THE INDUSTRIAL TRIBUNALS

CASE REF: 3322/19

CLAIMANT: **David Porter**

RESPONDENT: **Chief Constable of the Police Service of Northern Ireland**

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claim of disability discrimination is dismissed.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Orr**

Members: **Mrs F Cummins**
Mrs D Adams

APPEARANCES:

The claimant was represented by Ms N Leonard, Barrister-at-Law, instructed by Edwards and Company Solicitors.

The respondent was represented by Mr J Kennedy, Barrister-at-Law, instructed by The Crown Solicitors Office.

CLAIMS

1. The claimant presented a claim to the tribunal on 31 January 2019 claiming disability discrimination on two grounds: direct discrimination and a failure to make reasonable adjustments. His claim relates to the respondent's decision to apply its Absence Management Policy and the decision to issue him with a formal written improvement notice following sickness absence for a period of 132 days.

2. The respondent in its response form denied disability discrimination on both grounds. The respondent disputes that the claimant's musculoskeletal back condition satisfies the definition of disability pursuant to the Disability Discrimination Act 1995 (as amended). Furthermore, the respondent denies knowledge of the claimant's disability at the relevant time and relies on the statutory exemption in Section 4A(3) that it is not under a duty to make reasonable adjustments as it did not know or could not reasonably be expected to know of the claimant's alleged disability at the relevant time.

ISSUES

3. The tribunal was provided with a copy of legal and factual issues that had been agreed as part of the case management process. These were clarified and considerably narrowed by the claimant's representative at the substantive hearing and during submissions.

4. The claimant's claim of direct discrimination was withdrawn in submissions and is therefore dismissed.

5. The claimant suffers from a bowel condition and a musculoskeletal back condition. The respondent accepts that the claimant's bowel condition amounts to a disability under the Disability Discrimination Act 1995, however disputes that the claimant's musculoskeletal back condition amounts to a disability under the legislation. The claimant makes no claim of discrimination in relation to his bowel condition.

6. Accordingly the issues to be determined by the tribunal are as follows:

   (1) Is the Claimant's musculoskeletal back condition a disability for the purposes of the Disability Discrimination Act 1995?

   (2) Did the respondent have the requisite knowledge of the claimant's disability at the relevant time?

   (3) Was the Claimant subject to a provision criterion and/or practice ("PCP") which placed him at a substantial disadvantage in comparison with people who were not disabled in relation to the requirement that he maintain a certain level of attendance in order not to be subject to the Attendance Management Policy?
   In this case the claimant relies on two substantial disadvantages:

      (i) Emotional upset and hurt; and

      (ii) The first written improvement notice 'being the first step to dismissal'.

SOURCES OF EVIDENCE

7. The tribunal was provided with an agreed trial bundle and a bundle of medical notes and records, containing GP notes and records, occupational health notes and Reports and a medical report from Mr McMurray, consultant orthopaedic surgeon.

8. The tribunal was provided with witness statements and heard oral evidence from the claimant on his own behalf and from Mr Stephen McPeak on behalf of the claimant. The claimant submitted a witness statement from Mr David Thompson the contents of which were agreed between the parties.

9. The tribunal was provided with witness statements and heard oral evidence from the following witnesses on behalf of the respondent.

   - Ms Jane Bryans – File and Crime Manager

   - Inspector Martin Reid – Head of Northern Occurrence and Case

Management Team ("NOCMT")

- Ms Carole McClenaghan – Manager of NOCMT.

RELEVANT LAW

Definition of Disability

10. Section 1(1) of the Disability Discrimination Act 1995 (as amended) ("DDA") provides:

'Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.'

11. Schedule 1 of the DDA at paragraph 2(1) provides that:

'The effect of an impairment is a long-term effect if –

(a) it has lasted at least 12 months;

(b) the period for which it lasts is likely to be at least 12 months; or

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

12. Paragraph 4(1) of Schedule 1 provides that:

'An impairment is to be taken to affect the ability of the person concerned to carry out normal day-to-day activities only if it affects one of the following – (tribunal emphasis)

(a) mobility;

(b) manual dexterity;

(c) physical co-ordination;

(d) continence;

(e) ability to lift, carry or otherwise move everyday objects;

(f) speech, hearing or eyesight;

(g) memory or ability to concentrate, learn or understand; or

(h) perception of the risk of physical danger.'

13. Paragraph 6(1) of Schedule 1 of the DDA provides that:

'An impairment which would be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities,

but for the fact that measures are being taken to treat or correct it, is to be treated as having that effect.'

Paragraph 6(2)

'In sub-paragraph (1) 'measures' include, in particular medical treatment'.

14. In ***Goodwin v The Patent office [1999] ICR 302***, it was established that the tribunal's approach in determining whether a person has a disability is to consider;

(a) whether the person has a physical or mental impairment;

(b) whether the impairment affects the person's ability to carry out normal day to day activities;

(c) the effect on such activities must be 'substantial';

(d) the effects must be 'long-term'.

15. The Equality Commission Disability Code of Practice – Employment and Occupation (as amended) provides:

"***What is a 'substantial' adverse effect?***

A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.

What are 'normal day-to-day activities'?

They are activities which are carried out by most people on a fairly regular and frequent basis. The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or a sport, to a professional standard or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition. The test of whether an impairment affects normal day-to-day activities is whether it affects one of the broad categories of capacity listed in Schedule 1 to the Act. (see paragraph 11 above).

What about treatment?

Someone with an impairment may be receiving medical or other treatment which alleviates or removes the effects (though not the impairment). In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if substantial adverse effects are not likely to recur even if the treatment stops (ie the impairment has been cured)."

16. A tribunal should approach the issue of disability by concentrating on what an individual cannot do or can only do with difficulty rather than on the things he can do – ***Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19***.

17. In ***Aderemi v London and South Eastern Railway Ltd UKEAT0313/12*** Mr Justice Langstaff stated at paragraph 14:

> *"It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the hearing "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other".*

18. In the case of **J v DLA Piper UK [2010]** Justice Underhill (as he then was) gave the following guidance.

> *"40 …*
>
> *(1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin.*
>
> *(2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in paragraph 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long term basis), and to consider the question of impairment in the light of those findings."*

<u>*Disability Discrimination - the Duty to Make Reasonable Adjustments*</u>

19. Section 4A of the 1995 Act provides, so far as it relevant to these proceedings:-

> *"(1) Where –*
>
> *(a) a provision, criterion or practice applied by or on behalf of an employer, or*

(b) any physical feature or premises occupied by the employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to provision, criterion or practice, or feature, having that effect.

