondence trail the integrity of which is not disputed, in other words the Claimant has not said any of it is fabricated, as is obvious from my rehearsal of the same I just cannot see how any Employment Tribunal would be able to find that this chain of events constituted harassment. It follows that I find that it has no reasonable prospect of success.

87. It follows that the only element of the harassment claim which is permitted to proceed is the allegation relating to the observation/remark of Detective Inspector Claire Gould (CG) on or about 17 July 2020 as per Bp 143 - 145. Albeit that remains as an isolated harassment allegation confined to itself and therefore a very limited issue, I cannot say it does not have only little reasonable prospect of success because it will require the questioning of her. The Claimant should of course be aware that it is a claim which has very limited value, if any, in the context of matters.

Victimisation

88. The following is the definition - s.27 EqA

27 Victimisation

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

(a) B does a protected act, or

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

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

…

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

…"

89. As to the heads of claim as per the amended particulars viz victimisation, first of all prima facie the email of the Claimant to CG of 28 July 2020 is, as I have already stated, potentially capable of being a protected act. The issue becomes was the investigation, starting with the Claimant being given the first Regulation 17 on notice on 2 September 2020, a detriment which was because he had

made that protected act?

90. Stopping there, obviously to be subjected to a potential misconduct investigation with all the anxiety that would cause a long-serving police officer is in itself a detriment. But was it taken for perverse reasons which might be an indication as to whether it is therefore a detriment because he has made the protected act? Prima facie for all the reasons I have given, and it flows through from the documentation, whatever the Claimant might think, ie his perception, objectively the documentation shows to me conclusively that there was objective justification. It follows that the Claimant could only get off the ground on this accusation if he was seeking to say that it was improperly started at the inception of CG or, given that this was a joint referral, Superintendent Lawson. The Claimant is very vague in his pleading in that respect, as to which see Bp 60, paras 47 - 49. He gives no particularisation as to who the perpetrator was. On the face of it, there is this clear-cut justification for the inception of both the first and the second investigation, as to which objectively it cannot be faulted, certainly nothing would flag up to indicate there was any perversity about the way in which it was conducted or the findings. Albeit the Claimant might say that the outcome is "saving face", it does not square with the content of the report or the reasoning of DCI Sanders, and which I have now rehearsed.

91. It follows that taking his case at its highest, the Claimant is left with hoping that he can by way of cross-examination of such as CG establish such a causal link between the protected act and the inception of the process. But there is nothing wrong with what happened thereafter and objectively the conclusions are such as to mean, apropos ***Mechkrov*** , that this part of the Claimant's claim on the face of it is "totally and inexplicably inconsistent" with undisputed contemporaneous documents. In any event, this unparticularised hope, as it seems to me, that something might turn up through cross-examination is such in the context as per paragraph 32 of the Choudhury Judgment to mean: "*… 'the time and resources of the ET's ought not be taken up by having to hear evidence in cases that are bound to fail'."*

92. It follows that I am dismissing the victimisation claim as having no prospect of success.

The direct discrimination claim

93. Engaged is s.13 of EqA:

> "***13 Direct discrimination***
>
> *(1) A person (A) discriminates against another (B) if,* because of a protected characteristic, A treats B less favourably *than A treats or would treat others.*
>
> *…*
>
> *(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more*

favourably than A treats B.

…"

94. This case is brought as one of disability discrimination by way of association, namely the Claimant's disabled wife. The first core question of course needs to be resolved, which is who is the comparator? This I raised at the first case management hearing before me on the basis that there appeared to be little detail provided of who was the comparator and why. We then got the further and better particulars. I have now made reference to that and the fact that Sgnt Kate Long cannot be sustained as a comparator and which leaves GH. As to the shorter discussion CG had with him as opposed to the Claimant in April that is not relied upon. In any event I have already dealt with that.

95. As per para 51k- n (Bp60) of the amended particulars of claim there are four claims based on less favourable treatment:

> "k. *Having his ability to carry out and discharge his full time duties called into question by Insp Gould in the ASM notes provided on **21 July 2020***".

