



EMPLOYMENT TRIBUNALS

Claimant: Miss H Holmes

Respondent: The Chief Constable of Merseyside Police

HELD AT: Liverpool (remotely, by CVP)

ON: 29 & 30 November 2021
1 and 2 December 2021

BEFORE: Employment Judge Buzzard
Mr A Murphy
Mr J Murdie

REPRESENTATION:

Claimant: In person

Respondent: Mr Flood of Counsel

JUDGMENT

1. The claimant's claims of discrimination arising from disability and discrimination on the basis that the claimant was a part time worker are dismissed as not well founded.
2. The claimant's claims of direct discrimination and discrimination by failing to make reasonable adjustments are dismissed on withdrawal by the claimant.

REASONS

Introduction

1. The claimant made four claims, namely:
 - 1.1. Direct Disability Discrimination
 - 1.2. Discrimination by failure to make reasonable adjustments

- 1.3. Discrimination arising from disability; and
- 1.4. Discrimination on the basis that the claimant was a part time worker.
2. The claim of direct discrimination was withdrawn by the claimant in the course of making submissions at the end of the hearing. Accordingly, this claim was dismissed.
3. The claim of discrimination by failure to make reasonable adjustments was withdrawn during the claimant's oral evidence to the Tribunal. Accordingly, this claim was also dismissed.
4. The only claims that remained for determination by the Tribunal were the claimant's claims of discrimination arising from disability and of discrimination contrary to the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations.

The Law

5. The disability based claims that the claimant makes are governed by the Equality Act 2010. The claims relating to the claimant's part time status arise from the Part time workers (prevention of less favourable treatment) regulations 2000.

The Relevant Law – The Equality Act 2010

6. Part 5 of the Equality Act 2010 applies to employees prohibits discrimination and against and harassment of employees in the workplace.
7. In relation to discrimination s39 states:

39 Employees and applicants

(2) *An employer (A) must not discriminate against an employee of A's (B)—*

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

8. The right to make a claim in an Employment Tribunal in relation to a breach of these provisions of Part 5 comes from Chapter 3 of Part 8 of the Equality Act 2010. Specifically s120 states:

120(1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—

(a) a contravention of Part 5 (work);

Under this a Tribunal has the jurisdiction to determine if prohibited discrimination has occurred.

9. The definitions of the various types of discrimination come from Part 2 of the Equality Act. This firstly creates the concept of protected characteristics, the relevant one here being disability. Part 2 Chapter 2 goes on to define what discrimination is.

The Relevant Law – What is a Disability?

10. The definition of disability under the Equality Act 2010 has several requirements. These are:
 - 10.1. The claimant must have an impairment; and
 - 10.2. That impairment must have substantial adverse impacts on the claimant's ability to carry out day to day activities; and
 - 10.3. Those impacts must have lasted, or be expected to last for 12 months at the date of the alleged discrimination, this is the requirement that the condition is long term.
11. There are other elements to the definition of disability, such as relation to terminal and progressive conditions, which are not relevant to the issue here.

The Relevant Law – What is Discrimination arising from disability?

12. There is more than one form of discrimination based on disability. The relevant form of discrimination to this claim is Discrimination arising from disability. This is defined by s15 of the Equality Act as when:

15(1) A person (A) discriminates against another (B) if, A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

13. Accordingly, the claimant must show that she has been treated unfavourably.
14. Establishing unfavourable treatment is not however sufficient: for the claim of discrimination to be made out, the conduct complained of must be also be '*because of something arising as a consequence of* the claimant's disability.
15. A claim of discrimination arising from disability can only succeed if the alleged discriminator was either aware that the claimant was disabled, or should reasonably have been aware.
16. If the unfavourable treatment did arise from something arising as a consequence of the claimant's disability, the question then becomes was it justified as a proportionate means of achieving a legitimate aim.

The Relevant Law – The Burden of Proof under the Equality Act 2010

17. Considering the claimant's claim of disability discrimination the burden of proof is determined by s136 of the Equality Act. The relevant parts of this section state:

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

18. This in effect reverses the traditional burden of proof so that the claimant does not have to prove discrimination has occurred which can be very difficult. Section 136(1) expressly provides that this reversal of the burden applies to 'any proceedings relating to a contravention of this [Equality] Act'.