(2) In sub-section (1) 'the disabled person concerned' means –

...

(b) in any other case, a disabled person who is –

...

(ii) an employee of the employer concerned;

(3) Nothing in this section imposes any duty on an employer in relation to a disabled person if the employer does not know, and could not reasonably be expected to know –

...

(b) in any case, that that person has a disability and is likely to be affected in the way mentioned in sub-section (1)."

20. Section 18B of the 1995 Act provides:-

"(1) In determining whether it is reasonable for a person to take a particular step in order to comply with the duty to make reasonable adjustments, regard should be had, and in particular, to –

(a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

(b) the extent to which it is practicable to take the step;

(c) the financial and other cost which will be incurred by him taking the step and the extent to which taking it would disrupt any of his activities;

(d) the extent of his financial and other resources;

(e) the availability to him of financial or other assistance with the respect of taking step;

(f) the nature of his activities and size of his undertaking;

(g) ...

(2) *The following are examples of steps which a person may need to take in relation to a disabled person in order to comply with duty to make reasonable adjustments –*

(a) *making adjustments to premises;*

(b) *allocating some of the disabled person's duties to another person;*

(c) *transferring him to fill an existing vacancy;*

(d) *ordering his hours of working or training;*

(e) *assigning him to a different place of work or training;*

(f) *allowing him to be absent during working or training hours for rehabilitation, assessment or treatment;*

(g) *giving, arranging for, training or mentoring (whether for the disabled person or any other person);*

(h) *acquiring or modifying equipment;*

(i) *modifying instructions or reference manuals;*

(j) *modifying procedures for testing or assessment;*

(k) *providing a reader or interpreter;*

(l) *providing supervision or other support."*

21. In ***The Environment Agency v Rowan [2008] IRLR 20*** the EAT outlined the steps that the Tribunal must go through in order to determine whether the duty to make reasonable adjustments arises and whether it has been breached. The steps relevant to this case, are as follows:-

(i) identify the provision, criterion or practice (PCP) applied that has put the claimant at a disadvantage compared to those who are not disabled;

(ii) identify the non-disabled comparator (where appropriate);

(iii) identify the nature and extent of the substantial disadvantage suffered by the claimant.

22. The EAT confirmed in ***Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley [2012] UKEAT,*** that if a non-disabled person would be affected by the PCP in the same way as a disabled person then there is no comparative substantial disadvantage to the disabled person and no duty to make reasonable adjustment arises.

At paragraph 76 Birtles J stated:

"The duty to make reasonable adjustments in Section 4A is, of course, expressed not in terms of the duty to alleviate disadvantage arising in consequence of a disability or for a reason relating to disability or (to borrow the language now in the Equality Act 2010) arising from disability. The duty arises only where the disabled person is substantially disadvantaged in comparison with persons who are not disabled. A disadvantage has to be because of the disability."

23. If the duty arises the Tribunal will then determine whether the proposed adjustment is reasonable to prevent the PCP placing the claimant at that substantial disadvantage. In ***Smith v Churchill Stairlifts PLC [2006] ICR 524***, the Court of Appeal confirmed that the test of reasonableness is an objective one and it is ultimately the Employment Tribunal's view of what is reasonable that matters.

24. Reasonable adjustments are limited to those that prevent the provision, criterion or practice (PCP) or feature placing the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled. Any proposed reasonable adjustments must be judged against the criteria that they must prevent the PCP from placing him at a substantial disadvantage.

25. A proper assessment of what is required to eliminate the disabled person's disadvantage is a necessary part of the duty of reasonable adjustment ***Southampton City College v Randall [2006] IRLR 18.***

26. In ***Nottingham City Transport Limited v Harvey UKEAT/0032/12*** Mr Justice Langstaff (stated at paragraph 17):

"Although a provision, criterion or practice may as a matter of factual analysis and approach be identified by considering the disadvantage from which an employee claims to suffer in tracing in back to its cause, … it is essential, at the end of the day, that a tribunal analyses the material in light of that which the statute requires; ***Rowan*** *says as much, and* ***Ashton*** *reinforces it. The starting point is that there must be a provision, criterion or practice; if there were not, then adjusting that provision, criterion or practice would make no sense, as is pointed out in* ***Rowan****. It is not sufficient merely to identify that an employee is being disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP. Section 4A(1) provides that there must be a causative link between the PCP and the disadvantage. The substantial disadvantage must arise out of the PCP".*

27. Langstaff J in ***Royal Bank of Scotland v. Ashton [2011] ICR 632***, stated at paragraphs 12 and 13:

"[The provisions concerning what reasonable adjustments could be carried out by the employer in s.18B of the DDA] *show clearly that the steps which are required of an employer are* ***practical steps****. They are intended to help the disabled person concerned to overcome the adverse effects of the relevant disabilities, at least to the greatest extent possible, so that he or she may fulfil a useful role as an employee. We accept that … the focus of the provisions as to adjustment requires a Tribunal to have a view of* ***the potential effect of the***

adjustment contended for*. The approach is an objective one. It follows … that it is irrelevant to the questions whether there has been or whether there could be a reasonable adjustment or not what an employer may or may not have thought in the process of coming to a decision as to whatever adjustments might or might not be made. It does not matter what process the employer may have adopted to reach that conclusion.* ***What does matter is the practical effect of the measures concerned”****.* (Tribunal emphasis added).

“It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons” (paragraph 24).

28. The EAT in ***Bray v Camden London Borough EAT [1162/01]*** confirmed that disability related absences do not have to be discounted entirely when applying absence management procedures.

29. Exempting employees from Absence Management Procedures was held not to be a reasonable adjustment by the EAT in ***Jennings v Barts and the London NHS Trust UKEAT/0056/12/DM***. Furthermore in the ***Royal Liverpool Childrens NHS Trust v Dunsby [2006] IRLR 351*** the EAT held at paragraph 17:

“In the experience of this tribunal, it is rare for a Sickness Absence Procedure to require disability related absences to be disregarded. An employer may take into account disability related absences in operating a Sickness Absence Procedure”.