96. Claims l- n relates to the misconduct proceedings; the issuing of the PRI ; and its being issued by DCI Sanderson.

97. As to para 51k, Mr Thorne in his written and oral submissions does not focus on GH as a comparator in this respect. And in the further and better particulars there is no construct as to a hypothetical comparator. Very little is said as to why this is a direct discrimination claim. This is important as per s.23 EqA;

> "***23 Comparison by reference to circumstances***
>
> *(1) On a comparison of cases for the purposes of section 13, … there must be no material difference between the circumstances relating to each case.*

98. Prima facie as submitted by Mr Rathman the correct comparator would be by example a serving police officer who as a single parent had extensive child caring responsibilities and whose juggling with work and caring issues in the same way as the Claimant might well have been questioned in the same way. No argument has been pleaded for the Claimant that this would not be the comparator or as to who the comparator is other than GH, but he cannot be the comparator as there is no evidence that he is in similar circumstances as per the definition to the Claimant.

99. Suffice to say that for the reasons I have already given I find weight in the arguments of Mr Rathbone. It follows that I conclude that this head of the direct discrimination claim has no reasonable prospect of success.

100. And that brings me to that the primary focus in terms direct discrimination is on the investigation / overtime issue. As to reliance upon GH being the comparator, the Claimant has provided no details whatsoever in that respect other than at

para 52a (Bp 61): "*…and undertaking overtime …*". The fact that he might undertake overtime is not the issue. For him to be a comparator, as I have already said it has to be that he also undertook a similarly high amount of overtime working as the Claimant and in similar circumstances with the regime outside work being prima facie incompatible in terms of commitments with the overtime claimed and when it was being taken. Finally, into the equation would be similar deficiencies in record keeping of work undertaken. So the Claimant has failed to provide these particulars.

101. Otherwise the Claimant is relying on a hypothetical comparator, ie para 53: "*… being a Police Sergeant in a similar role undertaking overtime who does not have caring responsibilities for a disabled person …*"

102. But the same comparator applies as per the first limb of the direct discrimination claim for reasons as already given.

103. The Claimant had ample opportunity prior to today, given I had raised issues about comparators and the need to get it clearer and that I had ordered back in December this hearing and that the parties were to agree a bundle, to have applied for such discovery as he considered to be relevant to deal with the issue of whether or not there was evidence that the police force does so act in comparable circumstances with other policemen and which he has not done. There has been no such request and his Counsel who in submissions I do appreciate has done his valiant best, has not sought to argue that there should be an adjournment because there had been such a failure to provide material disclosure for the purposes of dealing with the issues before me today and by the Respondent Solicitor in the run up to this hearing. I make clear that this has not been alleged.

104. Thus it follows that the Claimant has deployed no substance to his contention that the comparator would have been treated more favourably. Put simply there is no evidence that this police force would not, faced with these potential issues of abuse of the overtime system, have incepted the second investigation against any police officer in its ranks and irrespective of whether it be a person caring for disabled partner or on the other hand a single parent with caring responsibilities.

105. And it then logically flows that the same must apply in terms of concluding that there was a need to issue a PRI notice.

106. Also for reasons I have already given, administering the PRI by other than a new line manager following a transfer to another division so as to avoid embarrassment to the Claimant and thus give him a fresh start.

107. It follows that on the face of the papers the Claimant's case of direct discrimination is "conclusively disproved" and is "totally inexplicably inconsistent" with what is undisputed contemporaneous documents.

108. And finally letting the case proceed on the basis of the Claimant clutching at a straw in the hope that something might turn up under cross-examination would

be such that the time and resources of the ETs ought not to be taken up by having to hear evidence in a case that as of now is bound to fail.

109. Thus, it follows that I dismiss in its entirety the direct discrimination claim.

The way forward

110. It means that the only claim that I am allowing to proceed is the claim of harassment relating to Detective Inspector Gould and the remark that prima facie she may have made in her note on 21 July 2020.

111. The parties must now of course consider their options in terms of whether this case is to proceed or whether this residual matter is capable of resolution without the need for the tribunal, given its very limited compass.

112. Accordingly, I direct as follows:

Order

1. The parties will inform the tribunal within 28 days of the receipt of this Judgment and Reasons as to their proposals for the way forward. A Judge will then consider whether a further case management hearing should be heard to make directions and list a main hearing.

____

Employment Judge P Britton

Date: 24 May 2022

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