19. This is commonly referred to as the reversed burden of proof, and has 2 stages.

19.1. Firstly, has the claimant proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination? This is more than simply showing the respondent *could* have committed an act of discrimination.

19.2. If the claimant passes the first stage then the respondent has to show that they have not discriminated against the claimant. This is often by explanation of the reason for the conduct alleged to be discriminatory, and that the reason is not connected to the relevant protected characteristic. If the respondent fails to establish this then the Tribunal must find in favour of the claimant. With reference to the respondent's explanation, the Tribunal can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case.

20. It is not necessary for the Tribunal to approach these two elements of the burden of proof as distinct stages. The court of Appeal in **Madarassy v Nomura International plc** [2007] EWCA Civ 33 gave useful guidance that despite the two stages of the test all evidence should be heard at once before a two stage analysis of that is applied.

The Relevant Law – What is Part Time Worker Discrimination?

21. The Part time workers (prevention of less favourable treatment) regulations state at regulation 5:

5(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—

(a) as regards the terms of his contract; or

(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if—

(a) *the treatment is on the ground that the worker is a part-time worker, and*

(b) *the treatment is not justified on objective grounds.*

22. The regulation uses the phrase “*less favourably*”. This is a comparative test.
23. There is no scope for the claimant to rely on a hypothetical comparator, which in the case of equivalent disability discrimination she could. This was made clear by the EAT in **Carl v University of Sheffield 2009 ICR 1286**. In the Equality Act the words “*or would have*”, i.e. that the claimant is treated less favourably than a comparator was, or a hypothetical comparator would have been, treated are expressly included. No equivalent words are not found in the part time worker regulations.
24. Accordingly, the claimant *must* identify an actual person who worked for the respondent as a comparator. That comparator would have to be materially similar to the claimant save that, given the difference in treatment is alleged to be on the basis that the claimant was not full time, the comparator must be a full time worker.
25. If a valid full time comparator is identified, the claimant needs to show she was treated less favourably than that comparator. Further, any less favourable treatment must be on the ground that the worker was part time.
26. In a similar way as with discrimination arising from disability, there is scope for any discrimination on the basis of part time status to be justified on objective grounds.

The Issues

27. The parties had agreed a List of Issues. In respect of the claims that remained to be determined at this hearing, following the structure of the list of issues the following issues fell to be determined at this hearing:

The Issues - Disability

28. Was claimant was disabled by reason of post traumatic stress disorder (“PTSD”) at the relevant times to her claims?
 - 28.1. PTSD was specifically identified by the claimant as the disability she relied upon for the claims that remained to be determined by this Tribunal.
 - 28.2. Both at an earlier case management hearing, in the agreed List of Issues the claimant identified the relevant disability she relied on as being PTSD. The claimant has a number of other health issues, however these are not relied on as being a disability for the purposes of this claim.
 - 28.3. Part way through this hearing the claimant conceded that there was no written record to confirm she had ever actually been diagnosed with PTSD. At this point and after allowing the claimant an adjournment to consider the

position, the claimant confirmed she continued to assert that she relied on PTSD as her disability.

The Issues – Knowledge of Disability

29. Was the respondent aware that the claimant was disabled as a result of PTSD?
- 29.1. The claimant is claiming discrimination arising from disability contrary to s15 of the Equality Act 2010 (“EqA”).
- 29.2. For a claim under this provision the claimant needs to establish that the respondent either knew of the claimant’s disability or could they be reasonably expected to know that the claimant had the disability relied on. Specifically, this means knowledge of the relevant disability, here PTSD. If the respondent should have been aware, they are treated as if they did have knowledge of the disability for the purposes of the Equality Act 2010
- 29.3. If the respondent did not know and could not reasonably be expected to have known, then no claim of discrimination under section 15 can succeed.