30. In ***Griffiths –v- Secretary of State for Work and Pensions [2017] ICR 160 CA*** – the Court of Appeal considered the application of a sickness absence management policy and the identification of the relevant PCP. Elias LJ stated:

“There are in my view two assumptions behind the EAT's reasoning, both of which I respectfully consider to be incorrect. The first is that the relevant PCP was the general policy itself. If that is indeed the correct formulation of the PCP, then the conclusion that the disabled are not disadvantaged by the policy itself is inevitable given the fact that special allowances can be made for them. It may be that this was the PCP relied upon in the Ashton case. But in my view formulating the PCP in that way fails to encapsulate why a sickness absence policy may in certain circumstances adversely affect disabled workers – or at least those whose disability leads to absences from work. Moreover, logically it means that there will be no discrimination even where an employer fails to modify the policy in any particular case. The mere existence of a discretion to modify the policy in the disabled worker's favour would prevent discrimination arising even though the discretion is not in fact exercised and the failure to exercise it has placed the disabled person at a substantial disadvantage. (Paragraph 46)

In my judgment, <u>the appropriate formulation of the relevant PCP in a case of this kind was in essence how the ET framed it in this case: the employee must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions.</u> That is the provision breach of which may end in warnings and ultimately dismissal. Once the relevant PCP is formulated in that

way, in my judgment it is clear that the minority member was right to say that a disabled employee whose disability increases the likelihood of absence from work on ill health grounds, is disadvantaged in more than a minor or trivial way. Whilst it is no doubt true that both disabled and able bodied alike will, to a greater or lesser extent, suffer stress and anxiety if they are ill in circumstances which may lead to disciplinary sanctions, the risk of this occurring is obviously greater for that group of disabled workers whose disability results in more frequent, and perhaps longer, absences. They will find it more difficult to comply with the requirement relating to absenteeism and therefore will be disadvantaged by it." (Paragraph 47) (tribunal emphasis)

31. Elias LJ further stated at paragraph 58 of the judgement:

> *"The nature of the comparison exercise in the former case is clear: one must simply ask whether the PCP puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they are treated equally and may both be subject to the same disadvantage when absent for the same period of time does not eliminate the disadvantage if the PCP bites harder on the disabled, or a category of them, than it does on the able bodied. Of course, if the particular form of disability means that the disabled employee is no more likely to be absent than a non-disabled colleague, there is no disadvantage arising out of the disability. But if the disability leads to disability-related absences which would not be the case with the able-bodied, then there is a substantial disadvantage suffered by that category of disabled employees."*

32. As was noted by the House of Lords in its decision ***Archibald v Fife Council [2004] UKHL 32, [2004] IRLR 651 [2004] ICR 954*** (per Baroness Hale at paragraph 47), the duty necessarily requires the disabled person to be treated more favourably in recognition of their special needs. It is thus not just a matter of introducing a 'level playing field' for disabled and non-disabled alike, because that approach ignores the fact that disabled persons will sometimes need special assistance if they are to be able to compete on equal terms with those who are not disabled ... ***(Harvey on Industrial Relations and Employment Law L at [398.01]).***

<u>Knowledge</u>

33. As per Section 4A (3) of the DDA above, the duty to make reasonable adjustments is triggered only if the employer knows that the relevant person is disabled and that the disability is likely to put him at a substantial disadvantage in comparison with non-disabled persons. Knowledge is not limited to actual knowledge but extends to constructive knowledge – namely, what the employer ought reasonably to have known.

34. The Equality Commission Disability Code of Practice, provides:

> *"5.12*
>
> *Although … the employer has a duty to make an adjustment if it knows, or could reasonably be expected to know, that the employee has a disability and is likely to be placed at a substantial disadvantage. The employer must,*

however, do all it can reasonably be expected to do to find out whether this is the case.

An employee with depression sometimes gets upset at work, but the reason for this behaviour is not known to her employer. The employer makes no effort to find out if the employee is disabled and whether a reasonable adjustment could be made to the person's working arrangements …

5.15

If an employer's agent or employee (such as an occupational health adviser, a personnel officer or line manager …) knows, in that capacity, of an employee's disability, the employer will not usually be able to claim that it does not know of the disability, and that it therefore has no obligation to make a reasonable adjustment … Employers therefore need to ensure that where information about disabled person may come through different channels, there is a means – suitably confidential – for bringing the information together, to make it easier for the employer to fulfil its duties under the Act".

35. In relation to constructive knowledge, the EAT in ***DWP v Hall [2005] UKEAT/0012/05/DA*** emphasised that the question whether an employer had, or ought to have had, knowledge is a question of fact for the tribunal.

36. In ***Wilcox v Birmingham CAB Services Ltd [2010] UKEAT/0293***, Underhill J took the view that the knowledge defence was that an employer will not be liable for failure to make reasonable adjustments, unless it has actual or constructive knowledge of *both* (1) that the employee is disabled; *and* (2) that he or she is disadvantaged by the disability in the way set out in Section 4A (ie by a PCP).

37. In ***Lamb v The Garrard Academy EAT/0042/18*** – Simler J held at paragraph 15:

"Knowledge of disability, whether actual or constructive, must be knowledge of the following three matters:

(i) the impairment (whether mental or physical);

(ii) that it is of sufficient long-standing or likely to last 12 months at least;

(iii) that it sufficiently interfered with the individual's day to day activities to amount to a disability".

38. The Court of Appeal in ***Donelien v Liberata UK Ltd [2018] EWCA Civ 219,*** confirmed that the issue for a tribunal is what the employer could reasonably have been expected to know and emphasising, in making such an assessment of reasonableness of that nature, the exercise is factual in character. The Court of Appeal upheld a tribunal's decision that an employer did not have constructive knowledge of an employee's disability and therefore had no duty to make reasonable adjustments. The employer had not relied solely on an occupational health report stating the employee was not disabled; albeit later found to be wrong. It had also taken into account 'return to work' meetings and letters from the employee's GP.

39. Knowledge can be imputed to an employer where there has been evidence put before it which should have put the employer on notice of the disability (see ***Edworthy v YMCA South Devon Ltd [2003] UKEAT/0867***).