The Issues – Discrimination Arising from Disability

30. Was the claimant was subjected to the unfavourable treatment she relies on as being discriminatory?
- 30.1. The claimant has listed a number of potential acts of unfavourable treatment. These are all refusals (or recommendations to refuse) an application the claimant had submitted for permission to pursue a business interest outside of her duties as a police officer. For ease these are all referred to as refusals, despite some actually being recommendations given to senior officers that they refuse the application rather than actual refusals on each occasion.
- 30.2. These refusals related to two applications as follows:
- 30.2.1. First Application:
- by the claimant’s line manager, Mrs Jones, in mid-October 2019;
 - by a member of the Command Team, Chief Superintendent Thornton, on or around 28 October 2019;
 - by Detective Superintendent Hassall, who is now no longer with the force, who was a member of the Professional Standards Department, on 5 November 2019;
 - by Detective Superintendent Hassall, 8 November 2019, as a reconsideration of the refusal of 5 November 2019 after he became aware that he had not, prior to 5 November 2019, received information sent on behalf of the claimant;
 - by Chief Constable Cook on 18 February 2020, this being the final stage of the claimant’s first application;

- 30.2.2. Second Application:

- by the claimant's then line manager, Sergeant Devine , on or around 24 June 2020
- by a member of the command team, Superintendent Gibson on or around 26 June 2020
- by Detective Superintendent Hassall on or around 5 August 2020, this being the formal rejection of this second application.

31. Was this unfavourable treatment because of something arising from the claimant's PTSD?

31.1. The claimant asserts that the "*something arising*" was her absences from work.

31.2. The claimant argued that she had a number of absences due to or related to her PTSD, and that these absences were at least part of the reason why she was refused permission to have a business interest outside her role as a police officer. This is disputed.

31.3. If the reason for the refusal was in part the absences, and those absences were something arising from the claimant's PTSD, then it does not matter if the respondent was aware whether the absences were something arising from her PTSD, although the respondent does need to have had knowledge of the claimant's disability.

32. Was the refusal to grant permission to pursue a business interest a proportionate means of achieving a legitimate business aim?

33. In this case the respondent indicated they would argue it was, and the aim in question was running an effective and efficient police service. The respondent's position is that this cannot be done unless the police service maintain public confidence, which respondent argues would be undermined if the claimant were permitted to work in, and run, a business whilst saying at the same time she was not able to do her work for the police.

The Issues - Part-Time Discrimination

34. In relation to the discrimination on the basis of part-time status, in that claim the question is: did the respondent subject the claimant to a detriment or treat her less favourably than a comparable full-time worker?

35. The claimant relies upon exactly the same things as she argues were unfavourable treatment as the less favourable treatment for the purposes of this claim, i.e. the repeated refusal to grant her permission to pursue a business interest. The difference between this and section 15 is the treatment does not have to simply be unfavourable, it has to be less favourable than a comparator was treated. The claimant relies upon Kate Harrison and Ellie Devers as comparators in this case.

36. The Tribunal received very little actual evidence regarding these two potential comparators, and this was highlighted in submissions where the issue was discussed. Mr Flood for the respondent confirmed that Ellie Devers was a full-time officer but Kate Harrison was not. The claimant confirmed that she had no basis to disagree with this or to dispute this, and accordingly, as the comparator has to be a

full-time worker, it is apparent that only Ellie Devers *could* be a relevant comparator for the purpose of this claim.

37. Being full time is not enough to make Ellie Devers a valid comparator. To be a valid comparator she would have to have had a similar application for permission to have a business interest to the application made by the claimant approved.

38. If the claimant had established that she was treated less favourably than a valid comparator, the claimant would still have to go on to show that that treatment was actually on the ground that she was a part-time worker. The respondent disputes this.

39. If the claimant had established there was less favourable treatment because she was a part time worker, the respondent would then have argued that the treatment was justified. The test for justification is not materially different to the test for justification in relation to a claim of discrimination arising from disability.