40. However, whilst an employer must make reasonable enquiries based on the information given to them, it does not require them to make every possible enquiry, especially if there is little or no basis for doing so ***Ridout v TC Group [1998] IRLR 628***; ***Secretary of State for Work and Pensions v Alam [2010] ICR 665***.

41. In ***H J Heinz Co. Ltd v Kendrick [2000] ICR 491*** and ***Jennings v Barts and the Lonon NHS Trust UK EAT/0056/***12 the EAT made it clear that it is unnecessary to attach a label or a formal diagnosis to an impairment; knowledge that the claimant was suffering from symptoms falling within Schedule 1 or the manifestations of these sufficed - a specific diagnosis of the condition is not necessary for an employer to have knowledge of disability.

42. In ***Doran v Department of Works and Pensions (UKEATS/0017/14)***, whether an employer has complied with their duty to make reasonable adjustments will be judged not only on what it knew but also on what should have been known to them had they made reasonable enquiries at the relevant time; and, on the basis of such evidence, the tribunal will decide whether if such enquiries had been made the duty to make reasonable adjustments had arisen (followed in ***Nottingham City Homes Ltd v Brittain (UKEAT/0038/18).*** On the facts of this case, the claimant was seeking to rely on a retrospective opinion of a doctor given in evidence and since it was not before the employer when it took the relevant decision there was therefore not the relevant knowledge at the material time.

Burden of Proof

43. Section 17A of the 1995 Act (Burden of proof):-

> *"1(C) Where, in the hearing of a complaint under sub-section (1), the complainant proves facts on which the Tribunal could, apart from this sub-section, conclude in the absence of an adequate explanation that the respondent is acting in a way which is unlawful under this Part, the Tribunal shall uphold the complaint unless the respondent proves that he did not so act."*

44. The Employment Appeal Tribunal in the case of ***Project Management Institute v Latif [2007] IRLR 578*** Elias concluded that:-

> *"The paragraph in the DRC's Code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably have been inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing substantial disadvantage engages the duty but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the claimant would have to provide the detailed adjustment that would need to be made before the burden would shift. It would, however, be necessary for the respondent to understand the broad nature of the adjustment proposed and*

to be given sufficient detail to enable him to engage with the question of whether it could be reasonably be achieved or not."

"[We] very much doubt whether the burden shifts at all in respect of establishing the provision, criterion or practice or demonstrating the substantial disadvantage. These are simply questions of fact for the Tribunal to decide after hearing all the evidence, with the onus of proof resting throughout on the claimant".

RELEVANT FINDINGS OF FACT

Background

45. The claimant is a Police Officer in the PSNI attached to Northern Occurrence and Case Management Team ("NOCMT"). He has been in this unit since 2008 in the role of File Assessor.

46. NOCMT is an office based administrative unit that processes a number of criminal justice type functions within the PSNI. It is staffed by Administrative Support Officers and Police Officers. It is common case that the majority of, if not all, Police Officers attached to the unit are considered disabled under the Disability Discrimination Act 1995 ("DDA") and are placed within the unit as a reasonable adjustment for a variety of disability conditions. The claimant had specifically applied for a role in the unit and had not been placed there as a reasonable adjustment.

Musculoskeletal Back Condition

47. The claimant asserts that by reason of his musculoskeletal back condition he suffers a degree of discomfort/pain on a daily basis which regularly causes him sleep disruption. He gave evidence that - *"most nights I am wakened several times with the pain and discomfort".* He also asserted that - *"sitting and standing for prolonged periods without moving is problematic and painful".*

48. In the course of cross-examination the claimant stated that he self-managed his musculoskeletal back condition with pain relief and an exercise programme; this is consistent with the information he gave to the consultant orthopaedic surgeon Mr Murray (see paragraph 54 below). It is common case that his exercise programme is not physio led, nor has he been referred to physiotherapy by his GP. It is also common case that the claimant has not availed of any physiotherapy beyond the six free sessions he is entitled to under his terms and conditions of service with the respondent.

49. The claimant asserted that he had a regular prescription for pain relief medication for this musculoskeletal back condition. The tribunal does not accept the claimant's evidence on this point as the claimant's GP notes and records make no reference to a repeat prescription for pain relief specifically for a musculoskeletal back condition; nor was the tribunal referred to any such regular prescription in the medical evidence. There is reference in the GP notes and records to the claimant taking cocodamol, paracetamol and ibuprofen, however the GP notes record this medication being taken in relation to headaches and sinus related problems (21 October 2016, 26 June 2016, 19 December 2017 and 11 July 2018) a condition

which the claimant had been suffering from, from at least 2011. In addition, the GP notes and records refer to sleep disturbances and headaches in June 2016 specifically relating to this sinus condition.

50. The claimant accepted in cross-examination that he had no difficulty walking or using the stairs and his undisputed evidence was that he attends the gym, at lunch time 3 or 4 times a week, and if possible every day, where he undertakes at least 20 minutes on the rowing machine and stretching exercises. The occupational health notes in 2015 record the clamant spending *"half an hour on the rowing machine on most days".*

51. It is common case that the claimant's Duty Adjustment Screen, shows as follows:

<u>"Note: If ticked, the person can do this activity.</u>

☑ *Ability to sit for reasonable periods to write, read, use the telephone, to use (or learn to use) IT and other tasks requiring manual dexterity.*

☑ *Ability to run, walk reasonable distances, and stand for reasonable periods*

☑ *Ability to make decisions and report situations to others*

☑ *Ability to evaluate information and to record details*

☐ *Ability to exercise reasonable physical force in restraint and retention in custody*

☑ *Ability to understand, retain and explain facts and procedures*

☑ *Ability to safely handle firearms both on and off duty*

☑ *Ability to drive operational police vehicles if required*

☑ *Ability to serve at any location in Northern Ireland*

☑ *Ability to do shift work and overtime if required, including night duty*

☐ *Ability to participate in operations".*

52. The undisputed evidence of the respondent's witnesses was that the claimant regularly worked non-mandatory overtime and that during the period January 2016 until July 2018 his overtime hours were the third highest among the 28 Police Officers in the NOCMT unit.

53. The tribunal was provided with a medical report from Mr David McMurray, consultant orthopaedic surgeon dated 13 September 2019. This report was sought specifically for the purposes of these proceedings. The report contains no

information on any alleged adverse effects or the extent of the impact of any alleged difficulties on the claimant's ability to carry out day to day activities. Furthermore, the report makes no mention of the claimant being disabled as per the Disability Discrimination Act 1995, despite the letter of instruction from the claimant's solicitors requesting:-

> "*We need to prove our client is and has been suffering from a musculoskeletal disorder which would bring him under the DDA Act and whether in your opinion his employers should treat him accordingly*".

54. The following relevant extracts are his opinion on the claimant's impairment:

> *"EXAMINATION:*
>
> *The plaintiff walked into the examination room with a normal gait and was fully compliant with questioning and examination throughout. He appeared to move comfortably without any obvious distress.*
>
> *NECK:*
>
> *There was no midline or paraspinal pain to palpation of the neck. There was a full range of active motion of his cervical spine.*
>
> *BACK:*
>
> *He had normal spinal curvature. There was no midline of paraspinal pain to palpation. He could perform forward flexion to just below the knee and described feeling pain in the lower part of the back in the midline during this manoeuvre. He could perform lateral flexion to the knee. Straight leg raising was to 50 degrees bilaterally restricted any further by tight hamstring muscles. Neurological examination of both lower limbs was normal. He experienced some mild discomfort in his right buttock with hip rotation. He could perform straight leg raising without pain. He had an arc of movement of the right hip of approximately 40 degrees external rotation to 20 degrees of internal rotation.*
>
> *….*
>
> ***COMMENT***
>
> *….*
>
> *The first record of back pain in the GP records was in June 2011. The next attendance at the GP with a musculoskeletal complaint was in May 2017 with hip pain. He reattended with his GP in July 2018 with pain back and was off work for a period of time due to this.*
>
> *….*
>
> *When I examined Mr Porter he did have some restriction of forward flexion which reproduced lumbar back pain along with some discomfort in the right buttock with hip rotation. Right buttock pain was first described in his records*

in 2015. He has not had a recent x-ray of his pelvis. His signs and symptoms could be due to degenerative change in right hip. He reports back pain for many years but admitted that he would have self-medicated and tried to manage it himself with pain relief and exercises. The symptoms from his back appear to have been mostly at a level where he was able to self-manage as he did not consult his GP regarding his back between 2011 and 2018. He did however receive physiotherapy during this time for neck pains.

….

He reports his chronic back pain as getting worse over the years. He has not had any recent radiological investigations but considering his age and the gradual deterioration of his symptoms, it is possible his symptoms are due to a degenerative condition of his back. He seems to have had an acute flare up of symptoms in 2018 however this was reported as having returned to his usual level of symptoms in March 2019."

55. The tribunal considered the occupational health assessment reports dated 28 July 2015, 30 August 2018, 4 October 2018, 20 November 2018 and 25 March 2019 at which the claimant was assessed by a specialist physiotherapist, save for 30 August 2018. The relevant extracts record as follows:

(1) *"Reports pain in hip and low back – intermittent – most days – keeps awake at night at times and stiff to get out of chair – walks uses stairs, half hour on rowing machine most days.*

standard chair " (July 2015)

(2) *"Off sick from 18/7/18 – MED 3 back condition – attended SPS six sessions beneficial symptoms continued to be troublesome – sleep disturbed due to pain radiating R hip and lower back. Attending gym in his lunch time [to alleviate his symptoms] stopped by management due to time constraints – states require one hour to complete." (August 2018)*

(3) *"I have examined David today at OHW. As you are aware he is off with an acute episode of a musculoskeletal condition. This condition has been episodic over the years and David reports that he has generally self-managed this through exercising and Physiotherapy and this is well documented. Based on examination today his condition remains troublesome and he remains unfit for work. I understand that David has applied to go to one of the Police Treatment Centres (PTC) earlier this year however due to personal circumstances he had to cancel this and there appears to have been some confusion with regard to his reapplication which went forward in the summer. I would endorse his attendance at PTC as soon as practical as this will assist his ongoing management of his condition. (4 October 2018)*

(4) *"Observations: Able to sit for subjective in/out of chair relative ease. ROM: Lspine -Still some restriction in movement (stiffness mainly) reports extension and rightsided…..*

I reviewed David today at OHW. As you are aware he has been to the Police Treatment Centre (PTC) and he tells me this has been very beneficial. On examination today he could return to work at the end of this current sick line. I have put a short term duty adjustment in place for 12 weeks from today's appointment however I understand this should not affect his substantive post. Two weeks of phased return starting 50% hours and increasing to full time is advised. David has been given exercise to assist the maintenance of his condition being able to do these in the gym would assist that. I understand that David's role is quite sedentary and if is advised (sic) that he should get up from static sitting postures every 30 minutes and this should be encouraged by management. No routine review is planned." (November 2018)

(*5)"Able to sit for subjective in/out of chair relevant ease.*

Stiffness at EOR flexion to above ankles extension and RFS minimal decreased.

DDA likely to apply.

I have reviewed David today at OHW. As you are aware he had an acute episode of a long standing condition last year, has had treatment by SPS and PTC. On examination today his condition is relatively settled. David had a short term duty adjustment in place with regard to this condition which I understand would not affect his substantive post. I have extended the date of that today. David has had acute episodes of this condition over the years and this was well documented. This medical condition has had a significant effect (more than minor or trivial) on his normal day to day activities, and this has lasted for more than twelve months. If this was tested, it is likely this condition would meet the definition of disability under DDA. If this adjustment requires review please request by E Services."

56. The tribunal notes that the claimant's attendance at occupational health in March 2019 post-dates the lodging of these tribunal proceedings. Occupational health were not requested by the respondent to consider if the claimant was disabled by reason of his musculoskeletal back condition, yet at this attendance they did so. This was the first time that occupational health had stated that DDA was likely to apply to the claimant's musculoskeletal back condition. Occupational health had not stated that DDA was likely to apply in their reports dated 30 August 2018, 4 October 2018 or 20 November 2018. There was no dispute that the claimant could, at any time, have self-referred to occupational health for an assessment of DDA in relation to his musculoskeletal back condition.

57. The respondent made a referral to occupational health for assessment by a physiotherapist in June 2015 at which the respondent requested confirmation on whether the Disability Discrimination Act applied at this time and the response from occupational health was *"not likely to apply at this time".*

58. The claimant has attended Seapark physiotherapy sessions (SPS) for physiotherapy every year since 2014 for six free sessions which are the maximum that PSNI Officers are entitled to each year. The unchallenged evidence of both

Ms McClenaghan and Ms Bryans was that the six annual free physiotherapy sessions at Seapark was a workplace benefit that most staff within the respondent organisation made as much use of as possible, including themselves.