40. The List of Issues prepared by the parties identifies that in respect of the claimant's part-time worker claim there is a potential time limit issue. There was no dispute that this claim is not suggested on the claimant's ET1. The claimant, accordingly, needed permission to amend her ET1 to allow her to pursue the claim. The claim was raised well outside the time for presenting a claim. The respondent identified no particular prejudice to them by allowing the amendment. With the exception of relating to potential comparators, there would be no additional evidence needed from the respondent. IN the event, there was no factual dispute regarding the comparators relied on. Clearly not allowing the amendment would prejudice the claimant. Accordingly, the claim was amended. The claimant's part time worker claim was in the event dismissed on its substantive merits.

Evidence

41. The Tribunal heard from the claimant who presented witness evidence on her own behalf.

42. The respondent produced six witnesses as follows:

- 42.1. Mrs Jones, who was the first person to recommend the refusal of the claimant's first business interest application;
- 42.2. Chief Superintendent Thornton who was the second person to recommend the refusal of the claimant's first business interest application;
- 42.3. Former Detective Superintendent Hassall, who had actually rejected (rather than recommended rejection of) the claimant's first business interest application;
- 42.4. Chief Constable Cooke who had considered the claimant's appeal against the rejection of her first application, and rejected that appeal;
- 42.5. Sergeant Devine who was the first person to recommend the refusal of the claimant's second business interest application;

42.6. Chief Superintendent Gibson who was the second person to recommend the refusal of the claimant's second business interest application and

42.7. Former Detective Superintendent Hassall who had actually rejected (rather than recommended rejection of) the claimant's second business interest application.

43. All witnesses provided written witness statements which the Tribunal read. With the exception of Sergeant Devine, all the witnesses were cross examined.

44. The evidence of Sergeant Devine was accepted by the claimant without any challenge. The evidence of the other witnesses was challenged to a limited extent. The majority of the cross examination which occurred took the form of putting assertions to witnesses. In particular, the claimant put to the respondent's witnesses various assertions as to the real reasons for their decisions. None of the witnesses' evidence, including the claimant's, appeared to lack credibility under cross examination.

45. In addition to the witness evidence the Tribunal were provided with two bundles of documents. One was called a "*disability bundle*". This contained medical evidence relevant to the question of whether the claimant was a disabled person by virtue of PTSD. The second bundle, which was referred to as the main bundle, contained the limited additional documentary evidence regarding the substantive allegations of discrimination made by the claimant.

46. The Tribunal also had the benefit of the following documents agreed by the parties in advance:

46.1. a List of Issues;

46.2. a chronology of disability matters;

46.3. a chronology of events; and

46.4. a list of the various persons who were involved in events from which the claims arise.

47. At the end of the hearing the claimant provided written submissions to which she added some points in oral submissions. The respondent's submissions were entirely oral.

Findings of Fact

48. There were a lot of background events that were agreed. These were as set out below.

48.1. The claimant has been an officer with the respondent's Force since some time in 2005. The claimant had initially been full-time but became a part-time officer in 2013. This was around the time of the birth of her son, and was a change that occurred at the claimant's request.

48.2. Sometime in early 2013 the claimant applied for and was granted permission to pursue an outside business interest. That business interest was to work around four hours per week in the health and beauty sector. At that time the claimant's application for permission to pursue an outside

business interest did not include seeking permission to either own premises or to employ people. The permission sought was purely for working in the provision of beauty services.