59. In replies dated 3 July 2019 in response to a Notice for Additional Information, the claimant identified the substantial adverse effect of his impairment as - *"the requirement to take time off work as his movement is restricted".* He also identified *"attending work, sitting for long periods of time and driving long distances"* as the normal day to day activities affected by his physical impairment.

60. The claimant's case, at hearing, was that he "*assumed*" he was covered by the DDA by reason of his musculoskeletal back condition as well as his bowel condition. Nonetheless he accepted in cross-examination that he never clarified with the respondent, at any case review, that his musculoskeletal back condition was covered by the DDA in addition to his bowel condition.

61. Ms Bryans' unchallenged evidence was that she never understood the claimant to be disabled by reason of his musculoskeletal back condition. Her undisputed evidence was that she had personal knowledge of the claimant's daily use of the gym and knew the claimant to be very active including a specific recollection of him attending a relative's farm at the weekend to undertake tree cutting. It is common case that Ms Bryans took no part in the decision to implement the absence management process. Furthermore, during his absence (July 2018- November 2018), the claimant specifically chose not to discuss his symptoms or treatment with Ms Bryans for confidentiality reasons.

62. It is accepted and understood by the respondent that the claimant has an HGV driving licence for which he is medically assessed annually by occupational health for the purposes of renewal. It is common case that the claimant is registered with [redacted] as a relief driver, however his unchallenged evidence was that he has only undertaken relief driving once in the last year. In the course of cross-examination, the claimant stated that driving a heavy goods vehicle has *"no significant impact on his musculoskeletal back condition"*.

63. There is no dispute that the claimant has use of an orthopaedic chair at his work station and that this is not supplied by the respondent on the advice of occupational health or on account of any medical opinion. The claimant alleged that Ms McClenaghan sourced this for him from a retiring member of staff as he had discussed with her and occupational health the need for a chair due to his musculoskeletal back condition. The respondent disputes this. The claimant relies on this as evidence that Ms McClenaghan has the requisite constructive knowledge of his musculoskeletal back condition as a disability. The tribunal finds that the claimant had use of this chair simply by reason of it being "spare" within the respondent's office. The tribunal does not accept the claimant's evidence that he discussed the need for an orthopaedic chair with Ms McClenaghan or with occupational health. The occupational health notes specifically record the claimant as having a standard chair and that his substantive post is unaffected by his condition. The extent of occupational health's recommendation is that the claimant should get up from static positions every 30 minutes and exercise to maintain his condition. The tribunal is satisfied that if occupational health determined that the claimant's impairment required a specialist chair this would have been recommended.

Attendance Policy

64. The respondent has an Attendance Management Policy as a measure to address and minimise occurrences of sickness absence. Its underlying principle is to:

> "*provide a fair, open and proportionate method of dealing with attendance issues*".

The policy specifically states:

> *"…………., not only does sickness absence impact on health of officers and staff who are ill; it also can have an adverse impact on wellbeing of colleagues who are required to cover the work and shifts of absentees. This then impacts on the PSNI's capacity to meet service delivery needs and expectations of our communities".*

65. It is common case that the respondent's policy provides for DDA considerations and reasonable adjustments including:-

- *Relaxation of the Bradford trigger point (OHW/HR opinion should be factored).*
- *Impact of the working patterns.*
- *Deferral of management action at that time.*

66. The tribunal accepts the unchallenged evidence of the respondent's witnesses that at the relevant time, namely - at the time of the claimant's absence and absence review, there was a recognised risk in the respondent that unsustainable absence and duty adjustments was impacting on its service delivery. The tribunal also accepts that as a result of this identified risk, the absence management process had been amended with revised guidance on process including the removal of Attendance Management Panels (AMP). The tribunal accepts Mr Reid's evidence that the absence management procedure was in a transition phase as a result of this.

67. The respondent's policy provides for case review at 28 days, 60 days and 90 days.

68. It is common case that the claimant reported unfit for duty by reason of a musculoskeletal back condition from 18 July 2018 until 28 November 2018. His sickness absence was certified as back pain by his GP.

69. The claimant's absence for this period was subject to the absence management procedure. He attended a 28 day case review on 17 August 2018, a 60 day case review on 20 September 2018 and a 90 days case review on 19 October 2018. At each review the claimant met with Ms McClenaghan his Countersigning Officer. The notes of the 60 day and 90 day case reviews record the claimant as permanently DDA. The tribunal accepts Ms McClenaghan's evidence that at all times she understood the reference to "permanently DDA" related to his bowel

condition only, furthermore the claimant accepted in cross-examination that at no time did he state at any review that he was DDA by reason of his musculoskeletal back condition.

70. By letter dated 24 October 2018 the claimant was informed that his absence had breached the absence trigger of 90 days and he was invited to attend a first stage meeting. The letter also invited him to provide any evidence or documentation that he intended to rely on at the first stage meeting by completing a Form 90/1. The claimant emailed his line manager, Ms Bryans, questioning if his attendance was being considered unsatisfactory. A further letter was forwarded to the claimant dated 30 October 2018 which confirmed that his absence was being considered as unsatisfactory/unsustainable because of its impact on the organisation and department.

71. A first stage meeting took place on 1 November 2018. The outcome was a formal written improvement notice Stage 1 dated 5 November 2018. The letter specifically stated

> *"In determining my decision and not querying the validity of your absence – the impact of this absenteeism is considered unsustainable against service delivery".*

72. The claimant appealed this on the ground that the decision was unjustified. The appeal, in the main, raised issues of breach of procedure and stated

> *"DDA is applicable in my case but has not been considered".*

The appeal also stated that the claimant believed he had received this formal written notice because he reported wrongdoing in December 2017 involving his line manager and that the improvement notice was *"another attempt at payback".*

73. It is common ground that Inspector Reid conducted the claimant's appeal and did so by way of a review of the papers. The respondent fully accepts this is contrary to the respondent's absence management policy as the claimant is entitled to attend an appeal hearing as part of his appeal process. The tribunal accepts Mr Reid's explanation that he was not aware of the revised guidance in relation to the absence management process and that the claimant was entitled to attend an appeal meeting. The tribunal accepts that the respondent's absence management process was in a transition period and Mr Reid's view that no appeal hearing was required was based on his understanding of the previous process. Around the same time Mr Reid conducted an appeal of another disabled officer in the unit in exactly the same way – both appeals were non-compliant with the new absence management guidance. The other officer had been issued with a written improvement notice after 125 days of sickness absence and Mr Reid also rejected his appeal. Mr Reid was clear in his evidence that even had he understood the claimant to be disabled by reason of his musculoskeletal back condition, he would have treated the claimant in exactly the same way and the first written improvement notice would have been upheld. At hearing the claimant no longer pursued a claim of direct discrimination in relation to this breach of procedure. Therefore this was not an issue to be determined by the tribunal.