- 48.3. The permission granted in 2013 to the claimant to pursue a business interest was renewed annually up to 2018. Annual renewal is a requirement for all business interest permissions in the respondent's Force. The claimant says that this annual renewal was dealt with during her annual reviews.
- 48.4. The claimant was absent from work in early 2018. That absence related to an operation and was for a long period. The claimant whilst absent neglected to apply to renew her business interest permission, and this resulted in that permission automatically lapsing for non-renewal. The claimant does not suggest she was absent with PTSD at the time her permission lapsed.
- 48.5. The claimant did not pursue her claim of discrimination arising from disability related to the automatic lapse of her permission.
- 48.6. The claimant's business interest permission lapsed in March 2018. It does not appear that the claimant sought to reapply for a permission to have a business interest until September 2019. This is some 18 months later.
- 48.7. By the time the claimant did reapply for permission to have a business interest she was the owner of a business with premises and staff.
- 48.8. The Tribunal was shown no evidence that the claimant ever had permission to own such a business. The Tribunal was shown no evidence that the claimant had permission to have any business interest of any type whatsoever from March 2018 onwards.
- 48.9. The claimant submitted an application for permission to have a business interest in September 2019. That was the first application relevant to these proceedings.
- 48.10. Miss Jones recommended this first application be refused on or around 15 October 2019.
- 48.11. Chief Superintendent Thornton recommended this first application be refused on or around 28 October 2019.
- 48.12. The Professional Standards Department, in particular Detective Superintendent Hassall, formally rejected this first application for permission to pursue a business interest on or around 5 November 2019. He was then alerted to the fact that some information from the claimant's Federation representative had not reached him before he reached his decision, and so he reconsidered the decision in the light of that information. On reconsideration he again concluded the application should be rejected and therefore rejected it, that further rejection being on or around 8 November 2019.
- 48.13. The claimant appealed against this rejection. Chief Constable Cooke refused the claimant's appeal on 18 February 2020. In his notification of the

refusal Chief Constable Cooke stated that the claimant's application would be reviewed, by him, in 12 months' time.

- 48.14. The claimant chose not to wait for those 12 months for Chief Constable Cooke's review and instead submitted a new application for permission to have a business interest on or around 24 June 2020. It is noted this application was submitted after the claim to this Tribunal had been presented. This was the claimant's second application relevant to this claim.
- 48.15. The claimant's second application was recommended for rejection, initially by the claimant's then line manager, Sergeant Devine. It was further recommended for rejection by then by Superintendent Gibson. The second application was finally rejected by Detective Superintendent Hassall on or around 5 August 2020.

Findings - Relevant Comparators for the Part Time Worker Discrimination Claim

49. The only evidence presented to the Tribunal about potentially relevant comparators for this claim was contained in documentary evidence.

50. Specifically, the Tribunal had the benefit of sight of extracts of records from the respondent's systems relating to an application for permission to have a business interest made by one full time officer. That application included a description of the business interest for which permission had been sought. From that description the Tribunal identified the following four relevant points:

- 50.1. The alleged comparator's business interest application was to allow the provision of beauty treatments. This is similar to the type of interest that the claimant's application sought.
 - 50.2. The alleged comparator's business interest application was, however, for permission to work in the outside interest for only four hours a month. This equates to roughly one hour a week, although the application stated the work would be done on one Saturday or Sunday each month. This is considerably less than the time the claimant's indicated would be dedicated to her business should her application be granted.
 - 50.3. The alleged comparator's business interest application did not suggest that it would involve the ownership of premises. This is a significant and material difference to the claimant's application.
 - 50.4. There was no suggestion in the alleged comparator's business interest application that there was any intent to employ staff. This is again a material and significant difference to the claimant's application.
51. The Tribunal find that the application for permission to have a business interest that was made by the alleged comparator, which was granted, was comparable to the application for permission to have a business interest the claimant had made, which was then granted, in 2013. That permission had been renewed annually until the claimant omitted to apply for a renewal.

52. The claimant was granted that interest at or around the time she transferred to being part-time. The interest was held and renewed for several years whilst she was part-time.
53. The Tribunal do not, however, find that the alleged comparator's business interest application was comparable to the applications the claimant made in 2019 and 2020.
54. The claimant's applications in 2019 and 2020 involved the employment of staff and the owning of premises. It was a much more involved interest running a business. It was also for much more than one hour a week, or four hours per month. For these reasons it is found that the suggested comparator was not, in fact, granted permission to have a business interest comparable to the business interest the claimant sought permission for. It follows that the suggested comparator is not a valid comparator.
55. In the absence of any evidence of any valid actual comparator, and noting that for the purposes of this claim the claimant cannot construct and rely upon a hypothetical comparator, the claim cannot succeed and is dismissed.

Findings - Disability

56. A significant amount of the evidence that was heard that related to the dispute over the claimant's disability status. During the claimant's cross examination, where detailed reference was made to the claimant's GP records and to the medical evidence that had been disclosed, the claimant conceded that there was no written record anywhere of her being actually diagnosed with having PTSD.
57. The respondent does not dispute that the claimant asserted that she had PTSD, at the very latest by September 2019, which was before the decisions she complains about were made. There is no dispute that the claimant was submitting sick notes from her doctor from around the beginning of July 2019 that went on for a considerable period, and these recorded the symptoms or the reasons for the claimant's absence as follows:

| | |
|-------------------|--|
| 1 July 2019 | Abdominal symptoms. |
| 10 July 2019 | Abdominal symptoms/anxiety. |
| 30 July 2019 | Abdominal symptoms, ongoing review. |
| 23 August 2019 | Abdominal symptoms exacerbated by situational triggers or situational stressors. |
| 16 September 2019 | Abdominal symptoms exacerbated by situational triggers or situational stressors. |
| 28 October 2019 | Anxiety aggravated by situational stressors. |
| 11 November 2019 | Anxiety aggravated by situational stressors. |
| 10 December 2019 | Anxiety aggravated by situational stressors. |
| 20 January 2020 | Anxiety aggravated by situational stressors. |

58. None of these sickness certifications, signed by the claimant's various GPs, mentioned or referred to PTSD.

59. The claimant's evidence was that she told her GP on 10 July 2019 that she was content for them to identify PTSD as the reason for her absence on her sick notes. This was because she said she had notified the respondent that she understood she had PTSD. The GP records of that consultation do not reflect this assertion. They state that the claimant had indicated she was content for anxiety to be recorded on her sick notes which, albeit not until October 2019, it started to be. There is nothing in those sick notes that suggests that the claimant's absence was for PTSD or that she had been diagnosed as having PTSD at that time or indeed at all.

60. The claimant referred the Tribunal to references in her medical records and elsewhere, for example a record from July 2010, that referred to "*elements of PTSD*". The claimant asserts that this supports her argument that she had PTSD. The claimant also refers to the fact she is recorded as having been referred for something referred to as "*EDMR*" treatment as evidence that she must have PTSD, because, on the claimant's evidence, that is a treatment that is specifically and only for PTSD.

61. The claimant referred us to letters from her GP that were included in the bundle of documents. One from May 2020 stated:

"In July 2019 the claimant's symptoms became especially severe, manifesting flashbacks, and there was an agreement to refer to the Community Mental Health Team. They agreed with us that PTSD was a diagnosis and she continue with more targeted treatment."

62. Then again on 1 December 2020:

"Heather has ongoing struggles with her mental health and although she doesn't have a formal diagnosis of PTSD, she has been noted to have symptoms of this by both my colleague and the Mental Health Practitioners. She hasn't undergone a formal mental health assessment to look into this further."

63. The claimant, when all this was put to her and explored in detail, conceded in her cross examination that these records do not record that she was ever diagnosed with having PTSD. At the highest record that the claimant had some symptoms that were consistent with PTSD.

64. When this became apparent during the cross examination of the claimant, the Tribunal adjourned to give the claimant a time to reflect and consider the position. The claimant was informed that she could apply for consent to amend her claim to rely upon a disability other than PTSD, for example other impairments which may be in some ways consistent with PTSD but are not necessarily PTSD. The claimant, after the adjournment, declined this course. This was done partly taking into account the indication from the respondent that any application to amend would be objected to, and also that there was a concern that any amendment that was permitted may result in the hearing having to be postponed to allow the respondent to prepare to deal with a different disability.

65. This is not just the mere labelling of a disability. In this case the claimant has, very specifically stated she is relying on PTSD as her disability. The respondent had

prepared to deal with that specific disability. Whilst anxiety may, in some circumstances, amount to a disability, it is by no means automatically so. In this case the claimant was not saying she was unfit to work anywhere – her problem was only in working at a police station, and not any particular police station(s). It is far from clear that general anxiety would make this a credible argument. This is something that in fairness the respondent would also certainly need to be given time to consider and prepare to deal with.