74. The tribunal was provided with a copy of a briefing paper prepared for the Chief Superintendent in January 2018 entitled "*Options Paper on Future Sustainability of Legacy and Justice Department Occurrence Case Management Team*". The contents of this document were not disputed by the claimant. This records the following:

- there is a risk of service delivery failing due to continuing staff losses;
- the OCMT is a 'lean' resource model currently operating with 59 less staff than it was designed to operate with - amounting to around a third of its designed capacity; and
- a "*tipping point*" had been reached with service delivery failing – *"only propped up by the professionalism of staff and a dependence on overtime that is unlikely to be sustainable beyond this financial year".*

The document concluded:-

> *"If no action is taken, OCMT will not be able to maintain its critical functions without transferring other less critical functions and as this requires a lead in time, there is a need to start this now so as to mitigate the impact it will otherwise have".*

75. It is common case that a consequence of the claimant's absence and the retirement of another police constable in the unit, two members of staff were required to move into their file assessing roles.

76. The tribunal accepts the clear and consistent evidence of both Ms McClenaghan and Mr Reid that regardless of whether or not the claimant was disabled by virtue of his musculoskeletal back condition, the claimant would have been issued with the formal written improvement notice as the number of day's absence was considered unsustainable.

CONCLUSION

"Disability"

77. The onus is on the claimant to establish that he is disabled for the purposes of the DDA at the relevant time – namely – at the time he was subject to the absence management process.

78. The respondent accepts and the tribunal is satisfied that at the relevant time, the claimant's musculoskeletal back condition is a physical impairment for the purposes of the DDA. The respondent contends that the claimant has failed to establish that his physical impairment had a substantial adverse effect - more than 'minor' or 'trivial' - on the claimant's ability to carry out normal day to day activities.

79. The tribunal carefully considered the claimant's evidence and the medical evidence and concludes that the claimant has failed to discharge the burden of establishing on the balance of probabilities that he had, at the relevant time, a disability within the meaning of the DDA. The tribunal is satisfied that the claimant's musculoskeletal back condition did cause the claimant some degree of discomfort,

however the claimant's evidence and the medical evidence clearly demonstrate that on a daily basis, his mobility and ability to lift, carry or otherwise move everyday objects was not substantially adversely affected by his musculoskeletal condition for 12 months nor likely to be. In its determination the tribunal had particular regard to the following:

(i) The limited evidence adduced by the claimant regarding the impact of the physical impairment on his ability to carry out normal day to day activities. The claimant's case was that his impairment caused sleep deprivation and that sitting or standing for prolonged periods without moving was problematic. These were the only day to day activities identified by the claimant that he could not do without difficulty. However, the tribunal was unable to reconcile this with the claimant's evidence that he uses a cross-trainer and/or rowing machine three or four times a week or sometimes every day, without difficulty and that he can walk normally, use stairs and drive a heavy goods vehicle without difficulty. The only sleep disturbances recorded in the GP notes relate to sinus problems. These facts fundamentally undermine the claimant's argument that his impairment had a substantial (more than minor or trivial) impact on his ability to carry out day to day activities.

(ii) Apart from one period of sickness absence (which led to the formal written improvement notice), at all times the claimant was fit to carry out his work related activities and this was supported by occupational health. It is clear from the occupational health reports that the claimant's ability to carry out the duties of his substantive post was unaffected by his physical impairment. The only recommendation from occupational health was that due to the sedentary nature of the claimant's role, he should get up from static sitting positions every 30 minutes or have short breaks from static positions. The tribunal, acting as an industrial jury, views this as good practice for all individuals who occupy sedentary occupations.

(iii) The expert medical report adduced by the claimant in support of his claim from Mr Murray's dated 13 September 2019 stated that

"the symptoms from his back appear to have been mostly at a level where he was able to self manage as he did not consult his GP regarding his back between 2011 and 2018".

The tribunal considers this to be evidence of an impact which is not more than minor or trivial on the claimant's ability to carry out day to day activities.

(iv) The tribunal does not accept that the occupational health report dated March 2019 is determinative of the issue of disability. The question of whether or not an individual is disabled pursuant to the DDA is a question of fact and law to be determined by the tribunal in its consideration of the evidence and when applying the legislation and the guidance; experts cannot usurp the tribunal's role. The tribunal considered the report as part of its overall assessment of the evidence taking into account the date and timing of the report, the fact that occupational health made no statement prior to this or at the time of the alleged discrimination, that the claimant was likely to be covered by the DDA by reason of his musculoskeletal back condition nor did

the claimant's appointed expert Mr Murray, six months later, give an opinion that the claimant was disabled pursuant to the DDA or provide any opinion or details of adverse impact on day to day activities.

(v) The claimant identified in replies to particulars that having to take time off was the substantial adverse effect of his impairment. The claimant had one single instance of sickness absence for his musculoskeletal back condition. The undisputed evidence of the respondent is that the claimant had an excellent attendance record and he had never previously been absent by reason of his musculoskeletal back condition or since December 2018. As set out above the occupational health reports confirm that his ability to carry out the duties of his substantive post was not affected. Except for the one period of absence due to his musculoskeletal back condition, at all other times the claimant was fit to carry out his work related activities as confirmed in his comments to occupational health.

(vi) The claimant attended his GP on only 3 occasions in 7 years in relation to his musculoskeletal back condition. No further referral was made by his GP.

(vii) As per the findings of fact set out above, the tribunal notes that contrary to the claimant's assertion that he was on a regular repeat prescription for pain relief in relation to his musculoskeletal condition, there was no such prescription in his GP notes and records.