66. No application to amend was made and the claimant confirmed she would seek to rely upon an assertion that she had PTSD, arguing in the absence of a diagnosis that there was sufficient evidence in the medical records for the Tribunal to conclude that on the balance of probability she had PTSD. The Tribunal do not find this to be the case. It is clear that it is possible that the claimant had PTSD, however, the medical professionals she refers to have always declined to reach that diagnosis in the evidence presented.

67. The burden falls upon the claimant to establish she is disabled. In the absence of evidence showing on the balance of probability that the claimant has PTSD, there can be no finding that she was discriminated against because of something arising from that PTSD. Accordingly, her claim of disability discrimination must fail and is dismissed.

Potential Knowledge of Disability

68. The Tribunal, however, went on to consider whether, if the claimant had been found to be disabled with PTSD, her substantive allegations of discrimination would have been well founded.

69. The respondent argues that they were not aware the claimant had PTSD. In this case the claimant actually told the respondent that she thought she had PTSD, and in many cases that would be sufficient for a Tribunal to say that the respondent had effectively constructive knowledge – they should have known she was likely to have or may have PTSD. There is, however, a wider picture in this case. Quite unusually there is evidence that, at the time, contradicted that position. In particular, multiple sick notes signed by the claimant's doctors were produced, none which even mention PTSD. This continued even in numerous sick notes in the months following the time the claimant says she told her doctor to feel free to mention her PTSD.

70. There are also the Occupational Health conclusions which do not confirm the claimant had PTSD.

71. Even had it been found the claimant did have PTSD at the relevant time it would have been found that the respondent was not aware of this fact, and could not reasonably be expected to have been aware. The information available to the respondent at the time came from the claimant's medical professionals and from the claimant. This information was contradictory, in that the claimant asserted she had PTSD but her medical professionals do not appear to have supported that assertion.

72. On balance, the respondent were entitled to rely on the certified evidence from medical professionals of the reasons for the claimant's absence rather than the claimant's contradictory assertion. At the highest, the respondent should have been aware the claimant thought she had PTSD which was causing absences, which her doctors contradicted.

73. Accordingly, if the claimant had been found to have been disabled with PTSD it would have been found that there was a lack of knowledge of this on the respondent's part which would again preclude the claimant pursuing her discrimination arising from disability claim.

Would the refusal of the claimant's applications have been found to be because of something that arose from the claimed disability?

74. The Tribunal went on to consider, regardless of the above, whether the refusal of the claimant's applications for permission to pursue a business interest would, if the claimant had been found to have had PTSD and the respondent were aware of that, have been found to be because of something that arose from that PTSD.

75. There is no dispute that not granting the claimant's applications was unfavourable.

76. Given the claimant made two applications to pursue a business interest, and both were refused, these must each be considered.

The First Application

77. The individuals who either recommended the refusal of the claimant's first application, or refused the first application, identified a number of concerns which factored into their decisions. These concerns were:

77.1. for the claimant's welfare,

77.2. about the total number of hours the claimant might be working,

77.3. that the application the claimant was making in her second application was very different to the permission she had been previously granted, and

77.4. that it appeared the claimant had been operating her business for a significant period of time without the necessary permission.

78. The only one of these concerns that appear to have any potential connection to the claimant's health is the concern for her welfare.

79. The decision makers, in their evidence, explained at length their concerns regarding the claimant's welfare. They stated that they had looked at all the information available regarding the claimant's welfare, which did include her absences and reasons for those absences. They did not agree that this meant they had either refused or recommended the refusal of the claimant's application because of her absences. Her absences were identified by the claimant as the alleged '*something arising*' from PTSD that she sought to rely on in this claim.

80. All of these concerns are matters that would be relevant to any officer seeking permission to run a business alongside their work for the respondent force. On balance, the evidence before the Tribunal that the permission had been refused because of the claimant's absences was not persuasive. The Tribunal identified no reason not to accept the explanations of the decision makers that a holistic approach was taken and the primary concerns they held were around the much more extensive nature of the business interest sought in this application. Accordingly, it is not found that the refusals were because of something arising from a disability.

The Second Application

81. The claimant's second application to pursue a business interest was made in June 2020. The substantive reason that application was refused was the same at every stage where it was considered, and for each and every one of the three decision makers. This reason was that the Chief Constable had rejected the claimant's first application, and had in doing so said he would arrange for him to review it 12 months later.

82. The three decision makers in the second application all gave evidence that they were unwilling to contradict the Chief Constable's position in that regard.

83. It is noted that there are reasons recorded on the respondent's internal systems for each refusal or recommendation of refusal. These do not appear to be simply that the decision maker was unwilling to contradict the Chief Constable's position. These reasons are, however, very brief and at places vague and unhelpful.

84. The Tribunal has the advantage of having heard oral evidence from each one of those decision makers, which at least in the case of Sergeant Devine was not disputed.

85. The claimant did put assertions to Chief Superintendent Gibson and Detective Superintendent Hassall that the reason why they had either not recommended or refused her second application was either

85.1. Intended to force her to accept an increase in her working hours, or

85.2. because she had had too much time off with PTSD.

86. Neither witness under cross examination strayed in any way from the explanations given in their evidence in chief for not supporting the application. These explanations were clear and credible, namely that they were fundamentally unwilling to contradict the position taken by the Chief Constable.

87. This witnesses did refer in their evidence to having a number of relevant concerns, which in substance were no different to those present when the first application was considered.

88. As discussed above, the finding of the Tribunal is that these concerns are not something that arose from the claimed disability, In any event, the Tribunal found the evidence that the fundamental reason the second application was not supported was a reluctance to contradict the chief constable to be persuasive. That reason has no possible connection with the claimant's health.

89. Accordingly, it would not have been found that the refusal of the application was because of something arising from the claimant's disability, had the Tribunal been called on to make this finding.

Would any discrimination in refusing the claimant's application have been justified?

90. The Tribunal went on to consider what it would have done if it had found the refusal of the claimant's application to be unfavourable treatment that was because of something that arose from a disability. The unanimous view of the Tribunal is that that the refusal would have been justified as an objective means of achieving a legitimate aim.

91. The legitimate aim the respondent, in submissions, invited the Tribunal to consider can be paraphrased as '*running the Force in an effective and efficient way*'. This was expressed in terms of how significant reputational damage could have an impact on this aim. The respondent submitted that if the public became aware that an officer who was not fit to be working for the respondent, in any capacity, but was granted permission, which was then acted on, to run a business employing people and owning premises, this would cause significant reputational damage.

92. The claimant's position was the reverse, namely that the respondent would suffer reputational damage if it became known that a disabled officer had been mistreated or subjected to unlawful discrimination.

93. There was no argument from the claimant that the aim relied on was legitimate.

94. The issue was framed in submissions as having two elements:

94.1. was there a risk of reputational damage that could impact that legitimate aim; and

94.2. if so was what the respondent did a proportionate way of avoiding that risk?

95. The Tribunal's disagreed with the logic of the claimant's arguments regarding reputational damage, and found the respondent's submission persuasive. The claimant's submission was circular in its logic. It is only if there was unlawful discrimination that there could be any reputational damage for that discrimination. Accordingly, the risk of reputational damage the claimant identifies does not exist if there is no unlawful discrimination.

96. Regardless of the outcome of the claimant's claims, there is a potential significant risk of public criticism for the respondent force if it became publicly known that an officer who was unable to do any role for the respondent Force for an extended period of time, was at the same time able and given permission to own and run a business.

97. The respondent's Chief Constable had undertaken to review the claimant's business interest application in 12 months. It was not flat out refused forever; it was refused subject to future review. This is a balanced approach, enabling the respondent to protect its reputation, whilst allowing scope for the claimant's application to be reconsidered later. This appears to the Tribunal to be a proportionate approach to dealing with the claimant's business interest application.

98. Accordingly, even if the claimant had persuaded the Tribunal that she was disabled with PTSD, that the respondent was aware she had PTSD and that the refusal of her application was because of something arising from PTSD, the Tribunal would have found that the refusal was justified and thus not unlawful discrimination.

Employment Judge Buzzard
20 January 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON
3 February 2022

FOR THE TRIBUNAL OFFICE

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