80. Even had the claimant satisfied the tribunal that he was disabled by reason of his musculoskeletal back condition, the tribunal finds that the respondent did not have the requisite knowledge of his disability. The test for knowledge in a reasonable adjustments case is two-fold, as set out above; the knowledge required is both that the claimant is disabled and that he is disadvantaged by the disability by reason of the relevant PCP. The claimant does not argue that the respondent had actual knowledge of his disability but relies on it having constructive knowledge at the relevant time. The tribunal does not accept that the respondent had constructive knowledge that the claimant was disabled and was disadvantaged by the PCP for the following reasons:

(i) Prior to July 2018, the claimant had never been absent from the workplace by reason of his musculoskeletal back condition. The undisputed evidence of the respondent's witnesses was that his attendance was very good.

(ii) Occupational health confirmed in 2015 that the claimant's musculoskeletal back condition was not covered by DDA. The first time occupational health opined that the claimant's condition would likely be DDA was in March 2019. The claimant argued that the respondent ought to have made specific enquires from occupational health from July 2018 onwards as to whether the DDA applied. However, the reality is that the claimant, at no time required work place adjustments for this condition. The tribunal finds that by making the three referrals to occupational health during the claimant's absence, this discharged the obligation to make enquires. At all times it was open to occupational health to give its opinion on whether DDA was likely to apply - as it did in March 2019, without a specific request having been made.

Furthermore, the claimant was always at liberty to request an assessment for DDA with occupational health in relation to his musculoskeletal back condition.

(iii) The evidence of all the respondent's witnesses was that at all times they understood the claimant to be DDA by reason of a bowel condition only and that any reference to permanent DDA at case reviews or elsewhere related solely to his bowel condition. All three respondent witnesses gave clear and consistent evidence that they had no understanding that the claimant was asserting DDA by reason of his musculoskeletal condition. The tribunal accepts their evidence in this regard and the evidence of the claimant that at no time, at any meeting did he clarify that DDA applied to his back condition.

(iv) The tribunal does not accept that use of the six free annual sessions of physiotherapy at Seapark constitutes evidence of constructive knowledge. This was a benefit that many Police Officers made use of. The tribunal is satisfied that it is not determinative of whether the user has an impairment under the DDA. The respondent was aware that the claimant had never availed of additional physiotherapy at Seapark or elsewhere beyond these six free sessions.

(v) The respondent accepts that it is led by occupational health on the issue of disability, which the tribunal does not criticise given occupational health's clear expertise. Nonetheless, it is also relevant to the question of the respondent's knowledge at the relevant time that Ms Bryans and Mr Reid had personal knowledge of the claimant's gym usage on a daily basis and were aware of the claimant holding an HGV license and his registered business interest as a driver for [redacted]. The respondent's witnesses were also aware of his excellent attendance record and the number of overtime hours the claimant worked. The tribunal concludes that these are all factors which operate against the respondent having constructive knowledge of the claimant's disability.

Reasonable Adjustments

81. Irrespective of the tribunal's finding that the claimant was not disabled and that the respondent did not have the requisite knowledge, the tribunal would have dismissed the claimant's claim for failure to make reasonable adjustments for the following reasons:

(i) There was no evidence before the tribunal that the claimant was substantially disadvantaged in the application of the absence management policy or in the consequent decision to issue him with a formal written improvement notice in comparison with those who are not disabled. The first identified disadvantage relied upon by the claimant was his upset and distress, occasioned by the absence management process and the formal written improvement notice. There was no evidence before the tribunal that this particular disadvantage arose by reason of his disability. As per ***Nottingham City Transport Limited v Harvey*** there must be a causal link between the PCP and the disadvantage. If a non-disabled person would be affected by the PCP in the same way as the disabled person, then there is no comparative substantial disadvantage to the disabled person. The tribunal

finds that a non-disabled person subject to an absence management process and a formal improvement notice, likewise would have experienced the same upset and distress.

(ii) Furthermore the second identified disadvantage was that the attendance management process and formal written improvement notice was a *"first step to dismissal"*. However on the facts of this case this is not a substantial disadvantage in comparison with those who are non-disabled. The claimant had no absence prior to the absence in July 2018 – December 2018 and had not previously been subject to the absence management procedure. The claimant had a very good attendance record and he had never been absent by reason of his musculoskeletal back condition – accordingly a non-disabled person would be affected by the PCP in the same way. As per ***Nottingham City Transport Limited v Harvey*** there must be a causal link between the PCP and the disadvantage. If a non-disabled person would be affected by the PCP in the same way as the disabled person, then there is no comparative substantial disadvantage to the disabled person. As per Elias LJ (as paragraph 27 above) – if the particular form of disability means the disabled employee is no more likely to be absent than a non-disabled colleague, there is no disadvantage arising out of the disability. Therefore the tribunal determines the duty to make reasonable adjustments would not have been triggered in the circumstances of this case.

(iii) Furthermore, the tribunal finds that the particular steps identified by the claimant as reasonable adjustments, namely not to apply the absence management process or not to issue a formal written improvement notice, are not in all the circumstances of this case, reasonable adjustments having regard to Section 18B (1)(b) and (c) for the following reasons:

1 The respondent's absence management policy aims to encourage and facilitate staff back to work the purpose of which is to minimise and manage absence.

2 The absence management policy applies to all staff. The respondent has a responsibility to ensure the levels of absence are managed effectively for the benefit and welfare of all its staff and employees.

3 The respondent was, at the relevant time, at risk of service delivery failure due to staff losses, unsustainable absence and duty adjustments.

4 The consistent evidence of both Ms McClenaghan and Mr Reid was that the claimant was considered disabled by reason of his bowel condition; had he been considered disabled by reason of his musculoskeletal back condition, the formal written improvement notice would still have been issued because the extent of his absence was considered unsustainable for the reasons set out above at (i) – (iii). Furthermore, the authorities are clear, there is no legal obligation to discount all disability absences as a reasonable adjustment when applying absence management procedures.

82. Accordingly the claimant's claim of disability discrimination by reason of a failure to make reasonable adjustments is dismissed.

Employment Judge:

Date and place of hearing: 21-22 October 2010, 19-21 November 2019, Belfast.

Date decision recorded in register and issued to parties: